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LAW AND PUBLIC CHOICE

A Critical Introduction

EPILOGUE

Beyond the Economic Sphere: A Madisonian Perspective on the Privacy Cases

Because of its connection with welfare economics, public choice has influenced public law mostly regarding economic legislation. Indeed, we have illustrated this book almost exclusively with examples of the intersection of public choice, public law, and economic regulation. Public choice's assumptions about the motivations of legislators and private groups were formulated largely with the "rent-seeking" paradigm in mind: the use of legislation by private interests to obtain an economic advantage beyond what the free market will bear.

We have been cautious in suggesting how public law might partially incorporate the public choice perspective. As chapter 5 indicates, public choice's focus on structure, procedure, and legislative inertia provides useful suggestions about the evolution of public law generally. Our prescriptions in chapter 5 for reforming public law in light of public choice—campaign finance reform, discouraging covert delegations, and encouraging legal evolution—were largely illustrated with economic examples. Legal controversies far removed from economic regulation could also profit, however, from increased attention to concrete political setting and legislative inertia. Public choice could perform a great service by increasing judicial sensitivity to those political dynamics.

On the surface, the Supreme Court's highly controversial decisions about contraception and abortion seem far removed from the appropriate sphere of public choice. To be sure, the behavior of reelection-minded legislators faced with the antiabortion lobby fits the public choice perspective. Beyond that obvious linkage, it may be hard to see how public choice adds anything to the contentious debate about the sexual privacy decisions. These decisions take on a new light, however, under a particularized focus on political setting and legislative inertia. A realistic understanding of politics requires Madison's awareness of factionalism, instability, and the role of institutions, as well as his aspirations for deliberative democracy. A Madisonian perspective may not justify going as far as the Court has gone in the privacy area. It does suggest a more modest judicial strategy, which might have had ultimately a better chance of success.

In most of what follows, we will be using public choice as a source of general inspiration, not as a specific body of knowledge or set of analytical tools. Public choice does, however, shed some interesting light on the political dynamics of privacy. We saw in chapter 2 that relatively compact groups are likely to exercise undue influence. This means that, as a general matter, producer groups (firms and unions) tend to exercise influence at the expense of consumer groups. In the sphere of moral behavior, religious organizations enjoy a similar organizational advantage; it was not for nothing that Madison's concern over factions extended to religious factions.

Moreover, beyond the normal disadvantages of organizing large, diffuse groups, opponents of "morals" legislation have a special disadvantage. The regulated conduct is usually considered otherwise private—and from an economist's point of view, privacy simply means that individuals regard the revelation of certain information as costly. It is consequently hard to organize individuals who would like to buy contraceptives, obtain abortions, or engage in homosexual activity—partly because it is hard to identify them in the first place, and partly because of their fear that political involvement will indirectly reveal their private conduct. For example, political action against antisodomy laws was limited until a significant number of people no longer found it desirable to "remain in the closet." It is hard enough to organize car buyers into an effective political force, but it would be much harder if most people were embarrassed to admit in public to owning a car.

Putting these factors together, we can conclude that the political process is apt to overrepresent the views of organized political groups and underrepresent their opponents. Because of the inertia created by legislative structures like the committee system, this imbalance will be all the more pronounced when the question is not whether to pass new morals legislation but to repeal old legislation. Knowledge of these political dynamics does not necessarily translate directly into new constitutional doctrine. Nevertheless, awareness of these dynamics may provide a basis for a more intelligent judicial response.

As the rejection of Robert Bork's nomination for the Supreme Court demonstrates, American society widely embraces *Griswold v. Connecticut,*[1] in which the Court held that married couples have a constitutional right to use birth control. What has been largely forgotten is the cautious path the Court took to reaching this decision. Over a period of two decades, the Court seemingly took political reality into account in attempting

1. 381 U.S. 479 (1965). Bork's refusal to find any legitimacy for the Court's sexual privacy opinions, most notably *Griswold,* was one of the most controversial aspects about his candidacy for the Court. For Bork's writings attacking *Griswold,* see Dronenburg v. Zech, 741 F.2d 1388, 1392 (D.C. Cir. 1984); Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 11 (1971).

to force the state legislature to resolve the issue itself. The Court stepped into the breach only when it had satisfied itself that no legislative resolution would be forthcoming.

The Connecticut statute struck down in the 1965 *Griswold* decision was before the Supreme Court as early as 1943. In the 1943 case, a physician argued that the statute prevented him from giving birth control advice to women whose health would be threatened by pregnancy and birth. The Court avoided the issue because, it said unanimously, the doctor did not have "standing" in this situation: he had alleged no injury to himself caused by the statute, and he could not get into court merely by asserting the rights of other persons, such as his patients.[2]

Not quite two decades later, a new lawsuit was brought. The plaintiffs included married women who allegedly had a medical need for birth control advice. The Court again ducked the issue, this time concluding that the lawsuit was not "ripe."[3] Apparently only one prosecution had been brought since the statute's adoption in 1879, and in that case the prosecutor eventually refused to proceed. Contraceptives were readily available in Connecticut drug stores, notwithstanding the statute. As Justice Frankfurter explained for four Justices, "[t]he undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. . . . 'Deeply embedded traditional ways of carrying out state policy . . . '—or not carrying it out—'are often tougher and truer law than the dead words of the written text.' "[4] Justice Brennan, who provided the crucial fifth vote not to hear the case, stated that he was not convinced that plaintiffs "as individuals are truly caught in an inescapable dilemma."[5]

As Justice Harlan pointed out in dissent, the Court's refusal to hear the 1961 case was dubious as a matter of the Court's precedents on ripeness. But the majority of the Court apparently concluded that its power of judicial review—the countermajoritarian authority to invalidate legislative pronouncements as inconsistent with the Constitution—should not be exercised except where truly necessary as a practical matter. Professor Alexander Bickel explained the majority's apparent sensitivity to legislative inertia:

> The point was that the office of the Court, even in a perfectly real, concrete, and fully developed controversy, is not necessarily to resolve issues on which the political branches are in deadlock; it may be wise to wait till the political institutions, breaking the deadlock,

2. Tileston v. Ullman, 318 U.S. 44 (1943) (per curiam).
3. Poe v. Ullman, 367 U.S. 497 (1961).
4. *Id.* at 502.
5. *Id.* at 509 (Brennan, J., concurring in the judgment).

> are able to make an initial decision, on which the Court may then pass judgment. . . . The influences that favor the objective of the [Connecticut] law cannot—or perhaps will not—summon sufficient political strength to cause it to be enforced. . . . The influences that oppose the law cannot summon sufficient political strength to cause it to be repealed; attempts have been made from 1923 onward, and they have failed.[6]

The Court was properly hesitant, we think, to decide whether the legislature of Connecticut had the power to forbid the use of contraceptives when such great doubt existed about whether the people of Connecticut really wanted to do so.

The Court seems influenced too rarely by this kind of Madisonian sensitivity to policy-making processes, a sensitivity that public choice can sharpen. Public law is usually viewed as the application of general principles in generalized fashion—uniformly, to all similar cases properly before the Court. This conception of public law has merit, for it tries to prevent the Court from being influenced by "politics" with a small "p," of the "Republicans versus Democrats" or "whose ox is being gored" variety.[7] But particularized attention to political detail, coupled with the avoidance tactics that Bickel termed "passive virtues," ought to be part of the judicial arsenal. Returning to the 1961 case, public officials in Connecticut had essentially "shift[ed] the decision to the Court," as Bickel wrote. What was needed was a technique "to turn the thrust of forces favoring and opposing the present objectives of the statute toward the Legislature, where the power of at least initial decision belongs in our system."[8]

In chapter 5, we considered a recent effort by the Court to remand a sensitive issue to the appropriate decisionmaker in *Hampton v. Mow Sun Wong*. The Court might have made effective use of a legislative remand in the 1961 case. Professor Bickel suggested one theory, "desuetude," a doctrine in Continental law under which a statute may become unenforceable through disuse.[9] Public choice theory, by sharpening our awareness of legislative inertia, provides a rich source of insights for the use of such passive virtues.

Connecticut officials finally did bring a prosecution under the statute against two doctors who provided birth control information to married persons at a large clinic. No controversy could have been riper, nor could the doctors' standing have been clearer to challenge the constitutionality of the statute. In 1965, when this case made its way to the Supreme Court, the Justices held that married couples had the right to use birth control, and that

6. A. Bickel, The Least Dangerous Branch 146–47 (1962).

7. *See* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964).

8. A. Bickel, *supra* note 6, at 148.

9. *See id.* at 148–56.

doctors could not be prosecuted as accessories to the crime of birth control use by such persons.

The legitimacy of *Griswold* would have been undercut, as a practical matter, had the Court reached out to make this decision prematurely. The Court bought itself two decades of judicial delay—and societal evolution—before it found itself forced to tackle the difficult constitutional question in *Griswold.* Surely the public's ultimate acceptance of *Griswold* is attributable in some part to the Court's strategic restraint in this regard.

The Court's abortion decision in 1973, *Roe v. Wade,* could have profited from the practical lessons of the birth control cases. In 1962 the influential American Law Institute, in its Model Penal Code, proposed liberalizing criminal abortion statutes.[10] Beginning in 1968, thirteen states had softened their abortion statutes to allow abortions not only if the woman's life was threatened, but also if the pregnancy seriously endangered her physical or mental health, if the child would have major physical or mental abnormalities, or if the pregnancy resulted from rape. Four states allowed abortion on demand if performed early in the pregnancy. Both the American Bar Association and the American Medical Association had gone on record favoring liberalization of abortion laws.[11]

Although many states continued to have restrictive approaches to abortion in the early 1970s, the trend in the states, if left unimpeded, might well have led to much wider availability of abortion through state legislation. Indeed, immediately after *Roe,* 52% of those polled in a national survey said that they approved of *Roe*'s holding, which was described as "making abortions up to three months of pregnancy legal."[12] A prudent Court might well have allowed the issue to percolate further, rather than leaping into the fray in 1973.

Moreover, the Court in 1973 had little help in addressing the abortion issue. The question whether a woman has a constitutional right in this context had been seriously litigated for only a few years prior to *Roe.* Indeed, no federal court of appeals had even considered the issue.[13]

As with the birth control statute in *Griswold,* many of the abortion statutes on the books in the early 1970s were a century old, adopted in a different time and climate, both moral and political. The primary purpose of those statutes apparently was to protect the life and health of the mother from the

10. *See* MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962).

11. For an overview, see Morgan, Roe v. Wade *and the Lessons of the Pre-*Roe *Case Law,* 77 MICH. L. REV. 1724, 1726–30 (1979).

12. *See* Uslander & Weber, *Public Support for Pro-Choice Abortion Policies in the Nation and States: Changes and Stability After the* Roe *and* Doe *Decisions,* 77 MICH. L. REV. 1772, 1775 (1979).

13. *See* Morgan, supra note 11, at 1727–29.

comparative danger of abortion instead of childbirth.[14] By 1973 the medical basis for the criminal statutes had evaporated: abortion in the early stages of pregnancy had become safer than carrying the fetus to term. Consequently, one lower court judge argued that the old abortion statutes should be invalidated because there was no longer any logical connection between the nineteenth-century legislature's purpose and the means chosen to effectuate that purpose.[15] He thus was able to avoid the enormously controversial question of whether a state legislature might constitutionally criminalize abortion for the purpose of preserving the life of the fetus.

Had the Supreme Court taken this limited tack in *Roe,* it would have disappointed many abortion advocates. Moreover, it would have invited the state legislatures to adopt new abortion statutes, and some of those might have been highly restrictive.[16] The Court would then have been required to address the ultimate question whether outlawing abortion could be squared with the sexual privacy right recognized in *Griswold.* At a minimum, however, the Court would have bought itself—and American society—some additional time to come to grips with this profoundly difficult question. It would have contributed to a national dialogue about women's rights. Furthermore, the doctrinal foundation of the opinion would have been strengthened, because it could have exploited post-1973 developments regarding women's rights. The Court could then have linked some protection for abortion to the Court's gender discrimination cases, which recognize that statutes discriminating against women may be rooted in outdated stereotypes. In any event, with the benefit of hindsight, a continuation of the politics of abortion of the early 1970s might well have been preferable to the political storm that looms with the possible overruling of *Roe* less than two decades later.

The Court missed a similar opportunity in its most recent sexual privacy case, *Bowers v. Hardwick.*[17] There the majority of the Justices said they were answering this question: "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and

14. *See* Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common Law Liberty?,* 17 N.Y.L.F. 335 (1971); Means, *The Law of New York Concerning Abortion and the Status of the Foetus 1664–1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411 (1968).

15. *See* Abele v. Markle, 342 F. Supp. 800, 809 (D. Conn. 1972) (three-judge court) (Newman, J., concurring in the result).

16. Indeed, in response to *Abele v. Markle* (*see id.* and accompanying text) Connecticut quickly adopted a new statute allowing abortion only to save the mother's life. *See* Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972) (three-judge court), *vacated and remanded,* 410 U.S. 950 (1973).

17. 478 U.S. 186 (1986).

have done so for a very long time."[18] The Court, predictably, answered this leading question in the negative. But the statute before the Court did not single out homosexuals; it provided harsh penalties for all manner of sodomy. Thus, while the Court focused on the traditional social taboo against homosexuality, the Georgia legislature that adopted the statute in question (a version of which dates back to 1816) obviously had in mind a different justification: that all nonvaginal sex was immoral, whether homosexual or heterosexual. That purpose seems as obsolescent as the "maternal health" justification had become for abortion statutes. Moreover, the statute had not been enforced in Georgia for decades even in the context of private consensual homosexual sodomy, and many states have decriminalized sodomy.

Thus, leaving aside larger arguments about the possible inconsistency of the statute with the broad rights of sexual privacy recognized in *Griswold* and *Roe,* the Court had a solid basis for striking down the Georgia law. The statute no longer had a rational connection with any current state objective, and enforcement had become so sporadic and unpredictable as to violate the due process requirement of fair notice. Had the Court acted on these narrow grounds, the burden of inertia in the Georgia legislature would have been shifted. If that body overcame the inertia and passed a new sodomy statute, there would be no need to speculate about what motivated the legislation. Such a development would stand in sharp contrast to *Bowers,* where the majority of the Court lamely justified the statute by "the *presumed* belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[19] As Justice Stevens pointed out in dissent, "the Georgia electorate has expressed no such belief—instead, its representatives enacted a law that presumably reflects the belief that *all sodomy* is immoral and unacceptable."[20]

Public choice strongly supports Stevens's reluctance to infer public attitudes from legislative inaction. It is rank speculation to presume that the Georgia legislature would outlaw homosexual sodomy had the Court struck down the old general sodomy statute on obsolescence grounds. If Georgia did ban homosexual conduct, there would have been ample time for the Court to address the much larger, and more difficult, question about whether a ban on all homosexual activity violated sexual privacy rights or the equal protection of the laws.

The majority of the Court profoundly erred in *Bowers* because it saw the issue as being whether judges may invalidate the populace's moral judgment. Viewing constitutional law at this gross level of abstraction is, perhaps, the unhappy consequence of activist decisions like *Roe,* where the

18. *Id.* at 190.
19. *Id.* at 196 (emphasis added).
20. *Id.* at 219 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting) (emphasis in original).

Court went out of its way to define privacy rights broadly in a detailed, legislative fashion. If, instead, the issue in *Bowers* becomes whether a state may selectively threaten to enforce an ancient, obsolescent statute only against a few members of an unpopular minority, a different answer naturally emerges. If that answer is inconsistent with the wishes of a motivated majority of the state legislature, it would be free to respond accordingly.

Our quick survey of the privacy cases shows that narrower, more Madisonian inquiries about public policy and legislative inertia would have helped reform birth control, abortion, and sodomy laws, while leaving room for the political institutions to respond. Our discussion has not used the technical jargon of public choice: terms like "rent-seeking," "free rider," and "incoherence" seem to have attenuated value when social legislation is examined. But awareness of public choice might have prevented the Court in *Bowers* from jumping to the ultimate constitutional issue of the limits of majority rule, thereby treating an obsolete 1816 statute as the equivalent of focused, carefully deliberated contemporary legislation. A sensitivity to public choice also suggests that a wide range of difficult public law issues, many of them far removed from socioeconomic regulation, can be analyzed profitably by "thinking small" rather than by generating broad theories of individual rights. Those theories have their place in constitutional law, but only after less intrusive strategies have failed. Moreover, the Court can profit from more extended public debate about rights. That debate is now needlessly truncated by premature judicial attempts to define the boundaries of legislative power.

Alexander Bickel once properly pointed out that to look to constitutional history for specific answers to specific legal issues is to ask the wrong question. "No answer is what the wrong question begets, for the excellent reason that the Constitution was not framed to be a catalogue of answers to such questions."[21] In our view, a similar poverty of answers flows from asking public choice to resolve public law controversies. But, as with constitutional language and history, even if public choice cannot provide a complete answer, it may well be a necessary component of analysis.

Although we doubt that judges and legal scholars were ever actually as naive as they sometimes appeared in their writings, much of public law has been characterized by a simplistic view of the political process. Too often, the leap is made from the existence of a statute to an inference about majority preferences. It does not take public choice theory to see that this leap is sometimes unjustified, but the teaching of public choice is that this problem must be taken very seriously.

21. A. Bickel, *supra* note 6, at 103. Professor John Hart Ely later attempted to hoist Bickel on his own petard by quoting this language. *See* J. Ely, Democracy and Distrust 43, 72 (1980).

Public choice has two main lessons in this regard. First, compact, easily organized groups are likely to have an undue influence on the legislative process. Second, legislative outcomes may be the product of the legislature's structure and procedures, rather than being any simple reflection of voter preferences.

Some of the earlier legal scholarship on public choice took these conclusions to extremes. For these writers, if legislation does not simply reflect the "majority will," then its legitimacy seemed to be very questionable. We have argued that this is an overreaction. The empirical news about special interests is not so bad, while a deeper understanding of legislative structure and procedures can rehabilitate the legislature's legitimacy. Because of our more guarded appraisal of the teachings of public choice, we have resisted the temptation to translate public choice theorems directly into legal doctrines. We have contended, however, that public choice used properly can be a useful tool in shaping public law.

Ambrose Bierce defined politics as "[a] strife of interests masquerading as a contest of principles. The conduct of public affairs for private advantage."[22] Seventy years later, enough academic merit was found in a sophisticated modeling of Bierce's epigram to justify a Nobel prize. We mean no disrespect to James Buchanan and other practitioners of the dismal science when we suggest that public choice provides no sure foundation for public law. As Oliver Wendell Holmes said, "[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[23] But if axiomatic theory cannot be incorporated directly into public law, it nonetheless can perform some valuable roles, which we have attempted to identify. To say that public choice has only this limited application in public law is not to defame it, but to put it in its appropriate place as a tool, not a talisman.

22. A. Bierce, The Devil's Dictionary 103 (1979 ed. 1st publ. 1911).
23. O. Holmes, The Common Law 5 (1963 ed.).

INDEX

Abortion, 9, 145–46, 149–50
Administrative agency. *See* Legislative power, delegation of
Affirmative action, 112–15, 121–25
Agenda, importance of, in legislature, 3, 39–42, 49–50, 55, 58, 61. *See also* Single-subject (germaneness) rule
Aleinikoff, T. Alexander, 114
American Indians, federal law concerning, 121, 123
Americans for Democratic Action, ratings of legislators, 29–32
Anti-Federalists, 44. *See also* Republicanism
Armstrong, William, 96–97
Arrow, Kenneth, 7, 38, 58. *See also* Arrow's Theorem
Arrow's Theorem, 7, 10, 38–42, 47–62; Condorcet winner and, 51; Copeland winner and, 51; core, game with, and, 52; Constitution of United States and, 55; fairness and, 52, 56–59; formal voting models and, 50–52; legislatures and, 39–42, 47–62; multimember courts and, 55; public interest and, 38–42, 58–62; political parties and, 49, 54, 56–58; procedural rules and, 39–42, 49–50, 52, 55, 58; republicanism and, 44–47, 57–62; strategic voting and, 40–42, 57n.52; strong point and, 51, 54; value solution and, 52; voting experiments and, 50; uncovered set and, 51, 52, 54; uni-peaked preferences and, 48–49, 53–56, 58, 59; yolk and, 51, 54

Bickel, Alexander, 147–48, 152
Bierce, Ambrose, 153
Birth control, 145–49
Blackmun, Harry, 75
Bork, Robert, 146
Bowers v. Hardwick, 150–52
Boyle v. United Technologies Corp., 142
Brennan, Goeffrey, 26
Brennan, William, 109–10, 113, 147
Buchanan, James, 1–2, 26, 153
Buckley, James, 97
Budget deficit, U.S., 35–36
Burger, Warren, 124

Calabresi, Guido, 106–7
Campaign financing. *See* Election financing
Chaos Theorem. *See* Arrow's Theorem
Chicago School economics, 16, 22, 71
City of Richmond v. J.A. Croson Co., 122
Coherence. *See* Arrow's Theorem
Collective action, 23, 37, 72, 141–42, 146
Commerce clause, 73–75
Committees. *See* Legislative committees
Common law, updating of, 139–42
Congress. *See* Due process of lawmaking; Legislative power, delegation of; Legislators
Constitutional law, federal, 8–9, 55, 62–87, 145–53; review of political process and, 73, 116–43. *See also* Abortion; Affirmative action; Commerce clause; Contraception; Due process; Due process of lawmaking; Federalism; Gender discrimination; Homosexuality; Legislative power, delegation of; Legislative veto; Taking clause
Consumers, political organization of, 24n.52, 37
Contraception, 145–49
Corruption. *See* Election financing; Interest groups
Cost-benefit analysis, 34–35
Council of Revision, 71
Cycles. *See* Arrow's Theorem
Cy pres. *See* Statutory interpretation

Dahl, Robert, 17
DeBow, Michael, 25–27
Delegation. *See* Legislative power, delegation of
Deliberation. *See* Legislative deliberation. *See also* Due process of lawmaking

Democracy: arbitrariness of, 3, 7–8, 38–42, 47–62; judicial review and, 63; nature of, 7–8, 37, 57, 61–62; pathologies of, 11; republicanism and, 44–47. *See also* Constitutional law; Due process of lawmaking; Legislator; Pluralism
Desuetude, 148
Dole, Robert, 96–97
Due process, 64, 138–39. *See also* Due process of lawmaking
Due process of lawmaking, 118–43, 148, 150–52; effectiveness of theory, 128–29; hierarchy of institutional legitimacy model, 122–24, 130–31, 136, 138–39; legal evolution and, 139–43; legislative deliberation model, 122–25, 129–30, 136, 137–38; procedural regularity model, 125–28, 130–31, 136, 138–39

Easterbrook, Frank, 2n.3, 4, 41, 41n.7, 47, 50, 54–55, 89–102, 111
Economic efficiency, and social justice, 34–35, 69, 76–77. *See also* Rent-seeking
Economic regulation, 4, 8–9, 63–87, 145. *See also* Rent-seeking
Election financing, 4, 14, 23, 133–35. *See also* Interest groups
Epstein, Richard, 67, 68, 76–77, 132
Equal protection, 119–222, 138–39. *See also* Affirmative action; Due process of lawmaking; Gender discrimination
Eskridge, William, 114

Federalism, 63, 73–78; public choice and, 75–78
Federalist Papers, 10–11
Federalists, 44
Fenno, Richard, 21
First amendment. *See* Election financing
Frankfurter, Felix, 147
"Free rider" problem. *See* Collective action
Friendly, Henry, 99–100
Fullilove v. Klutznick, 121–22, 124–25

Gender discrimination, 139–40
Grassley, Charles, 97
Griswold v. Connecticut, 146–49

Hampton v. Mow Sun Wong, 119–23, 139, 148
Harlan, John, 141, 147
Harrington, James, 43
Hart, Henry, 99
Hatch, Orrin, 100
Hayes, Michael, 18
Heart of Atlanta Motel v. United States, 74
Hefflin, Howell, 97
Hirschey v. FERC, 95–97
Holmes, Oliver Wendell, Jr., 65, 153
Homosexuality, 146, 150–52

Ideology: in politics, 7, 23–33; in popular voting, 24–27
Immigration & Naturalization Serv. v. Chadha, 84, 129–31, 136
Incoherence. *See* Arrow's Theorem
Interest groups: collective action problems of, 23, 37, 72, 141–42, 146; covert delegations of legislative power to, 136–39; economic theory of, 21–37; effects on politics, 7–11, 17–21, 21–37; legislative power, delegation of, and, 80–83; factors affecting political influence of, 18–20; interest group theory as part of public choice, 12–13; judicial perception of, as influencing public law, 13–14, 68; legal scholars' perception of, 12–17, 77, 83; narrow economic interests and, 18–20, 23, 37, 141–42; normative implications of group power, 33–37, 132; political science and, 17–21; public choice models of, 14–15; public perception of, 12; reducing power of, through public law, 132–39; religious, 146; risk aversion and, 82–83; Schlozman/Tierney study of, 18–20; sexual privacy and, 146; size and influence of, 19–20, 23–24, 70; support of legislators, 23. *See also* Economic theory of legislation; Election financing; Rent-seeking; Statutory interpretation; Taking clause
Interpretation. *See* Statutory interpretation
Interstate competition, 75–77

Johnson v. Transportation Agency, 112
Judicial activism, 8, 13–14, 63–87
Justice, and economic efficiency, 34–35, 69. *See also* Public interest

Kennedy, Anthony, 109
Keystone Bituminous Coal Assn. v. DeBenedictis, 72

K Mart Corp. v. Cartier, Inc., 108–10
Kozinski, Alex, 97–98

Landes, William, 15; interest group theory and, 15, 111n.67
Lee, Dwight, 25–27
Legal pragmatism, 6, 9, 106, 116–18, 142–43. *See also* Practical reason
Legislation, economic theory of, 21–33; deregulation and, 68; empirical studies and, 28–33; federal constitutional law and, 63–64, 67–73, 75–83; normative implications of, 33–37. *See also* Interest groups; Legislator
Legislative apportionment, 73
Legislative committees, 56–58, 100–101, 117. *See also* Legislative history
Legislative deliberation, 7, 8, 14, 16, 55–62, 100–101, 117–43. *See also* Due process of lawmaking
Legislative history, 88–102; defined, 89; interest groups as check on, 98; Scalia's critique of use in statutory interpretation, 95–102; legislative staff and, 95–99; public choice and, 100–102
Legislative intent. *See* Legislative history; Legislator, motivations of; Rent-seeking; Statutory interpretation
Legislative power: delegation of, 63, 78–87, 136–39; public choice and, 79–87
Legislative procedure, 4, 38–42, 49–50, 55, 57–60, 117–43. *See also* Agenda; Due process of lawmaking
Legislative veto, 84, 129–31, 136
Legislator: constituents and, 22–23, 27–33; interest groups and, 23, 27–33; median, 53–54, 101n.41; motivations of, 3, 20–33, 67–73, 76–78, 80–83. *See also* Legislative committees; Legislative history
Liberalism, defined, 43
Linde, Hans, 119
Lochner v. New York, 64, 67–68, 71
Loretto v. Teleprompter Manhattan CATV Corp., 65, 66, 72
Lowi, Theodore, 18

Macey, Jonathan, 79, 84
Madison, James, and Madisonian theory, 9–11, 13, 44, 143, 145–53
Marbury v. Madison, 123
Mashaw, Jerry, 42, 55, 61
Mayhew, David, 20–21
Mikva, Abner, 2–3, 4
Monitoring costs, of lawmaking activity, 81–82
Moragne v. States Marine Lines, Inc., 140–42
Mueller, Dennis, 7

National League of Cities v. Usery, 75
New Deal, 63, 64, 73–75, 86
Nollan v. California Coastal Commission, 65–66
Nondelegation doctrine. *See* Legislative power, delegation of

Occupational Safety and Health Act, 79, 85
Olson, Mancur, 23

PACs. *See* Election financing
Panama Refining Co. v. Ryan, 78
Pennsylvania Coal v. Mahon, 65, 66, 72
Personal preferences: Arrow's Theorem and, 38–42; pluralism and, 13–14, 44–47; republicanism and, 14, 44–47, 58. *See also* Pluralism; Public interest; Republicanism
Pluralism: as influencing public law, 13–14, 16; defined, 13; economic theory and, 22; public choice as undermining, 58, 61; public choice interest group model and, 15; political science and, 17–21. *See also* Interest groups; Rent-seeking
"Pogo effect", 36. *See also* Collective action
Political action committees. *See* Election financing
Political parties, 49, 54, 56–58, 135
Posner, Richard, 15, 41n.7, 92, 102–6, 113; interest group theory and, 15, 111n.67
Powell, Adam Clayton, 126–27
Powell, Lewis, 121
Powell v. McCormack, 125–27
Practical reason, 6, 60, 106, 116–18, 142–43. *See also* Legal pragmatism
Prisoners' dilemma game, 36
Private law. *See* Public law
Property rights, 8–9
Public choice: abstract nature of, 3; appropriate use in law, 9, 11, 63–64, 73, 77–78, 86–87, 116–18, 126–27, 131,

Public choice (*continued*)
132, 140–43, 145, 146, 148, 152–53; cynicism about politics, 1–3, 37, 54–55, 57; defined, 1, 6–7, 63n.1, 86; descriptions of legislative process, 2, 15, 38–42; federalism and, 75–78; importance of, 3–5; interest group theory of, 14–15; judicial selection and, 71; normative implications of, 2; potentially undermining respect for democracy, 2, 37; republicanism and, 44–47, 57–62; unrefined nature of, 6, 53. *See also* Arrow's Theorem; Economic regulation; Interest groups; Judicial activism; Legislation, economic theory of; Pluralism; Statutory interpretation; Voting, popular
Public interest: Arrow's Theorem and, 38–42, 58–62; legislature as representative of, 1, 21–22, 38, 58–62; nature of, 9, 59–60; republicanism and, 8, 14, 16
Public law: defined, 1, 6–7; relevance of public choice to, 1, 3–5, 13–17, 116–18, 132, 140, 142–43, 145, 146, 148, 152–53
Public values. *See* Public interest; Republicanism

Redistribution of social wealth, 34–35. *See also* Taking clause
Reelection, as goal of legislator, 3, 20–33
Regents of University of California v. Bakke, 121
Rehnquist, William, 79, 85, 112, 120–21
Rent-seeking: constitutional law and, 67–73, 76–77, 83; cost-benefit analysis and, 34–35; defined, 15n.10, 34; interest groups and, 23, 145; normative implications of, 33–37. *See also* Judicial activism; Legislation, economic theory of
Republicanism, 8, 10, 14, 16, 42–47, 57–62; defined, 8, 42–44; judicial review of economic regulation and, 67, 69–71; statutory interpretation and, 105n.49. *See also* Pluralism
Riker, William, 3, 4, 7, 40–41, 47, 54–55
Roe v. Wade, 149–50
Roosevelt, Franklin, 64. *See also* New Deal
Rose-Ackerman, Susan, 82

Scalia, Antonin, 4, 9, 65–66, 89–102, 109–10, 114
Schattschneider, E. E., 17
Schechter Poultry Corp. v. United States, 79
Schlozman, Kay Lehman, 18–20
Sexual privacy. *See* Abortion; Contraception; Homosexuality
Simon, Paul, 97
Single-subject (germaneness) rule, 55, 57–59, 127–28
Smoot-Hawley Tariff, 17, 18n.23, 86
Sodomy. *See* Homosexuality
Special interests. *See* Interest groups; Rent-seeking
Stability. *See* Arrow's Theorem
Stare decisis, 110–15
Starr, Kenneth, 97
States' rights. *See* Federalism
Statutory interpretation, 4, 9, 40–42, 53–54, 77–79, 82, 88–115, 121, 125; changed circumstances and, 106–15, 139, 141–42; decision theory and, 102–6; judge as legislature's faithful agent, 93–94, 102–8; legislative inaction and, 106–7, 109–10; public choice and, 88–89, 92, 95, 100–102, 106–7, 114–15; stare decisis and, 110–15; statutory evolution and, 106–15, 139, 141–42. *See also* Legislative history
Steelworkers v. Weber, 112–15
Stevens, John Paul, 120–21, 122
Stigler, George, 22
Structural due process. *See* Due process of lawmaking
Structure-induced equilibrium, 50, 83–86, 101. *See also* Agenda
Sunstein, Cass, 10, 16
Supreme Court of the United States: pluralism and, 14; presidential veto power and, 71; public choice and, 63; republicanism and, 14. *See also* Constitutional law, federal; Judicial activism; Statutory interpretation

Taking clause, 64–73; safe harbors for, 72. *See also* Interest groups
Tariffs. *See* Interest groups; Rent-seeking; Smoot-Hawley Tariff
Theory, role of in law, 5–6, 9, 13–14, 116–18, 132, 148, 152

Tierney, John T., 18–20
Tullock, Gordon, 33n.90
Twain, Mark, 1–2

Uncovered set. *See* Arrow's Theorem
United States Railroad Retirement Board v. Fritz, 136–39
United States v. E. C. Knight Co., 74

Virtue, civic. *See* Republicanism
Veto, presidential power of, 71. *See also* Structure-induced equilibrium
Voting. *See* Arrow's Theorem
Voting, popular: economic rationality of, 24–27; participatory norms and, 24–27, 37; reflecting voters' self-interest, 22–23

Weingast, Barry, 3, 4, 5, 7
Wickard v. Filburn, 74
Wilson, James Q., 18
Wrongful death actions, 140–42

Yolk. *See* Arrow's Theorem

Law

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