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The Mask of Virtue: Theories of Aretaic Legislation in a Public Choice Perspective

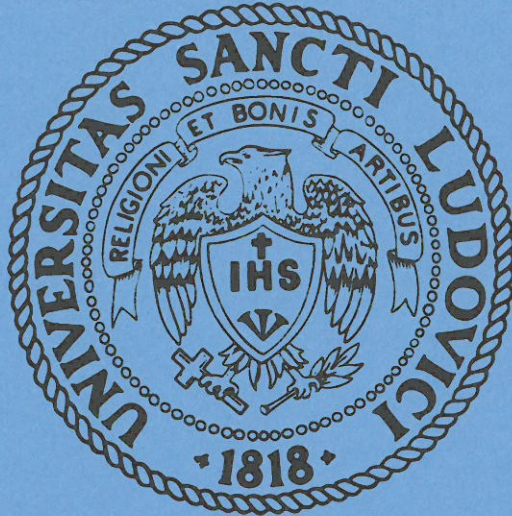
Donald J. Kochan



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DONALD J. KOCHAN

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THE MASK OF VIRTUE: THEORIES OF ARETAIC LEGISLATION IN A PUBLIC CHOICE PERSPECTIVE

DONALD J. KOCHAN*

ABSTRACT

This Article is a first-of-its-kind application of public choice theory to recently developing theories of virtue jurisprudence. Particularly, this Article focuses on not-yet-developed theories of aretaic (or virtue-centered) *legislation*. This Article speculates what the contours of such theories might be and analyzes the production of such legislation through a public choice lens. Any virtue jurisprudence theory as applied to legislation would likely demand that the proper ends of legislation be deemed as “the promotion of human flourishing” and the same would constitute the test by which we would determine the legitimacy of any legislation.

As noble as virtuous behavior, virtuous laws, virtuous judging, or virtuous legislation may be, there is no reason to believe that any such theories, if employed and adopted as decision rules, would be any less susceptible to the debilitating realities of public choice and interest group behavior than other principles or metrics intended to guide lawmaking. We cannot expect interest groups to be virtuous in the ends sought or lawmaking to be virtuous in the commodities offered and produced. Legislators remain subject to interest group bargaining and will manipulate a virtue-based rule for private gains through masking techniques rather than advance the concept of virtue itself. While some legislation will be drafted to seem virtuous to the public on its outside, its interior will be filled with rent-seeking bounties.

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INTRODUCTION

In the past several years, there has been growing attention in both moral and legal theory to the concept of virtue as a guiding principle for decision making. Initially, legal scholars began to consider the role of “virtue ethics” in law and most recently a number of scholars have embarked on an exploration of theories of “virtue jurisprudence.”¹ Virtue ethics, as applied to law and virtue jurisprudence, seeks to consider both the concept of virtue as critical to the formation of legal rules and the behavior of lawmakers and lawmaking institutions.² To date, these theories have remained almost entirely unchallenged by law and economics generally or by public choice theory specifically. The debate has instead centered on prudence of imposing virtue-based theories on legal decisions rather than on the public choice consequences and practical realities of implementing a virtue ethic in law.

As noble as virtuous behavior, virtuous laws, virtuous judging, or virtuous legislation may be, there is no reason to believe that any such theories—if employed and adopted as decision rules—would be any less susceptible to the debilitating realities of public choice and interest group behavior than other principles or metrics intended to guide lawmaking. Certainly, that skepticism applies regarding legislation and the (im)possibility of it as a vehicle for the advancement of virtue—the focus of this Article. Virtue, or aretaic, legislation stands in an equal if not inferior position to “public interest” legislation when it comes to the public choice critique.³ Legislators remain subject to interest group bargaining and will manipulate a virtue-based rule to enhance the durability of their legislation through masking techniques rather than advance the concept of virtue itself.

In many ways, this Article is a bit of a preemptive response.⁴ There is not yet a substantially developed theory of aretaic *legislation* advanced by any particular author.

Nonetheless, the idea of aretaic legislation theory has been contemplated and touched upon within the scholarship on virtue jurisprudence generally. Professor Lawrence Solum has explained that “[a] complete virtue

1. See, e.g., VIRTUE JURISPRUDENCE (Colin Farrelly & Lawrence B. Solum eds., 2008).

2. See Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 76 (2006) [hereinafter Solum, *Natural Justice*].

3. For a discussion of the failings of the public interest model for explaining legislative outcomes, see William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 276 (1988) (describing the view that legislators “will tend to pass public-seeking laws . . . [and] has fallen under sustained and persuasive criticism in the last three decades,” particularly as a result of the public choice critique).

4. Chapin F. Cimino, *Private Law, Public Consequences, and Virtue Jurisprudence*, 71 U. PITT. L. REV. 279, 312 (2009) (“With time and attention, theorists will eventually uncover the specifics of the theory’s potential impact on law. A good time to start that work is now . . .”).

*jurisprudence would include a virtue-theoretic account of the ends of legislation, a virtue-centered theory of judging, and an aretaic account of the nature of law.*⁵ However, a theory of “virtue legislation,” otherwise termed “aretaic legislation,” has generally been unmapped in the literature. For example, in their “Introduction to Aretaic Theories of Law” in the groundbreaking anthology, *Virtue Jurisprudence*,⁶ Professors Colin Farrelly and Lawrence Solum explain that their exploration is largely limited to “virtue-centered judging” and that they “only skim the surface of the implications of virtue jurisprudence for the ends of law.”⁷

Solum notes elsewhere that the logical extension of virtue-based theories includes its application to legislation: “Virtue ethics makes the aretaic turn in moral philosophy. The analogous move in political theory might be called ‘virtue politics.’ In normative legal theory, the corresponding theory can be called ‘virtue jurisprudence.’”⁸ Furthermore, Farrelly and Solum contend that:

An aretaic theory of legislation would naturally begin with the premise that the *telos* or proper end of law is the promotion of human flourishing. If the purpose of law is to enable humans to acquire, maintain, and exercise the human excellences or virtues, it seems likely that there will be important implications for familiar debates [including (we must presume) the debates on the content of legislation].⁹

Thus, in any such virtue jurisprudence theory as applied to legislation, it would seem that the proper ends of legislation would be deemed as “the promotion of human flourishing” and the same would constitute the test by which we would determine the legitimacy of any legislation.

If a virtue jurisprudence related to legislation focuses on the ends of legislation, it seems in most ways very similar to the public interest model for legislation. The public interest model focuses on a metric for the ends of law—the promotion of the public interest.¹⁰ That model presumes that the public interest is both the natural motivation in lawmaking as well as the accomplished ends. Yet those presumptions have faced serious rebuttal from public choice theorists and others.

Because studies in virtue jurisprudence to date have focused on the proper ends of legal decision making, the theories have not been significantly

5. Solum, *Natural Justice*, *supra* note 2, at 76 (emphasis added).

6. Colin Farrelly & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, in *VIRTUE JURISPRUDENCE*, *supra* note 1, at 7–16. For a review, see Cimino, *supra* note 4, at 279 (“*Virtue Jurisprudence* is the first extended work seeking to place the notion of virtue at the center of legal theory.”).

7. Farrelly & Solum, *supra* note 6, at 2.

8. Solum, *Natural Justice*, *supra* note 2, at 76.

9. Farrelly & Solum, *supra* note 6, at 2.

10. Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 214 (2005) [hereinafter Morriss et al., *Choosing*].

evaluated in terms of positive political theory and the processes within which such ends would be employed as a justification for legislation.¹¹ Theories of aretaic legislation, however they might be formed, must contend with the real world process-oriented obstacles that may impede the ends desired.

Solum notes that virtue has generally received “scant attention” in legal theory.¹² And there are still many open questions regarding how virtue and law are meant to fit together, even in the collected works addressing these issues so far.¹³ In particular, those theorists that have tackled the task of looking at law and virtue have left open many questions about how their theories fit within the trappings of legislative and other political processes.¹⁴ Perhaps there is no real discussion of virtue legislation yet because virtue jurisprudence is following a “bottom-up” evolution, and the theories or experiments have not yet evolved to the point of comprehensive legislative analysis.¹⁵ Virtue theories of law deserve some closer examination in light of all that we know about the complex processes and complicated players in the production of law.

At the same time, the public choice literature has explored at times the issue of virtue but has never comprehensively explained a law and economics critique of legislation based on and directed by a virtue metric. Aristotelian and other theories of virtue should not rule out the realities of public choice and the fact that the pursuit of self-interest can overwhelm virtuous behavior.¹⁶ This

11. See, e.g., Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 917 (2009) (“It is striking how gingerly leading virtue scholarship treads around the topic of virtue politics.”).

12. Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 493 (2004) (“Legal theory (as practiced by philosophers or academic lawyers) has paid scant attention to one of the most significant developments in moral theory in the second half of the twentieth century, the emergence of virtue ethics.”); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centred Theory of Judging*, 34 METAPHILOSOPHY 178, 180 (2003).

13. Cimino, *supra* note 4, at 281 (“[H]ow virtue influences (or should influence) law in order to promote human flourishing—to ‘create the conditions for the development of human excellence’—is an open question While virtue as a source of law is an ancient and pedigreed philosophical concept, it is not well represented in contemporary legal theory.”).

14. See, e.g., Claeys, *supra* note 11, at 946–47 (“On the other hand, in virtue ethics and in political-philosophy scholarship, scholars still regard it as an open and extremely important question whether the prescriptions of virtue ethics can be transplanted seamlessly from the field of ethics back to the field of politics.”).

15. Cimino, *supra* note 4, at 289 (“[N]othing further is said directly on the question of how virtue is to ‘create the conditions for human flourishing’ through law. [Farrelly and Solum] refer to this strategy as a ‘bottom-up’ approach. . . . [T]he contours of the relationship between law and virtue are left murky.”) (citing Farrelly & Solum, *supra* note 6, at 2).

16. Edward Rubin, *The Conceptual Explanation for Legislative Failure*, 30 L. & SOC. INQUIRY 583, 588 (2005). Rubin explains the risks of power perverting virtue:

According to Aristotle, a virtuous government can be ruled by one person (monarchy), a small group (aristocracy), or a majority (timocracy or *politeia*), as long as the ruling element is motivated by the desire to serve the interests of the society as a whole. But

field, then, is an area appropriate and ripe for further discussion on what public choice can teach us about the possibilities of a virtue-centered rule for determining the legitimacy of legislation.

Some literature on evaluating legislative behavior based on standards of civic virtue helps establish a starting point for the analysis of an aretaic theory of legislation. It is instructive to begin with an observation from G. Marcus Cole and to build from there in this Article. Cole asserts that “[t]here is no reason to assume that democratic governments are virtuous in theory, and there is good reason to believe that they fail to reflect popular concepts of virtue in practice.”¹⁷ Cole continues by explaining that in light of public choice understandings of the production of legislation, there is no reason to believe that governments will be moral or virtuous or even that it is possible to create rules that move them in that direction:

Why cannot government provide moral guidance? What exactly is government? Is it something better than the individual? Is it “practiced” by those higher or more virtuous? Does it respond to popular, obviously flawed concepts of virtue? Even if it does, are its operatives sufficiently skilled to regulate such a delicate area of human affairs?

Public choice theory has provided many reasons, in addition to those provided by the Founders, to mistrust pure democracy. Majoritarian processes are now known to be limited and corruptible by “logrolling,” Condorcet cycling, and Arrow’s Theorem, resulting in special interest legislation that does not even represent the views of the majority. Why would legislation of aspirational morality be immune from these legislative infirmities?

Furthermore, even if legislation actually reflected the will of the majority, why should one expect fifty-one percent of the electorate to be particularly “moral?”¹⁸

This Article will explore these and other questions that arise from aretaic theories of legislation from a public choice perspective.

Part I discusses the concept of virtue and explores why, in concept, virtue is a good thing and noble pursuit. This first Part also explores some of the American Founders’ views on virtue and their attempts to consider the concept in the crafting of a new government. That survey provides a useful compilation of thought not before gathered together—something which makes that Part

these same governmental structures can lead to perverted forms of government, to tyranny, oligarchy, or mobocracy (Aristotle’s term for the last is democracy) if the ruling group is trying to advance its own particular interests instead (1981, bk. IV, 1288b-1301a).

Id. (citation omitted).

17. G. Marcus Cole, *What is the Government’s Role in Promoting Morals? . . . Seriously?*, 31 HARV. J.L. & PUB. POL’Y 77, 78 (2008).

18. *Id.* at 82 (citation omitted).

have stand-alone utility in its own right for furthering the historical understanding of the virtue debate. Part II is designed to speculate on what theories of aretaic legislation might look like once they are more developed by virtue scholars. Looking at the evolution of virtue jurisprudence and the efforts within that literature to establishing virtue as the proper end of lawmaking, we can get some sense of the architectural design of a regime where virtue-centered, or aretaic, legislation is the ideal.

Part III dispels some of the hope for virtue and the optimism in its pursuit by explaining the realities of the legislative process in a public choice perspective. It explains that the self-interested nature of legislators and those rent-seeking¹⁹ for legislative advantages ensures that most legislation is simply the culmination of an interest group bargain that leads to sub-optimal wealth transfers concentrating benefits on some while dispersing the costs on the general, unassuming public.²⁰

Part IV explains that one of the reasons the public remains in the dark during such seemingly distasteful legislative processes is through a process called masking. Legislation is labeled in a way that the public demands and sold to the public as if it is to their advantage. This phenomenon has been described as a mask,²¹ a curtain,²² cloak,²³ or a veil of legitimacy meant to make legislation less transparent and shield it from critique. Legislation's stated purpose is often a façade²⁴ or a charade.²⁵ The private nature of the

19. See MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 46–51 (2009) (explaining rents and rent-seeking).

20. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982) (“The ‘interest group’ theory asserts that legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare . . .”).

21. Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 580 (2009) (discussing masking special interest legislation).

22. POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN (Terry L. Anderson ed., 2000); Jonathan H. Adler, *Rent-seeking Behind the Green Curtain*, REG., no. 4, 1996, at 26.

23. Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 678 (2004) (discussing incomplete statutes and the delegation doctrine as ways to “use statutory incompleteness to cloak responsibility-shifting delegations without fear of reprisal from the electorate. When this is the case, lawmakers can mask their true political preferences, undermining electoral accountability.”).

24. Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 155 (2009) (“In some cases, ‘public interest’ statutes may serve as a facade, providing a symbol of government concern while masking government inaction.”).

25. Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 1013 (2009) (In administrative law, “the notice-and-comment process can be a charade, a purported exercise in objective analysis that seeks to mask inevitably political choices.”).

bargain is, therefore, less susceptible to challenge or at least the information costs are increased to reveal the true nature of the legislation. These attempts to pull the wool over the eyes of the electorate provide increased durability to the legislation.

This masking process would undoubtedly be used in any virtue-centered ethic for legislative outcomes, ultimately in the substance behind the mask subverting the ends of virtue and using the virtue concept to hide further private interest transfers. In light of these tactics, Part IV proceeds to conclude that if the public demands “virtue” legislation, it will most certainly get a virtue mask but is unlikely to get virtue in substance. Virtue-based legislation is almost an impossibility.

Part V synthesizes some of the analysis by returning to the relationship between virtue and the realities exposed by the public choice model. It also offers some observations on alternatives. Because there is a high probability that any piece of legislation is non-virtuous legislation, Part V concludes that limitations on the output of legislation itself are our better means of encouraging virtue. In other words, the most virtuous of laws would be those laws that make it difficult to create laws—as laws often involve non-virtuous wealth transfers and otherwise obstruct our ability to pursue private virtue. While virtue may be a wonderful thing to pursue and encourage in our private affairs, there is very little reason to believe it can be inculcated in us through legislative processes that are inherently non-virtuous.

This Article is part of the process that fits within the evolutionary discussion of virtue and the law.²⁶ There is still a long discursive journey ahead where debates and evaluation of the mechanics, possibilities, and prudence of applying virtue in courts, legislatures, and other legal forums will be necessary in order to determine whether and how aretaic theories are to take hold in the law.²⁷ This Article is one step in the necessary discussion of how legislative processes matter in determining the efficacy and possibility of aretaic values serving as the metric for determining the proper ends for legislation.

26. Cimino, *supra* note 4, at 312 (discussing the “newness of idea” and “because virtue theory as applied to law is such a novel idea that it will necessarily take time and experience in order to better learn how virtue is relevant to law”).

27. *Id.* (“Virtue Jurisprudence as both a theory and an anthology are significant contributions with as yet unknowable potential to influence normative legal theory. . . . [I]t will in all likelihood take years of writing and debate to fully realize the theory’s potential.”). Furthermore, Cimino counsels that exchange, even without knowing the specifics of the theories one might begin to critique, is not premature under these circumstances. *See id.* (suggesting we “continue to apply virtue to law, concept by concept, and not until the conversation is more robust can any one theorist step back and try to offer the unifying principles”).

I. SURVEYING THE VALUES OF VIRTUE: VIRTUE AND ASPIRATIONS TOWARD EXCELLENCE ARE NOBLE AIMS AS METRICS FOR INDIVIDUAL BEHAVIOR

The terms virtue²⁸ and virtuous,²⁹ while lacking precise definitions and in some ways necessarily subjective in nature, have meanings that can generally be understood and examined in terms of excellence. And in some ways virtue involves a concept of selflessness that seems contrary to human nature.³⁰

Aristotle's definition of virtue, as principally advanced in *Nicomachean Ethics*,³¹ dominates much of the current discussion in virtue ethics and related developments like virtue jurisprudence.³² The pursuit is *arête*, the Greek term for excellence that is coterminous with virtue,³³ and the end sought is *eudaimonia*, which means happiness and it is a condition that can only be achieved through virtue.³⁴

Much of what follows in this Part involves further explications of the meaning of Aristotelian and neo-Aristotelian concepts of virtue, although not exclusively so. This Part is intended to introduce the general meaning virtue has in political and social discussions in order to get a sense of the virtue

28. 19 THE OXFORD ENGLISH DICTIONARY 675 (2d ed. 1989) (defining "virtue" as including, among other definitions, "A particular moral excellence; a special manifestation of the influence of moral principals in life or conduct.").

29. *Id.* at 678–79 (defining "virtuous" as including, among other definitions, "Possessing or showing virtue in life and conduct; acting with moral rectitude or in conformity with moral laws; free from vice, immorality, or wickedness; good, just, righteous," and "Of great excellence or worth.").

30. THOMAS HOBBS, LEVIATHAN, 186–87 (C. B. Macpherson ed., 1968) (1651) (discussing man's self-interested nature).

31. See THE NICOMACHEAN ETHICS OF ARISTOTLE 34–57 (F.H. Peters trans., 1886), available at <http://archive.org/details/nicomacheaneth00arisuoft>. See also JONATHAN LEAR, ARISTOTLE: THE DESIRE TO UNDERSTAND 154–55 (1988) ("The aim of the *Nicomachean Ethics* is to give one a reflective understanding of how one can achieve happiness by living an ethical life within society.").

32. Cimino, *supra* note 4, at 279–80 (identifying neo-Aristotelian themes in most of the literature on virtue jurisprudence); Claeys, *supra* note 11, at 903 (discussing how most virtue ethics is Aristotelian or neo-Aristotelian to some degree).

33. Cimino, *supra* note 4, at 292 ("[I]n well-ordered societies, the *nomoi*, or just laws and social norms, are those that 'create the conditions for human flourishing.' As we have seen, human flourishing is the goal of law in aretaic theory."); Claeys, *supra* note 11, at 903 ("Virtue ethics theories in this strict sense have 'aretaic' foundations, referring to *aretê*, the Greek term for 'excellence' or 'virtue.'").

34. Cimino, *supra* note 4, at 285 ("Aristotle defines virtue as that which allows human beings to be happy: '[s]ince happiness is an activity of the soul expressing complete virtue, we must examine virtue.'"); Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679, 689 (1992) ("According to Aristotle's political writings, the good of the political community and the good of the individual are inseparable. The *telos* or natural end of human life is *eudaimonia* or happiness, and one achieves happiness by living a life in accordance with virtue.").

concept. For purposes of this Article, we need not resolve some true or absolute meaning of virtue, as any meaning will meet the same process critique leveled later in the Article. But it is important to see how alluring the call to virtue is and to identify virtue as a worthy individual pursuit—which does not translate automatically into a conviction that it should also be pursued as a dictated metric for the legitimate ends of legislation.

There is some debate over the origins of virtue in the human condition and society. Some contend that virtue is conceived in nature but nourished by knowledge and education,³⁵ and obtained after maturing and evolving into an energetic and ever-present metric that places it above comfort as the superior governing ethic of individual behavioral choice.³⁶ But the maturation of virtue is difficult for persons and institutions.³⁷ Competing preferences in and infirmities of the human condition create obstacles for a virtue ethic to mature and transfer itself into human action. Hayek explains that knowledge of and adherence to rules of conduct can help control these obstacles so long as one can internalize as rational the limitations on behavior necessary to dodge tendencies in the human condition that lead to “impermissible” behaviors:

Human action, however, is in fact as much guided by rules which limit it to permissible kinds of actions—rules which generally preclude certain *kinds* of actions irrespective of the foreseeable particular results. Our capacity to act successfully in our natural and social environment rests as much on such knowledge of what *not* to do (usually without awareness of the consequences which would follow if we did it) as on our knowledge of the particular effects of what we do. In fact, our positive knowledge serves us effectively only thanks to rules which confine our actions to the limited range within which we are able to foresee relevant consequences. It prevents us from over stepping these limits. Fear of the unknown, and avoidance of actions with unforeseeable consequences, has as important a function to perform in making our actions ‘rational’ in the sense of successful as positive knowledge.³⁸

35. A NEW DICTIONARY OF QUOTATIONS: ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES 1251 (H.L. Mencken ed., 1991) [hereinafter MENCKEN] (“Virtue, though she gets her beginning from nature, yet receives her finishing touches from learning.”) (quoting QUINTILIAN, 12 INSTITUTIO ORATORIO (c. 90)).

36. “‘Virtue’ means energetic manliness.” RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 99 (1974) [hereinafter KIRK, ROOTS]; MENCKEN, *supra* note 35, at 1251. (“The superior man thinks always of virtue; the common man thinks of comfort.”) (quoting CONFUCIUS, ANALECTS IV (c. 500 B.C.)).

37. MENCKEN, *supra* note 35, at 1251 (“Virtue, like art, constantly deals what is hard to do and the harder the task the better the success”) (quoting ARISTOTLE, NICOMACHEAN ETHICS, bk. II (c. 340 B.C.)).

38. F. A. HAYEK, THE CONFUSION OF LANGUAGE IN POLITICAL THOUGHT 22 (1968).

Virtue requires an absence of a desire for vice, not just abstention from it³⁹—for the inclination toward vice leaves one susceptible to the seduction away from virtue. Despite human tendencies toward self-interest and sometimes viciousness, some argue that virtue itself is of sufficiently high utility that even the rational, self-interested individual has an incentive to embrace it in practice.⁴⁰

Some conclude that an individual's dutiful respect and regard for his virtuous obligations—which are described by some as owed to God, to his fellow man, or to himself—are best evaluated through a review of his actions in, and observable by, the public.⁴¹ One can talk a good game of virtue and even adhere to it in purely private affairs, but adherence to virtue can only be truly examined through the public lens and the actions affecting others.⁴²

A virtuous man, it has been said, does not seek popularity, applause, or bounty for his actions. Cato contends that a man seeking to obtain such things or to gain favor from those interests willing and wanting to dole it out must inevitably “act foolishly for one side, and wickedly against the other,” requiring manners of deception, bribery, or other tactics that the truly virtuous man eschews.⁴³ As Cato observes:

Popularity is the fondness and applause of many, following the person of one, who in their opinion, deserves well of them; and it must doubtless be a sensible to him who enjoys it, if he enjoyed upon good terms and from reputable causes: but where it is only to be acquired by deceiving men with words, or intoxicating them with liquors, or purchasing their hearts with bribes, a virtuous man would rather be without it; and therefore virtuous men have been rarely popular, except in the beginning, or near the first rise of states, while they yet preserved their innocence.

Where parties prevail, a principle way to gain popularity is, to act foolishly for one side, and wickedly against the other.⁴⁴

39. MENCKEN, *supra* note 35, at 1255 (“Virtue consists, not in abstaining from vice, but in not desiring it.”) (quoting GEORGE BERNARD SHAW, *MAXIMS WERE REVOLUTIONIST* (1903)).

40. MENCKEN, *supra* note 35, at 1253 (“The utility of virtue is so manifest that even the wicked practise [sic] it in self-interest.”) (quoting LUC DE VAUVENARGUES, *RÉFLEXIONS* (1746)).

41. 1 JOHN TRENCHARD & THOMAS GORDON, *CATO’S LETTERS* 210 (Ronald Hamowy ed., 1995) [hereinafter *CATO’S LETTERS*]. Cato writes:

Our publick [sic] virtue is the best and surest proof that we can give of our private piety: Piety and justice are inseparable; and prayers said ten times a day, will not atone for a murder or a robbery committed once a month: Appearances go for nothing, when facts contradict them. The readiest way therefore to shew [sic] that our hearts are pure, is to shew [sic] that our hands are clean, and that we will punish those that have foul ones. Here is a test of our virtue and innocence!

Id.

42. *Id.*

43. *Id.* at 338. *See also id.* at 82–83 (discussing the virtuous lawmaker).

44. *Id.*

For Cato, it is not necessarily the viciousness of the state that is dangerous but the access to its coercive power—when the state then is used in a manner that makes it become itself the functional equivalent of the plundering Hobbesian man.⁴⁵

Some proclaim that virtue is one of the “the great pillars of all government and of social life.”⁴⁶ It is vital to liberty.⁴⁷ In this absolutist sense, shirking virtue cannot be justified. Adherence must be unconditional, lest we begin to poke holes that create a slippery slope and unsteady foundation that eviscerates virtue’s status as a controlling ethic altogether. Russell Kirk explains such claims of “justified” departures as leading to certain moral decay:

There is no more certain symptom of the decay of the principles requisite to maintain even our imperfect standard of virtue, than when the plea of necessity is urged in vindication of any departure from its mandate, since it is calling in the aid of ingenuity to assist the passions, a coalition that rarely fails to lay prostrate the feeble defenses of a tottering morality.⁴⁸

Virtue is, then, something that does not generally provide for exceptions.

All of this Part’s discussion has been designed to describe some of the ways in which virtue is characterized and to demonstrate that it is beyond doubt a wonderful aim. If it were possible to achieve virtue, then it should be pursued. No doubt, each person should strive to be virtuous. In all of these regards discussed above, virtue is simply one of the highest aims of civilization. However, that does not necessarily mean that it can effectively be mandated or promoted by government or that we can expect that it will exist in governors. Nonetheless, since our Founding, we have tried.

According to Charles Murray, “Everyone involved in the creation of the United States knew that its success depended on virtue in its citizenry—not gentility, but virtue.”⁴⁹ The American Founders believed that, with appropriate constraints, government could be constrained but only if its citizens were virtuous. James Madison stated, “To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical

45. *Id.* See also FREDERIC BASTIAT, *THE LAW* 6 (Dean Russell trans., 1996) (1850) (“[S]ince man is naturally inclined to avoid pain—and since labor is pain in itself—it follows that men will resort to plunder whenever plunder is easier than work.”).

46. 2 PATRICK HENRY: *LIFE CORRESPONDENCE AND SPEECHES* 592 (William Wirt Henry ed., 1891).

47. Benjamin Rush, *Of the Mode of Education Proper in a Republic* (1798), reprinted in *OUR SACRED HONOR* 412 (William J. Bennett ed., 1997) (“[W]ithout virtue, there can be no liberty, and liberty is the object and life of all republican governments.”).

48. RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO ELIOT* 199 (7th rev. ed. 1986) [hereinafter KIRK, *CONSERVATIVE MIND*] (quoting James Fenimore Cooper, *THE HEIDENMAUER* 98–99 (1837)).

49. CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960–2010*, at 128 (2012).

idea.”⁵⁰ Some Founders like Jefferson believed that man was innately moral, although needed guidance and exercise if he is to stay that way.⁵¹ But, these Founders also understood the limitations of human nature and, thus, attempted to create a regime that would constrain the darker tendencies of the human condition from accessing power.

Madison explained in *The Federalist* that the advancement of virtue indeed was a major goal of the Constitution:

The aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust.⁵²

The importance of virtue in fact pervaded much of the discourse at the Founding.⁵³

50. THE COMPLETE MADISON: HIS BASIC WRITINGS 49 (Saul K. Padover ed., 1953); 5 THE WRITINGS OF JAMES MADISON 223 (Gaillard Hunt ed., 1904). William A. Stanmeyer discusses the heavy focus that the Founders had on virtue as a precondition to freedom and the survival of the Republic:

Franklin, Adams, Madison, Jefferson, Washington—these are the most important heroes in the pantheon of early American leaders. Their comments, and many more than one could adduce, make clear the founding generation’s conviction that the Constitution would work only if the people were virtuous. The precondition of political freedom was personal virtue. This philosophy was the fruit of a tradition going back to ancient writings on the essence of good citizenship, political health, and social morality; a tradition that “stressed the moral character of the independent citizen as the prerequisite to good politics and disinterested service to the country.”

William A. Stanmeyer, *Keeping the Constitutional Republic: Civic Virtue vs. Pornographic Attack*, 14 HASTINGS CONST. L.Q. 561, 568–69 (1987) (citation omitted).

51. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 554 (1986). Sherry writes:

Jefferson wrote repeatedly that man was innately moral. . . . The best example is a letter to his nephew written in 1787: Man was destined for society. His morality therefore was to be formed to this object. He was endowed with a sense of right and wrong merely relative to this. This sense is as much a part of his nature, as the sense of hearing, seeing, feeling. . . . It is given to all human beings in a stronger or weaker degree. . . . It may be strengthened by exercise, as may any particular limb of the body.

Id. at 554 & n.41 (alteration in original).

52. THE FEDERALIST NO. 57, at 384 (James Madison) (Jacob E. Cooke ed., 1961).

53. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 160–229 (1967) (discussing the Founders’ vision as a fundamental transformation of society and governance); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 47–48 (1969) (same); John Warren, *An Oration*, in THE RISING GLORY OF AMERICA, 1760–1820, at 57–58 (Gordon S. Wood ed., 1990) (discussing the ideal of virtue in creating a new government).

Franklin opined that true and full true virtue is a learned art:

Most people have naturally *some* virtues, but none have naturally *all* the virtues. To *acquire* those that are wanting, and secure what we acquire, as well as those that we have naturally, is the subject of *an art*. It is as properly an art as painting, navigation, or architecture. If a man would become a painter, navigator, or architect . . . he must also be taught the principles of the art.⁵⁴

Many philosophers have contended that the adherence to virtue is inextricably linked to happiness,⁵⁵ and thus it is its own reward.⁵⁶ The happiness and contentment that derives to an individual from the virtuousness of person⁵⁷ may also derive to a government and a people from the virtuousness of country.⁵⁸ As George Washington explained, characteristics of virtue such as “the general prevalence of piety, philanthropy, honesty, industry, and oeconomy [sic] seems, in the ordinary course of human affairs, particularly necessary for advancing and conforming the happiness of our country.”⁵⁹

According to John Adams, virtue is innate, requiring only an essential ability to discern between good and evil.⁶⁰ A government unchecked and sometimes embraced by a dependent public can suffer temptations toward

54. Letter from Benjamin Franklin to Lord Kames (May 3, 1760), *reprinted in* THE AMERICAN ENLIGHTENMENT 86 (Adrienne Koch ed., 1965).

55. MENCKEN, *supra* note 35, at 1252 (“I believe long habits of virtue have a sensible effect on the countenance.”) (quoting Benjamin Franklin, *The Busy-Body*, Feb. 18, 1729); George Washington, First Inaugural Address (Apr. 30, 1789), *reprinted in* OUR SACRED HONOR, *supra* note 47, at 382 (“[T]here is no truth more thoroughly established, than that there exists . . . an indissoluble union between virtue and happiness . . .”).

56. MENCKEN, *supra* note 35, at 1251 (“Virtue is its own reward”) (quoting CICERO, DE FINIBUS, bk. III (c. 50 B.C.)).

57. CATO’S LETTERS, *supra* note 41, at 3 (“Happiness is therefore from within just as much as is virtue; and the virtuous man enjoys the most.”).

58. John Adams, *The Foundation of Government*, *reprinted in* 2 THE ANNALS OF AMERICA 410 (Encyclopedia Britannica 1968). Adams stated the following:

All sober inquirers after truth, ancient and modern, pagan and Christian, have declared that the happiness of man, as well as his dignity, consists in virtue. . . . If there is a form of government, then, whose principle and foundation is virtue, will not every sober man acknowledge it better calculated to promote the general happiness than any other form?

Id.

59. Letter from George Washington to the General Assembly of Presbyterian Churches (May, 1789), *reprinted in* GEORGE WASHINGTON: A COLLECTION 533 (W. B. Allen ed., 1988) [hereinafter WASHINGTON, COLLECTION].

60. KIRK, CONSERVATIVE MIND, *supra* note 48, at 92–93. John Adams explained the need for primacy of conscience in decision making:

There is no necessary connection between knowledge and virtue. Simple intelligence has no association with morality. . . . A faculty or quality of distinguishing between normal good and evil, as well as physical happiness and misery, that is, pleasure and pain, or in other words a *conscience*—an old word almost out of fashion—is essential to morality.

Id. (quoting John Adams).

viciousness and away from virtue.⁶¹ Benjamin Franklin warned in 1787 that “only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters.”⁶² Kirk cautioned that history proves that “there cannot be a good common wealth unless most citizens are virtuous, and the citizens find it difficult to hold by the old morality in a time of political disorder and corruption.”⁶³ Hamilton in *Federalist No. 1* explained that the American people at the Founding were tasked with deciding “the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force.”⁶⁴ The Founders aimed to foster institutions that advanced virtue.⁶⁵

As George Washington explained, governments must equally act virtuously to abstain from oppression, while faithfully exercising their duty to govern to protect against oppression by man against man—preserving liberty and promoting virtue:

Government being, among other purposes, instituted to protect the persons and consciences of men from oppression, it certainly is the duty of rulers, not only to abstain from it themselves, but, according to their stations, to prevent it in others.

The liberty enjoyed by the people . . . is not only among the choicest of their *blessings*, but also of their *rights*. While men perform their social duties

61. KIRK, *ROOTS*, *supra* note 36, at 102 (discussing the “poison[ing] . . . with flattering hopes” and the “arrogance and luxury [that] advance it,” leading “avarice” and “ambition” to “evil” results for a governmental regime in a time of crisis).

62. Letter from Benjamin Franklin to Messrs. the Abbés Chalut and Arnaud (April 17, 1787), *reprinted in* 10 *THE WORKS OF BENJAMIN FRANKLIN* 297 (Jared Sparks ed., 1840). *See also* BLACKWELL ENCYCLOPEDIA OF THE AMERICAN REVOLUTION 693 (Jack P. Greene & J.R. Pole eds., 1991) (quoting 9 *THE WRITINGS OF BENJAMIN FRANKLIN* 80 (Albert H. Smyth ed., 1905)).

63. KIRK, *ROOTS*, *supra* note 36, at 104 (“There existed material reasons for the decline of the high old Roman Virtue, but also that falls from virtue accelerated de-political disintegration of the common wealth.”).

64. FEDERALIST NO. 1, at 3 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). *See also* John Hancock, Speech in the Council Chamber (Feb. 27, 1788), *reprinted in* OUR SACRED HONOR, *supra* note 47, at 17 (“I hope and pray that the gratitude of [the hearts of future Americans] . . . may be expressed . . . by exhibiting on the great theater of the world those social, public, and private virtues which give more dignity to a people possessing their own sovereignty than the crowns and diadems afford to sovereign princes.”).

65. Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 *GEO. WASH. L. REV.* 931, 941 (1995) (describing virtue as key to the Founders’ vision that “the main task of government was to foster and protect the multitude of associations in which proper character was formed”).

faithfully, they do all that society or the state can with propriety demand or expect.⁶⁶

While virtue can stand alone, vice is best accomplished in collusion and collection between individuals or groups allied in an end or objective.⁶⁷ An individual's vice-laden end can be fueled and justified in his mind by the acceptance of others with aligned interests supporting or collecting in the effort. And, such non-virtuous behavior can be made effective when "justified" or made acceptable to otherwise competing interests—or when the opposition is disarmed—through information control like lies, deception, masks, deflection, and subterfuge, or through coercive means including outright force. Therein lies the risky reality of injecting virtue as a controlling ethic in politics and legislation exposed in the teachings of public choice theory.

To the extent one can design such a thing, "Good government does . . . produce great virtue, much happiness, and many people."⁶⁸ The question becomes how to design such a government and whether even the best of designs can accomplish that end of virtue.

As William Stanmeyer explains, the Founders believed that the republic's survival was dependent on the character of the American people:

The Constitution does not exhaust the Founders' beliefs about political order in a free society. They had profound insights into the kind of people Americans would have to be in order to maintain a constitutional republic. They believed, in opposition to most modern commentators who generally omit notions of self-restraint or "virtue" as important political elements, that only if "republican virtue" were widely practiced could the republic survive.⁶⁹

Stanmeyer proceeds to explain the classical roots of the Founder's beliefs in the importance of the virtue of the citizenry to produce good government:

This "classical" understanding originated with Plato and Aristotle. . . . The theory posits that a republic with democratic institutions is a form of self-government, but the "self" must be worthy of governing. Thus, the *character* of the people who govern—or more essentially, of the people who elect who will govern—is crucial to the merit, indeed the survival, of the polity. The right balance of freedom and authority, of liberty and order, did not just happen: it resulted from a comparable moral balance in the lives of most citizens. A bad people could not produce good government. Rather, good government arose from good people; consequently, the government itself had to be solicitous for

66. Letter from George Washington to the Annual Meeting of Quakers (Sept. 1789), reprinted in WASHINGTON, COLLECTION, *supra* note 59, at 533.

67. MENCKEN, *supra* note 35, at 1255 ("Virtue can stand without assistance, and considers herself as very little obliged by countenance and approbation; but vice, spiritless and timorous, seeks the shelter of crowds and support of confederacy.") (quoting Samuel Johnson, *The Rambler*, Nov. 9, 1751).

68. CATO'S LETTERS, *supra* note 41, at 270.

69. Stanmeyer, *supra* note 50, at 566.

the character of the people—to be interested in encouraging a modicum of virtue among the citizenry. Again and again, the Founders came back to this theme: moral breakdown leads to political breakdown, so the people must maintain a strong commitment to basic morality.⁷⁰

Stanmeyer focuses on the “people who elect who will govern” as critical to the security of the Republic.⁷¹

Despite the fact that the United States is governed “by the people,”⁷² I believe that it is important to focus on the virtue of the people who have been elected to govern—not some amorphous idea of “the public” as a collective. The governed and the governors should be treated as two distinct groups, and the presence of virtue must be treated separately if we are to understand the effectiveness of constitutional design at promoting virtue with each. Douglas Laycock explains part of this problem that comes from conflating the two concepts. He explains, “[The Founders’] differing views of human nature were possible in part because they sometimes thought of government as *The People*, the ones to be protected, at last running their own government, and they sometimes thought of government as *The Government*, an alien force much like the Crown.”⁷³ He continues that:

Publius had a seemingly schizophrenic view of human nature. Sometimes he seemed to think of people as virtuous protectors of their own liberty, and sometimes he seemed to think of people as self-interested abusers of power. One reason it was possible to have schizophrenic thoughts about human nature is that the Founders had subdivided a single group of people into two different roles and were thus thinking of them in two entirely different ways. The general populace was at the same time the government and the governed.⁷⁴

While we can examine institutional design in an attempt to steer politicians towards virtue and control legislator tendencies toward vice, Samuel Adams posited that “neither the wisest constitution nor the wisest laws will secure the liberty and happiness of a people whose manners are universally corrupt.”⁷⁵ As Alexis de Tocqueville has been attributed to have said, “America is great because she is good and if America ever ceases to be good, America will cease

70. *Id.* at 566–67.

71. *Id.*

72. *Id.* at 567–68 (discussing the Founders’ ideas of the people governing). The maxim “government by the people” has a long history in American political discussions, including famously by Abraham Lincoln. See Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), reprinted in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, 536 (Don E. Fehrenbacher ed., 1989) (discussing the “great task . . . that government of the people, by the people, for the people, shall not perish from the earth”).

73. Douglas Laycock, *Individual Liberty and Constitutional Architecture: The Founders’ Prompt Correction of Their Own Mistake*, 16 HARV. J.L. & PUB. POL’Y 75, 84 (1993).

74. *Id.*

75. WILLIAM V. WELLS, 1 THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 22 (1865).

to be great,” and much of that test of goodness will depend on the level of individual adherence to virtue both within the people and by the governors.⁷⁶

The private morality and private virtue of the citizenry was seen by many Founders as critical to the foundation of the American Republic.⁷⁷ The people themselves must be virtuous and knowledgeable.⁷⁸ This belief, of course, is based on the presumption that a virtuous people will not only act virtuously and therefore maintain self-order, but also that they will demand virtuous governance and use democratic means to hold lawmakers to their duty and obligation to be virtuous themselves. Adams, for example, exclaimed that freedom is dependent on a State that supremely honors virtue in its citizens and in itself.⁷⁹

Franklin believed men should strive toward virtue, and virtuous men who hold a monopoly on wisdom should collect together, preach truth, and crusade to spread, strengthen, and nurture virtue throughout the masses.⁸⁰ Such a command would seem to justify the creation of seemingly paternalistic regulations and rules that could demand that the governed conduct themselves virtuously. Franklin called for an active program for the education of virtue:

76. EZRA TAFT BENSON, *GOD, FAMILY, COUNTRY: OUR THREE GREAT LOYALTIES* 360 (1975). *See also* FRANCIS J. GRUND, *ARISTOCRACY IN AMERICA* 212 (Harper & Brothers 1959) (1839); FRANCIS J. GRUND, *THE AMERICANS IN THEIR MORAL, SOCIAL, AND POLITICAL RELATIONS* 171 (1968). Francis Grund explained:

I consider the domestic virtue of the Americans as the principal source of all their other qualities. . . .

No government could be established on the same principle as that of the United States, with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the whole form of their government.

Id.

77. John Adams, *Letter to Benjamin Rush* (Feb. 2 1807), *reprinted in* OUR SACRED HONOR, *supra* note 47, at 408–09 (“[W]ithout national morality, a republican government cannot be maintained.”); George Washington, *First Inaugural Address* (Apr. 30, 1789), *reprinted in* OUR SACRED HONOR, *supra* note 47, at 380–82 (“[T]he foundations of our National policy will be laid in the pure and immutable principles of private morality . . .”).

78. Samuel Adams, *Letter to James Warren* (Feb. 12, 1779), *reprinted in* OUR SACRED HONOR, *supra* note 47, at 217 (“If Virtue & Knowledge are diffused among the People, they will never be enslaved. This will be their great Security.”).

79. Samuel Adams, *Letter to James Warren* (Nov. 4, 1775), *reprinted in* OUR SACRED HONOR, *supra* note 47, at 260–61 (“It is not possible that any State shd [sic] long remain free, where Virtue is not supremely honord [sic].”).

80. Benjamin Franklin, *Doctrine To Be Preached* (1731), *reprinted in* OUR SACRED HONOR, *supra* note 47, at 370–71 (“Virtuous Men ought to league together to strengthen the Interest of Virtue, in the World: and so strengthen themselves in Virtue. . . . [N]one but the Virtuous are wise. . . . Man’s Perfection is in Virtue.”).

[N]othing is of more importance for the public weal, than to form and train up youth in wisdom and virtue. Wise and good men are, in my opinion, the strength of a state; much more so than riches or arms, which, under the management of ignorance and wickedness, often draw on destruction, instead of providing for the safety of the people.⁸¹

This view is consistent with the belief by some that being virtuous is a responsibility and fundamental aspect of good citizenship.⁸²

Yet again, however, we must ask whether it is possible to reach such a lofty goal of virtuous governance by a virtuous people when we know certain tendencies of both persons and politics. Self-love, self-gratification, and self-interest are antithetical and antagonistic to a moral duty of virtue.⁸³ When legislators exhibit propensities toward their own self-interest separate from and at the expense of the public interest to which they serve, they are violating their moral duties.⁸⁴ Yet, that violation is precisely what obtains when a legislator uses the powers entrusted to him to serve a particular interest at the expense of others and in return for a personal gain—the primary contention of public choice advocates about the reality of the legislative process.

The Framers recognized the flaws of human nature when designing institutions for the new Republic.⁸⁵ Constitutional safeguards to protect against the temptations of man to abuse power were embedded in the governmental structure. James Madison in the famous “if men were angels” passage of *The Federalist* observed the necessity of governmental accountability when he wrote:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls [sic] on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the

81. Benjamin Franklin, *Letter to Samuel Johnson* (Aug. 23, 1750), in *THE AMERICAN ENLIGHTENMENT*, *supra* note 54, at 77. *See generally* Benjamin Franklin, *Morals and Religion*, in *THE AMERICAN ENLIGHTENMENT*, *supra* note 54, at 61–66.

82. Cass R. Sunstein, *Rights and Their Critics*, 70 *NOTRE DAME L. REV.* 727, 742–43 (1995) (Virtue “is an aspect of citizenship that is notoriously neglected in public discussion and social practice. Whether rights are the culprit here may be questioned. But insofar as rights are understood in purely self-interested terms, it is certainly conceivable that they can crowd out issues of responsibility.”).

83. *THE BLACKWELL ENCYCLOPEDIA OF THE AMERICAN REVOLUTION* 692 (Jack P. Greene & J.R. Pole eds., 1991) (As Thomas Jefferson stated, “Self-love, therefore, is no part of morality. . . . It is the sole antagonist of virtue, leading us constantly by our propensities to self-gratification in violation of our moral duties to others.”).

84. *Id.*

85. Stanmeyer, *supra* note 50, at 565–66 (“[T]he very structure of the federal system makes it abundantly clear that the Founders embraced the Biblical view of mankind’s ‘fallen human nature.’”).

government to controul [sic] the governed; and in the next place, oblige it to controul [sic] itself. A dependence on the people is no doubt the primary controul [sic] on the government; but experience has taught mankind the necessity of auxiliary precautions.⁸⁶

Washington proclaimed, “It is substantially true that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free government.”⁸⁷ To respect virtue, a lawmaker may not act imprudently.⁸⁸ But as Lord Acton warned, “Power tends to corrupt, and absolute power corrupts absolutely.”⁸⁹ And as stated in a letter to Thomas Jefferson in 1788, James Madison warned that “[w]herever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince.”⁹⁰ It is these realities with which any theory of aretaic legislation must contend.

The Hobbesian man seeks his self-interest without regard for his neighbors or constituents—it is only a matter of power, self-help, and survival of the fittest.⁹¹ The result is a life that is vicious—or as Hobbes would say, “solitary, poore [sic], nasty, brutish, and short.”⁹² Many of the Founders of the American Republic understood that human tendency and knew it was necessary to create a governmental structure formulated under principles of what Epstein calls the Lockean world as a response to the Hobbesian man.⁹³

86. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

87. George Washington, Farewell Address (1776), reprinted in WASHINGTON’S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES, S. DOC. NO. 106–21, at 20 (2d Sess. 2000).

88. KIRK, CONSERVATIVE MIND, *supra* note 48, at 9 (“[A] statesman’s chief virtue, according to Plato and Burke, is prudence.”).

89. Letter from Lord Acton to Bishop Mandell Creighton (1887), reprinted in 1 LOUISE CREIGHTON, LIFE AND LETTERS OF MANDELL CREIGHTON 371, 372 (1904). See also GERTRUDE HIMMELFARB, ESSAYS ON FREEDOM AND POWER 329, 335, 339 (1972).

90. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON AND MADISON 1776–1826, at 562, 565 (James Morton Smith ed., 1995).

91. HOBBS, *supra* note 30, at 186. See also BASTIAT, *supra* note 45, at 16 (“Sometimes the law defends plunder and participates in it. Thus the beneficiaries are spared the shame, danger, and scruple which their acts would otherwise involve.”).

92. HOBBS, *supra* note 30, at 185–88. “[D]uring the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre [sic]; and such a warre [sic], as is of every man, against every man.” *Id.* at 185. See also *id.* at 266 (arguing that “masterlesse [sic] men” enjoy “full and absolute Libertie [sic]” at the cost of living in a state of “perpetuall [sic] war”).

93. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 9–10 (1985).

Man is self-interested. That is not necessarily a bad thing. As Adam Smith observes, at least in economic affairs self-interest promotes specialization, efficiency, and overall advancement in society.⁹⁴ As Adam Smith described:

Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to the society.

...

... [H]e intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.⁹⁵

Milton Friedman dismisses virtue, arguing it cannot be a legitimate motivating force for progress and contending instead that the great developments in modern society are motivated by the self-interested decisions of rational economic actors.⁹⁶ Because private property rights encourage exchange, and exchange permits specialization through the division of labor, the market and self-interested motivations work to ensure that most property (including skills) is put to its highest and most economically beneficial use.⁹⁷

But if one believes that man is instinctively self-interested, then it means that the controlling ethic of man's behavior—including political man—is *not* virtue.⁹⁸ If one believes that the legislator acts like a self-interested rational economic actor,⁹⁹ public choice posits that only when a virtuous act is perfectly

94. ADAM SMITH, *THE WEALTH OF NATIONS* bk. IV, at 397, 399 (Alfred A. Knopf 1991) (1776).

95. *Id.*

96. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 200–01 (1962). See also mearbhrach, *Milton Friedman—Greed*, YOUTUBE (July 14, 2007), http://www.youtube.com/watch?v=RWsx1X8PV_A (an excerpt from Phil Donohue's interview with Milton Friedman in 1979).

97. See F.A. HAYEK, *3 LAW, LEGISLATION AND LIBERTY* 74–75 (1979); LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 257–326 (3d rev. ed. 1963). See also RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 56–57 (1995); FRIEDMAN, *supra* note 96, at 26–27.

98. Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 184, 188 (1991) (“Public choice theory depends most fundamentally on the assumption that government officials, parties regulated by government, and all private citizens, when they engage in political activity, are acting out of self-interest and not altruistically.”).

99. JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 10–11 (1997) (Public choice theory posits that “[w]e must always seek to understand political outcomes as a function of self-interested individual behaviors.”).

aligned with a selfish act can we expect the generation of virtue on a political stage. Even Aristotle recognized the natural tendencies of men and the risks of abuse when they hold power.¹⁰⁰

Normatively, some idea of virtue sounds like a great thing and we should all be cheerleaders for a more virtuous society. However, expecting legislatures to be virtuous themselves or shepherds for the masses towards a virtuous ideal is misplaced. These next Parts explore that fundamental institutional infirmity for the successful operation of any theories of aretaic legislation.

II. VIRTUE JURISPRUDENCE AND POSSIBLE THEORIES OF ARETAIC LEGISLATION

We can begin to sketch the contours of any theories of aretaic legislation out of a broader understanding of virtue ethics and the virtue jurisprudence scholarship that has been written to date, even though there is not yet a well-developed body of scholarship on what aretaic legislation should be, nor have theories been substantially developed for evaluating legislation based on virtue standards. This Part provides that brief sketch, with an understanding that we need not necessarily know the specifics of a theory of aretaic legislation to introduce at least the public choice critique of that virtue-based legislative concept, a critique that is advanced in the later parts of this Article. Setting aside the complex issue of whether a mandate that legislation have aretaic value could be enforced and what mechanisms would be necessary for ensuring compliance, there are substantial concerns for implementation of an aretaic legislation theory even if those mechanical concerns could be worked out.

This Article assumes that a theory of aretaic legislation would require adopting some ethic demanding a litmus test for the legitimacy of legislation. The theory would also need to garner a sufficient level of acceptance that legislators feel bound by the constraint and adjust their action to pass that test. Presumably a theory of aretaic legislation would demand that the primary purpose or objective of legislation is the advancement of virtue. Perhaps it would be considered the highest or maybe even the exclusive aim of legislation.

The idea for a theory of aretaic legislation arises out of theories of virtue jurisprudence that germinated from virtue ethics.¹⁰¹ So, we begin with virtue

100. Claeys, *supra* note 11, at 926 (“One might object that this portrait of politics is too dour. Yet as Aristotle explained, when not properly shaped by background laws and customs, man ‘is the most unholy and the most savage’ of the animals. There are many parts of the world where politics *is* this dour. In those areas, when political rulers assume it is appropriate to use force and law to favor one way of life as higher than others, the results are depressing.”).

ethics.¹⁰² There is no single definition of virtue ethics,¹⁰³ and this Article will neither comprehensively survey the literature nor attempt to identify any commanding definition of the concept. However, as much of this Article's discussion springboards from Solum's work on virtue jurisprudence, it is useful to note that Solum explains that while "[t]here are many possible virtue ethics, . . . one of the most important and influential varieties of virtue ethics is associated with Aristotle," and "[c]ontemporary virtue ethics extends and develops the Aristotelian framework."¹⁰⁴ As a result, most contemporary virtue ethics is concerned with *eudaimonia* (or happiness) and *arête* (or human excellence).¹⁰⁵

Nonetheless, the fact remains that there is no single virtue ethics. As Eric Claeys explains, there are many theories, many terms, and many ways to characterize virtue ethics:

Such theorists do not agree unanimously among themselves about which theories even count as "virtue theories" or "virtue ethics theories." Virtue ethics could be understood as an "*alternative*" to standard deontological and consequentialist approaches, but it could also be understood more modestly, as "a way of *augmenting* one of the two main ethical theories of actions and rules." Separately, while most virtue ethics theories and their cousins are "neo-Aristotelian" to some degree, particular theories can vary widely in how "Aristotelian" or "neo" they are. Different scholars use many of the relevant taxonomy terms in different senses. Most important, rather than classifying normative obligations according to two or three external standards, many ethical philosophers instead prefer to treat different theories according to their own particular internal metaethical terms.¹⁰⁶

101. Farrelly & Solum, *supra* note 6, at 1–2 (discussing virtue jurisprudence as rooted in virtue ethics).

102. For some basic readings in virtue ethics, see, for example, ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 37–38 (1999); VIRTUE ETHICS (Roger Crisp & Michael Slote eds., 1997); VIRTUE ETHICS 2 (Daniel Statman ed., 1997); Justin Oakley, *Varieties of Virtue Ethics*, 9 RATIO 128, 143 (1996); Gregory Trianosky, *What Is Virtue Ethics All About?*, 27 AM. PHIL. Q. 335, 338 (1990).

103. Claeys, *supra* note 11, at 902 ("[I]t is rather hard to pin down what 'virtue ethics' is").

104. Cimino, *supra* note 4, at 284–85 ("The [*Virtue Jurisprudence*] anthology adopts the neo-Aristotelian perspective."); Solum, *Aretaic Turn*, *supra* note 12, at 497.

105. Solum, *Aretaic Turn*, *supra* note 12, at 497 ("For Aristotle, the highest achievable human good is *eudemonia* (roughly translated as happiness), which consists in a life of activity in accord with the human excellences (or virtues)."). Solum continues that "Aristotle divided the virtues into two categories. The intellectual virtues were *sophia* (theoretical wisdom) and *phronesis* (practical wisdom). The moral virtues included courage, temperance, good temper, and justice." *Id.* See also Sherman J. Clark, *Law as Communitarian Virtue Ethics*, 53 BUFF. L. REV. 757, 771 (2005) (describing that "the central aim of law and politics ought to be the happiness of the people governed thereby" as advanced within a communitarian virtue ethics framework).

106. Claeys, *supra* note 11, at 902–03.

The unifying idea, however, is that virtue matters and its advancement sits high up on the plane of ethical demands and expectations.¹⁰⁷ For most contemporary virtue theories, virtue in one way or another becomes “an end in and of itself.”¹⁰⁸

Virtue jurisprudence, as explained by Farrelly and Solum, is an outgrowth of virtue ethics with an application into law.¹⁰⁹ Although virtue ethics is quite developed in ethical and philosophical theory, its potential applications for law are only recently becoming explored.¹¹⁰ Farrelly and Solum and most others in their anthology *Virtue Jurisprudence* primarily focus on a theory of judging guided by virtue theories.¹¹¹ Of course, Solum’s work is neo-Aristotelian, focused on the *arête* and *eudaimonia*.¹¹²

Because of many missing details in the virtue jurisprudence literature so far, some scholars believe virtue jurisprudence lacks direction at this stage of its theoretical development.¹¹³ While the field of “virtue judging” scholarship is in its infancy and is itself only beginning to take shape,¹¹⁴ “virtue legislating” is even less certain as it is barely in the embryonic stage of scholarly attention. Nonetheless, some hint of what aretaic, or virtue-centered, legislative theories might look like exists in the early virtue jurisprudence works.

For example, while discussing a virtue-centered theory of judging, Solum indicates that “[a] complete virtue jurisprudence” would require also a “virtue-theoretic account of the ends of legislation.”¹¹⁵ Furthermore, Solum posits that “virtue jurisprudence postulates that the proper aim of legislation is the promotion of human flourishing through creation of the conditions for the

107. Cimino, *supra* note 4, at 285.

108. *Id.* at 285 n.13 (“By contrast to [consequentialist] approaches, neo-Aristotelian virtue theory derives its justification from virtue as an end in and of itself: virtue promotes human excellence, and human excellence is an end of itself, not tethered either to the concepts of duty or welfare.”).

109. Farrelly & Solum, *supra* note 6, at 1–2. *See also* Solum, *Aretaic Turn*, *supra* note 12, at 498 (“The move from virtue ethics to virtue jurisprudence is simply the translation of the aretaic turn in moral theory to the context of lawmaking and adjudication.”).

110. *Id.* at 3–7.

111. *See id.* at 2.

112. Cimino, *supra* note 12, at 280 (summarizing *Virtue Jurisprudence* as contending that “neo-Aristotelian principles of virtue and excellence (*arête*), is a better normative basis for law than either economics or rights”).

113. *Id.* at 282 (“[T]he method of reasoning inherent in virtue jurisprudence—in Aristotelian terms, *phronesis*, or “practical wisdom”—is quite different than the method of analysis of either of the two dominant theories. Specifically, unlike either consequentialism or deontology, virtue jurisprudence does not depend on a single core substantive principle or value to guide all reasoning . . .”).

114. Farrelly & Solum, *supra* note 6, at 1–2.

115. Solum, *Natural Justice*, *supra* note 2, at 76.

development of human excellence,”¹¹⁶ and to advance what a virtue jurisprudential theorist would define as the purpose of law—“enabl[ing] humans to acquire, maintain, and exercise the human excellences or virtues.”¹¹⁷

In fact, Solum counsels that the scope of virtue jurisprudence is broad and invites many questions, including regarding how the theories fit with legislation:

A full account of the implications of virtue ethics and epistemology for legal theory is a very large topic. Among the issues raised by virtue jurisprudence are the following: Virtue ethics has implications for an account of the proper ends of legislation. If the aim of law is to make citizens virtuous (as opposed to maximizing utility or realising [sic] a set of moral rights), what are the implications for the content of the laws?¹¹⁸

Although the details of an aretaic theory of legislation have not been fully developed in the literature, Solum’s remarks at least lead one to believe that any such theory would (1) set an “aim,” goal, decision rule, litmus test, or whatever you might call it for identifying the proper ends of legislation and for testing the legitimacy of those laws, and (2) part of the content in such legislation would be to “make citizens virtuous”—in other words through either enhancement, inducement, or regulation, it would seek to control the conduct and behavior of individuals. Solum did not elaborate further on the architecture of an aretaic theory of legislation, nor am I aware of any others that have done so to date in any great detail. It is unclear whether and where virtue jurisprudence is meant to have application.¹¹⁹ But for purposes of this Article, we will speculate on the likely basic features of a theory of aretaic legislation.

Aretaic legislation could be virtue-enhancing, virtue-inducing, or virtue-regulating legislation. Virtue-enhancing legislation might include subsidies to encourage virtuous behavior or government legislation authorizing or funding events or programs that educate citizens on how to be virtuous. Virtue-inducing legislation would make being virtuous beneficial to any citizen and therefore incentivize personal investment in virtuous behavior. Such legislation could include qualifications for the provisions of assistance to encourage virtue (such as work requirements for welfare), qualifications of virtue for holding

116. Solum, *Aretaic Turn*, *supra* note 12, at 498.

117. Farrelly & Solum, *supra* note 6, at 2.

118. Solum, *Virtue Jurisprudence*, *supra* note 12, at 181.

119. Cimino, *supra* note 4, at 281–82 (“[T]he volume does not directly ask, and so cannot answer, some very important questions. One is how does (or should) virtue affect law? For example, should virtue be the source of substantive legal standards or rules, as at least one of the essays suggests? Or, as others suggest, should the process of reasoning in virtue theory serve as a guide to reasoning in legal theory? Or is this all just theoretical, with no practical application?”).

office, rewards for identifiable virtuous acts, or other stimulus. Virtue-regulating legislation could include penalties for non-virtuous behavior, outright bans on activities that are considered non-virtuous, permit conditions to control risks for vice associated with activities, and other means of dictating what is and is not lawful behavior through a virtue metric.

One of the authors in *Virtue Jurisprudence* does focus on legislative ends, giving us some insight into what aretaic theories of legislation might look like. Robert George develops a theory to support morals-based legislation,¹²⁰ which he believes follows in the same line and tradition as virtue jurisprudence.¹²¹ He recognizes some limitations, noting that “it is a mistake to suppose that laws by themselves are sufficient to establish and maintain a healthy moral ecology. It is equally a mistake to suppose, however, that laws have nothing to contribute to that goal.”¹²² So, George does not wholeheartedly advocate for an unconditional normative aim for legislation but sees a place for it in the regulation of the extremes of behavior:

Critics of morals legislation often point out that law is a ‘blunt instrument’ [sic]. There is truth in this claim: law really is poorly suited to dealing with the complexities and details of individual’s moral lives. Laws can forbid the grosser forms of vice, but certainly cannot prescribe the finer points of virtue. Nonetheless, laws that effectively uphold public morality may contribute significantly to the common good of any community by helping to preserve the moral ecology which will help to shape, for better or worse, the morally self-constituting choices by which people form their character, and in turn affect the milieu in which they *and others* will in [the] future have to make such choices.¹²³

Of course, the George essay speaks more in terms of morals legislation than “virtue legislation” per se, but the general idea is the same—the identification of furtherance of a normative end as the legitimate aim of legislation. George believes it is only sometimes desirable to set a moral standard, but that at other

120. Robert P. George, *The Central Tradition—Its Value and Limits*, in VIRTUE JURISPRUDENCE, *supra* note 1, at 24, 29–46 (recognizing that there are limits to legislating virtue or morals generally but that there is some role for morals legislation). See also ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 25–26 (1993) (“[T]he law must first settle people down if it is to help them to gain some appreciation of the good, some grasp of the intrinsic value of morally upright choosing, some control by their reason of their passions.”).

121. Cimino, *supra* note 4, at 291 (“[I]n the end, George supports the view that the state is justified in taking the lead in passing ‘morals legislation’ to implement basic principles of what he calls the ‘perfectionist tradition’ . . .”).

122. George, *supra* note 120, at 46. See also Cimino, *supra* note 4, at 291 (evaluating the George essay and concluding that “George does not embrace the traditions of Aristotle and Aquinas without critique, but he does recognize the need for, and support, state intervention as to education in virtue.”).

123. *Id.* at 47.

times it is inappropriate to target legislation for the achievement of moral ends. Others might very well take a more extreme view, believing morals (or virtue or whatever normative goal is set) constitute “the” proper end of all legitimate legislation.

Theories regarding morals legislation might actually be a good starting point to develop, or upon which to model, theories of aretaic legislation, especially given that the debate in that field already has a long history.¹²⁴ Undoubtedly, I believe that most virtue theorists would contend that virtue jurisprudence is quite distinct from morals lawmaking. Yet even conceding they are distinct, there are some points of comparison. Each, it seems, has the goal of directing human behavior in a particular direction through identifying the proper ends of legislation as being the attainment of either virtue or morality, respectively. And in terms of morals legislation at least, there is some recognition of legitimate governmental power to regulate in that field of public health, safety and morals,¹²⁵ something perhaps transferable to legitimize the state pursuit of virtue laws. Proponents claim that morals legislation can serve to regulate¹²⁶ or can be useful for its expressive function and capacity to signal positive norms to individuals in society.¹²⁷ Opponents of morals legislation lodge a variety of objections based on the indeterminacy and subjectivity of morals, the existence of moral relativism, the intrusion upon individual liberty and personal autonomy associated with public dictating of morals, and the benefits of governmental neutrality.¹²⁸ Every one of these points of criticism could easily be leveled against virtue as much as they are against morality as the metric for legislation.¹²⁹ In terms of the principle critique in this Article

124. Suzanne B. Goldberg, *Morals-Based Justifications for Law-Making: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1247–58 (2004) (exploring the historical development of morals regulations in the United States); John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1, 11 n.25 (2009–2010) (listing some of the works that encompass the “large and ever-burgeoning body of philosophical literature on morals legislation which provides the backdrop for contemporary legal debate on the subject”).

125. For cases establishing that states and the federal government may regulate for the public health, safety, and morals, see, for example, *Champion v. Ames*, 188 U.S. 321, 356 (1903); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *Thurlow v. Massachusetts*, 46 U.S. 504, 529 (1847).

126. Hill, *supra* note 124, at 8 (“The standard understanding of morals legislation is that it involves laws which regulate or prohibit private acts on grounds that the majority believes them to be immoral. This captures the basic idea, but . . . morals laws sometimes extend beyond the ‘private,’ prohibiting activities which are indeed ‘public.’”).

127. *Id.* at 9 (describing the expressive function of moral legislation and the reinforcement of moral outrage or repugnance).

128. *Id.* at 8 n.20 (listing and discussing five basic varieties of justifications for opposing morals legislation, many of which would be equally true for virtue legislation).

129. Cimino, *supra* note 4, at 281 (“[T]he very idea of ‘virtue’ seems intuitively too lofty, too vague, too ambiguous, and too indeterminate for law, and so legal theorists have left virtue largely unexamined in legal scholarship.”).

from a public choice perspective, there is surprisingly very little public choice evaluation of even morals legislation, a concept that has a much longer history than virtue legislation.¹³⁰

Much in the same way “moral” is difficult to define for purposes of codifying a public consensus into law, having a definitive and acceptable definition of “virtue” may be the most troubling impediment to a theory of virtue-centered legislation.¹³¹

Of course there is difficulty defining virtue with any degree of specificity. The previous Part highlights this fact. Sometimes there are divergent definitions. The meaning of the term virtue can be quite contested between competing visions even within the same camps that might agree that, for example, virtue is about happiness and excellence—such as where within those groups there are differing views on the meaning of happiness or excellence. Cimino accurately describes virtue as “one of those broad brush terms.”¹³² This definitional difficulty also just feeds into the manipulation of the term that could be accomplished by interest group behavior. These problems have often existed in debates on moral and philosophical issues,¹³³ including questions about the meaning of morality or the state’s role in fostering it.¹³⁴

If you can define virtue, and however you define virtue, its incorporation into law and legislating faces major barriers. If virtue is contextual as some contend,¹³⁵ or is otherwise difficult to define then broad-based, universally applicable legislation may not be the best place for virtue analysis. To the extent that it is a guiding “ethic” for legislation, its definition can be shaped by

130. Goldberg, *supra* note 124, at 1247–58 (exploring the historical development of morals regulations in the United States).

131. B. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 187, 196 (2006) (“The difficulty, however, in justifying regulation based on ‘morals’ is attempting to define what exactly that entails, not to mention the numerous problems, including constitutional, with having the government define ‘morality.’”).

132. Cimino, *supra* note 4, at 284–85 (“‘Virtue’ . . . on one hand, seems very familiar, but on the other hand, is hard to situate with precision. . . . There are multiple conceptions of virtue based on various normative approaches within virtue theory—neo-Aristotelian is just one.”).

133. See, e.g., Hill, *supra* note 124, at 17 (“Our ideas of what it means for something to be an injury often reflect a set of background assumptions which are frequently philosophically controversial.”); Andrew F. March, *Rethinking Religious Reasons in Public Justification*, AM. POL. SCI. REV. (forthcoming), at 2 (Feb. 14, 2013), available at <http://ssrn.com/abstract=2217691> (describing the possible ways for parties with polar opposite aims to each use moral arguments as a means for justifying their policy positions).

134. See, e.g., Hill, *supra* note 124, at 18 (“[E]ven our concept of injury frequently reflects a contestable normative stance which will often be reflected in our notions about what constitutes a legitimate state interest.”).

135. Cimino, *supra* note 4, at 288 (discussing virtue as contextual and thus it “may open aretaic theory to the charge of relativism”). But for an argument virtue need not be relative, see Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, 13 MIDWEST STUD. PHIL. 1, 13 (1988).

the powerful. Instilling virtue in the citizenry through law may be simply beyond human capacity.

There is a difference between aspiring toward virtue as an individual or even hoping that others will do the same and mandating virtuous behavior or directing individuals toward virtue through a definition of virtue as the proper end of legislation. Furthermore, rejecting a theory of aretaic legislation that dictates virtue as the ends of legislation also need not cut virtue out of the debate about any particular legislative agenda. Clark, for example, believes that at a minimum virtue should stand on equal footing with other theories of justification for legislation.¹³⁶ Perhaps there is a place for virtue in the political conversation, but that could exist absent any recognition of a jurisprudence of virtue and presumably it is advanced as an argument for legislation already, but that is distinct from giving virtue some special status.¹³⁷

But even as one of many metrics, there are reasons to question the possibility of virtue having a pure impact in legislation. Importantly, there is cause for concern whether the refined ethical theories of virtue can be adapted functionally to the less refined venues of law and politics.¹³⁸ The next Parts are devoted to those concerns. The capacity to produce virtue-enhancing, virtue-inducing, or virtue-regulating legislation is handicapped by the legislative tendencies exposed in the public choice model.¹³⁹

III. THE PUBLIC CHOICE THEORY OF REGULATION

In order to understand the processes in which the production of aretaic legislation might occur, we must begin with an understanding of the role of interest groups and public choice theory. Given the realities that legislation is regularly the product of interest group bargaining for rent-seeking and private advantage,¹⁴⁰ it is difficult to see how any broad and noble goal like virtue can

136. Clark, *supra* note 105, at 783–84 (“What judges and legislatures need to do is to be willing to listen—to recognize that these sorts of arguments may on many circumstances be as important, as legitimate, and as ‘legal’ as the consequentialist and normative arguments they now hear every day.”).

137. *Id.* at 758 (“One of the functions performed by law, and which might be performed more effectively and beneficially, is to provide a context and an arena for an ongoing conversation about what sort of a community we are and want to be.”).

138. Claeys, *supra* note 11, at 921 (“The other danger is to assume unrealistically that the principles that work in ethics fit seamlessly into law or other forms of politics.”).

139. JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 4 (1993) (“Modern democratic states have themselves become weapons in the war of all against all, as rival interest groups compete with each other to capture government and use it to seize and redistribute resources among themselves.”).

140. STEARNS & ZYWICKI, *supra* note 19, at 46 (“Public choice theorists claim that interest group influence on legislative outcomes is commonplace, with the effect of producing narrow tax exemptions, protective tariffs, industry subsidies, and competitive restrictions (also known as barriers to entry).”).

overcome these tendencies. In fact, legislation “in the interest of virtue” seems indistinguishable from the theories that legislation is produced “in the public interest” that have been seriously rebuffed in the past several decades by public choice theory. This Part begins the discussion by explaining the basic tenets of public choice theory and introduces the barriers that exist to producing truly virtue enhancing legislation.

While Aristotle claimed that legislators should ensure that “citizens become good men” he also cautioned that leaders must evaluate what institutions produce such results.¹⁴¹ Public choice helps us to understand the processes and institutions that might be constructed to guard against destructive self-interested behavior.¹⁴²

A. *Public Interest Theory*

For many decades, the public interest theory dominated in political science and the evaluation of how laws are produced.¹⁴³ The public interest model speculates that lawmakers (regulators and legislators included) regularly make decisions based on their assessment of what is in the best interest of the overall public and in order to maximize social welfare.¹⁴⁴ Over time, this “idealized” or “romanticized” view has faced substantial criticism,¹⁴⁵ particularly given the realities of interest group influence in political decision making as revealed in public choice theory.¹⁴⁶

141. James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 168 n.350 (2000) (“Aristotle argued, for example, that one of the most important jobs of the legislator is ‘to ensure that his citizens become good men. He must therefore know what institutions will produce this result.’”) (citation omitted).

142. MASHAW, *supra* note 99, at 28 (If public choice “has a good description of human behavior in political contexts, then it should give us *some* guidance on the question of what sorts of processes and institutions are possible for us and how to construct them.”).

143. Morriss et al., *Choosing*, *supra* note 10, at 214 (“The oldest theory of regulation, the public interest theory, holds that regulators purposefully seek to improve the nation’s overall well being.”).

144. *Id.* (“Each regulator is motivated to serve a broadly defined public interest. . . . The theory posits that regulators generally seek to serve the public interest, not special interests such as the interest of one state or community, or the interests of a particular industry or firm.”); Todd J. Zywicki, *Baptists?: The Political Economy of Environmental Interest Groups*, 53 CASE W. RES. L. REV. 315, 325–26 (2002) [hereinafter Zywicki, *Baptists*] (explaining the public interest model).

145. James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in *THE THEORY OF PUBLIC CHOICE—II* 11 (James M. Buchanan & Robert D. Tollison eds., 1984) (explaining how the romance of public interest theory must meet the realities exposed by public choice).

146. STEARNS & ZYWICKI, *supra* note 19, at 45 (presenting the tenets of the public interest model and explains how the public choice model identifies the “failings of an idealized view of regulation” seen in the public interest model).

Defining the public interest is alone a difficult task, subject to multiple and often subjective interpretations of what is or is not good and what does or does not advance social welfare—along with, for that matter, what is or is not social welfare in the first place.¹⁴⁷ The public interest is a difficult standard to identify so as to measure whether we are successful at promoting it.

More importantly, even if we could objectively define the public interest or reach consensus on the means to achieve it, our governing processes often impede the realization of the public interest through legislation or other governmental action. The public interest model ignores the way legislation is generated to advance particularized interests at the expense of the greater social utility and the way that legislation often concentrates benefits on a few while dispersing costs on the many in a manner that is ultimately inefficient, suboptimal, and sometimes quite unjust.¹⁴⁸ This is not to say that all lawmakers are seeking to subvert the public interest,¹⁴⁹ but instead that the mechanics of the exercise of legislation and regulation work against the achievement of truly public interested ends. The next subparts will explain in more detail the public choice critique in this regard.

Put simply, there is no reason to believe that a virtue-centered model of governance would fare any better than the public interest model when subjected to similar scrutiny. It seems that any move toward virtue-centered legislation would be a means of defining the public interest as equated with the furtherance of virtue. That is, rather than demanding that legislators produce laws that maximize some more general concept of social welfare, a virtue-centered legislative regime would seek to maximize virtue, which would be a more specific articulation of what social welfare should be, with virtue deemed the highest end of it. But such a designation hardly escapes the fundamental problems associated with the public interest model. The concept of virtue is almost as vague and subject to multiple meanings as public interest; the concept does not relieve such legislation from the general critique of the public choice model that attaining such a standard is nearly impossible; it unduly ignores the reality of interest group influence and the manipulation of the legislative process through rent-seeking and other behaviors to achieve private gain rather than some generally public good; and the concept is perhaps even more susceptible to the dangerous masking process that insulates private

147. *Id.*

148. Morriss et al., *Choosing*, *supra* note 10, at 215 (“There are obvious flaws with the public interest theory, not the least of which is that measures furthering special interests at the expense of society as a whole appear too frequently to be best explained as random noise.”).

149. *Id.* (“Publicly interested public servants do exist and, while it would be wrong to assume agencies are populated only by angels, it would be equally wrong to assume they are populated only by devils. It is often the angels we need fear the most, however.”).

interest transfers from effective public review. Each of these points will be taken up in this Article's remaining sections.

B. Interest Groups, Rent-Seeking, and Public Choice

There is no single virtue theory and the level of disagreement on the meaning of virtue itself is wide. But, for purposes of understanding the implications of public choice theory on virtue-centered theories of legislation, no such definition needs to be provided. Regardless of what the particular metrics for measuring virtue might be, an attempt to position any of them as a basis for legislation is susceptible to the same and equal public choice critique. Like the public interest standard, no testable and easily verifiable or sufficiently enforceable standard exists for determining what is or is not truly virtue-enhancing, even if virtue itself could be defined or a definition could be agreed to by some consensus.¹⁵⁰

Public choice theory posits that interest groups and economic principles play a key role in how legislation develops and is passed.¹⁵¹ It envisions legislation or regulatory action, including the receipt of governmental "permission" to act, as a saleable commodity.¹⁵² Supply and demand principles operate for legislation and regulation in much the same way as with any other economic good—interest groups wish to obtain legislation and legislators have the capacity to provide the product sought. Public choice theory generally provides a mechanism to predict most governmental actions broadly understood—including legislation and administrative agency and other executive regulatory actions. Indeed, the theory is also not limited to the affirmative act of legislation. Interest groups may often bargain to block legislation or to receive regulatory forbearance.¹⁵³

Those who are willing to invest in the passage of legislation or other governmental action (or inaction) will be able to obtain it absent any special

150. Charles Larmore, *The Limits of Aristotelian Ethics*, in VIRTUE: NOMOS XXXIV 185, 195 (John W. Chapman & William A. Galston, eds., 1992) ("If the modern experience has turned on the recognition that the meaning of life is a natural object of disagreement, then the cultivation of virtue . . . cannot be our common political bond, though it keeps its importance in other areas of social life.").

151. Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1987).

152. See James M. Buchanan, *Rent-seeking and Profit Seeking*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 3 (James M. Buchanan et al. eds., 1980); Farber & Frickey, *supra* note 151; Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 336 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 339 (1988).

153. See Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 101–03 (1987).

barriers, and the legislative bargain struck will occur independent of any concerns for overall social welfare, the general public interest, or for that matter whether it otherwise meets some public goal like the advancement of virtue.¹⁵⁴ Thus, public choice theory directly contradicts the tenets of the long-standing “public interest” theory analysis of the production of legislation or regulation.¹⁵⁵

Interest groups—including both those in favor of and opposed to regulation—seek to use the government to obtain more favorable prices for their desired gains than would be available under competitive market conditions.¹⁵⁶ Public choice theory posits that many individuals are motivated to escape market prices for the accomplishment of their desires through a process of “rent-seeking”¹⁵⁷—expending resources to obtain favors from government, which include direct subsidies or benefits or regulations to harm a competitor.¹⁵⁸ If they can obtain something from the legislative process by spending less than they would need to spend in another forum to obtain the same advantage, a rational interest group will invest on obtaining their preferred result through legislation and bank the savings.¹⁵⁹

Rent-seeking is successful because of what is often termed the phenomena of “concentrated benefits, with dispersed costs.”¹⁶⁰ Legislators can provide government assistance to the interest group—creating a concentrated, private

154. Morriss et al., *Choosing*, *supra* note 10, at 220 (public choice theory views “the legislative process as an auction where the content of specific bills is auctioned to the highest bidder. Those who might bid the most are generally those who have the most to gain, or lose, net of their cost of organizing and communicating their bids.”). Alternatively stated, “Interest group theory treats statutes as commodities that are purchased by particular interest groups or coalitions of interest groups that outbid and outmaneuver competing interest groups.” Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986) [hereinafter Macey, *Public-Regarding*].

155. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 20, 281 (1971); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 21–22 (1991).

156. See FARBER & FRICKEY, *supra* note 155, at 34–35; Robert D. Tollison, *The Economic Theory of Rent Seeking*, 152 PUB. CHOICE 73, 80 (2012) [hereinafter Tollison, *Economic Theory*].

157. FARBER & FRICKEY, *supra* note 155, at 34–35; Tollison, *Economic Theory*, *supra* note 156, at 73–75 (describing rent-seeking); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J., 224, 229–30 (1967).

158. STEARNS & ZYWICKI, *supra* note 19, at 50 (defining rent-seeking as “meaning affirmative lobbying efforts to secure beneficial legal protections against competition”).

159. Tollison, *Economic Theory*, *supra* note 156, at 80 (“[G]roups who can organize for less than a dollar in order to obtain a dollar of benefits from legislation will be the effective demanders of transfers.”).

160. Robert W. Hahn, *Ethanol: Law, Economics, and Politics*, 19 STAN. L. & POL’Y REV. 434, 461 (2008) (Public choice “theory examines the motivations of individuals, interest groups and politicians to help explain policy outcomes. . . . [T]hese groups are able to exert influence because the benefits of such policies are concentrated but the costs are diffuse.”).

gain or benefit.¹⁶¹ The interest group is willing to pay for this benefit so long as what they must pay is less than what they would need to pay to obtain the same benefit in an alternative forum such as the private marketplace.¹⁶² A rent arises when an activity (like investing in obtaining legislation) earns the investor more than could be earned by expending the same resources elsewhere (like in the open marketplace).¹⁶³ The opportunity cost of using resources to obtain legislation is the unavailability of those funds to invest in the market.¹⁶⁴ But if the return is higher with that choice, it is rational to invest in the legislation rather than spend resources to try to obtain the same thing (at a higher price) through private bargaining.¹⁶⁵

This incentive structure that results explains the success of rent-seeking behavior.¹⁶⁶ Interest groups have an incentive to obtain the legislation by granting special favors to legislators so long as the cost of the investment does not exceed the benefit they will obtain.¹⁶⁷ When groups “enjoy lower information and transaction costs than others, they will succeed in obtaining wealth transfers to themselves at the expense of other groups. These differential costs are the sine qua non of rent-seeking.”¹⁶⁸ It is very simply a matter of purchasing results from the lowest priced provider, and the politicians often understand that they control a valuable, demanded commodity known as legislation or regulation.¹⁶⁹

Interest groups—whether they are single individuals or organizations—have an incentive to use available means to influence governmental outcomes.¹⁷⁰ Politicians cooperate for a variety of reasons. Sometimes, their ideological preferences are in line with the interest group desires and

161. Morriss et al., *Choosing*, *supra* note 10, at 224 (discussing concentrated benefits and dispersed costs).

162. Adler, *supra* note 22, at 27 (“Many firms find it easier to lobby for wealth transfers than to compete for wealth in an open marketplace.”).

163. STEARNS & ZYWICKI, *supra* note 19, at 46 (defining economic rents).

164. *Id.* at 46–49 (explaining the terminology of economic rents as it applies to obtaining governmental products like legislation or regulation).

165. *Id.*

166. For a general discussion of the incentive structure resulting from concentrated benefits and dispersed costs, see Macey, *Public-Regarding*, *supra* note 154, at 229.

167. STEARNS & ZYWICKI, *supra* note 19, at 46 (“[A]n economic rent arises when an economic activity, for example labor, earns a return that exceeds the opportunity cost of the income-producing asset.”).

168. Macey, *Public-Regarding*, *supra* note 154, at 229.

169. Tollison, *Economic Theory*, *supra* note 156, at 80 (“The individuals who monitor the supply-demand process are politicians, bureaucrats, and other political actors. These individuals may be conceived of as brokers of legislation, and they essentially act like brokers in a private context—they pair demanders with suppliers of legislation.”).

170. Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012) (generally describing the mechanics and operations of lobbying and how it works).

exercising votes in line with their ideology will coincidentally bring financial and other support from their constituents.¹⁷¹ In such situations, a legislator may actually be acting according to principle but the alignment ensures that the interest group is benefitted, and interest groups will exploit such alignments or control information seeking to “re-align” the legislator’s ideological conclusions.¹⁷² A good interest group lobbyist might also pressure constituents to encourage their elected representative to adjust a position.¹⁷³ The legislator may in fact be rationally ignorant of the true private interest nature of the legislation.¹⁷⁴ Some legislators may even believe that legislation is in the public interest, believing the mask that is placed on it.¹⁷⁵ In other situations, a legislator may cooperate in an interest group bargain when vote trading is at stake and they end up supporting interest group legislation because they anticipate future performance from the requesting legislator on legislation the go-along legislator cares about (for whatever reason she cares).¹⁷⁶ Thus, even if an individual legislator will not receive a direct benefit from an interest group related to each particular legislative outcome, vote-trading may motivate a

171. Donald J. Boudreaux & A. C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1, 2 (1994) (“[I]deology matters to self-interested politicians when ideology matters to their constituents” and “[i]nsofar as their constituents are willing to pay—in money and votes—for ideological legislation, politicians are willing to supply it.”).

172. Macey, *Public-Regarding*, *supra* note 154, at 230–31 (“This control of information, particularly regarding complex issues, enables interest groups ‘to distort congressmen’s thinking on an issue—normally all an interest group needs to achieve its ends.’”) (quoting Gregg Easterbrook, *What’s Wrong with Congress?*, 254 THE ATLANTIC, No. 6, Dec. 1984, at 57, 70); Lloyd Hitoshi Mayer, *What Is This “Lobbying” That We Are So Worried About?*, 26 YALE L. & POL’Y REV. 485, 523 (2008) (“[I]nterest groups may try either to convince a legislator that the group’s position matches the legislator’s personal policy preferences or to shift those preferences to better align with the group’s preferences.”).

173. Mayer, *supra* note 172, at 523 (“Interest groups also try to convince the legislator’s constituents that the group’s position should be preferred by them and, if they are successful, the groups then try to communicate that preference to the legislator.”).

174. Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 855 (1999) [hereinafter Zywicki, *Externalities*] (“[M]ost elected politicians will even be rationally ignorant of most of the bills on which they vote” for the same reasons voters are—there is not enough incentive to investigate every piece of legislation because the cost of uncovering the private interest deal outweighs the benefits of avoiding it).

175. Macey, *Public-Regarding*, *supra* note 154, at 251 (explaining that “statutes may also be passed with public-regarding facades because special interest groups often control the flow of information to lawmakers. Congress, relying on this information, may pass statutes that it believes are unambiguously in the public interest, but which in fact are riddled with incidental benefits to interest groups”).

176. See William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1236 (1973) (describing the incentives for legislators to engage in vote-trading).

rational legislator looking for support for his own beneficial deals down the road.¹⁷⁷

Other modes of influence could be exercised by an interest group to curry favor from a legislator as well. These cooperation inducing measures could include “political support, promises of future favors, outright bribes, and whatever else politicians value,”¹⁷⁸ including honoraria for speaking engagements or promises of employment (in lobbying or elsewhere) after retirement¹⁷⁹ traded for governmental action or inaction beneficial to the interest group. The desire to be reelected, seeking higher office, or seeking a lucrative or prestigious post-legislative job could induce a legislator to support an interest group preference.¹⁸⁰ Using any of these techniques, from appeal to ideology all the way to the appeal to campaign budgets, pocketbooks, and ego, interest groups know how to hit the “pressure points” where legislators can be swayed to vote for a private interest bargain.¹⁸¹ The legislator might do so

177. *Id.*

178. Macey, *Public-Regarding*, *supra* note 154, at 228. Zywicki further explains the politician’s incentives:

Once in office, politicians garner direct benefits from speaking and appearance honoraria and expenses-paid junkets to posh locales. . . . [P]rivate interests also supply generous in-kind benefits, such as celebrity appearances, private planes, and meeting facilities. Much of the day-to-day currency of political influence includes meals at gourmet restaurants, rounds of golf, gifts, and entertainment. Indeed, many of these benefits now trickle down to Congressional staffers

Zywicki, *Externalities*, *supra* note 174, at 890.

179. Easterbrook, *supra* note 172, at 70–72. Mayer describes a wide range of favors interest groups might offer to legislators:

Interest groups also provide needed campaign financing and reelection support such as individual and bundled campaign contributions, campaign volunteers, campaign-related advertising, and voter mobilization efforts—not to mention wielding the threat of electoral opposition. Finally, interest groups also have historically sought to appeal to less high-minded personal preferences by providing lavish gifts, lucrative honoraria, desirable social connections, comfortable post-government service positions, and even pleasant companionship.

Mayer, *supra* note 172, at 524.

180. Zywicki, *Externalities*, *supra* note 174, at 888 (discussing “fame, power, and money” and the need for money in reelections and campaigns for higher offices).

181. Mayer provides a useful list of these “pressure points”:

Legislators and, by extension, their staffs, have their actions shaped by a number of different but interrelated preferences: their personally desired policy results, which usually includes results that further their ideological goals and/or their view of the public interest; the policy results preferred by those they represent; a desire for power and authority within the legislature; a desire to be re-elected; and more self-interested desires, such as to become wealthy, to become publicly recognized, and so on. Interest groups can and do try to affect legislators by using all of these pressure points to achieve their desired goals.

Mayer, *supra* note 172, at 522.

sometimes knowing of the private interest nature of the legislation, sometimes knowing of the private interest nature but believing it serves a greater public interest, sometimes willfully blind to the private interest gain, and sometimes just ignorant of the fact that the primary beneficiary of the legislation is a private interest group with the typically accompanying detriment to the overall public interest. The legislator is quite simply not immune from the same tendencies toward the satisfaction and advancement of self-interest that generally dominate human motivations.¹⁸²

Information costs also play a pivotal role in interest group success.¹⁸³ The information costs incurred to discover the impact of any single legislative issue on the taxpayer are high, thereby deterring him from identifying his interests in the first place.¹⁸⁴ Fighting against the government is thereafter expensive, and it is seldom cost-efficient to wage a fight against any particular piece of special interest legislation even when one can see the harm being done. That is the brilliance that makes rent-seeking successful for interest groups. The dispersion of costs, itself, is meant to limit the incentives for any one person to challenge a particular piece of interest group legislation.¹⁸⁵ The dispersion also creates substantial information costs to the public in obtaining and exposing the private nature of any legislative deal.¹⁸⁶

As Macey explains, “One of the primary reasons for the public’s failure to rise up in indignation at the special interest nature of certain pieces of legislation is simply the cost of discovering what Congress is doing.”¹⁸⁷ It will be rational to remain ignorant of the effects of legislation, even when such legislation could do one harm.¹⁸⁸ It is just too expensive to learn of the

182. See also BASTIAT, *supra* note 45, at 62–63 (explaining that if man is naturally inclined to self-interest and immoral acts, there is no reason to believe legislators would be different).

183. Macey, *Public-Regarding*, *supra* note 154, at 229. As Macey explains:

The high information and transaction costs associated with representative government enable interest groups to obtain wealth transfers from society as a whole to themselves. Information costs are incurred by an individual or group in the process of discovering the impact of an issue on the wealth of that individual or group, as well as the costs of identifying similarly situated individuals or groups who are likely to share the costs of obtaining political action.

Id.

184. Morriss et al., *Choosing*, *supra* note 10, at 225 (describing the role of rational ignorance in rent-seeking).

185. *Id.* at 224.

186. See MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 69–70 (1981). Hayes explains that “[m]embers of the mass public will generally find it irrational to obtain the information necessary to identify their interests on any given issue and moreover will be ill-equipped to interpret any information they do obtain.” *Id.*

187. Macey, *Public-Regarding*, *supra* note 154, at 256.

188. Morriss et al., *Choosing*, *supra* note 10, at 225–26 (“Rational ignorance means that individuals consider the benefits and costs of being informed. . . . When there are no perceived

offending legislation, and even after learning of it then expending resources to prevent the harm would be irrational as well.

Consider, for example, an individual that lives near an industrial park that includes a number of different polluting facilities. This individual suffers one dollar of harm from the pollutants present in the air that might be caused by and traceable to one of the nearby facilities. First off, this harm is so negligible that the person may not even know he is suffering harm. In such a case, he does not even know he needs to see a doctor and does not even know that he should be upset at the polluters. Meanwhile, assume that while feeling completely normal he wants to see a doctor for ten dollars to ask whether he is suffering any harm or hire an expert for ten dollars to test the air in order to discover the one dollar of harm. It would be irrational to take either diagnostic step, the cost of which already exceeds the harm let alone what would be required for the cure.

Assume next, alternatively, that the harmed individual knows he is suffering one dollar harm. This individual is not likely to spend what is required—let us say again ten dollars—to investigate the source of the harm, bring a lawsuit, and ultimately hope to recover the one dollar in damages. Thus, the rational individual either (a) never discovers that he is being harmed, or (b) discovers that he is being harmed but again considers it irrational to try to fight against the harm. The same is true of the general member of the public suffering negligible harm from any one piece of legislation as the costs are dispersed across the population.

Dispersion helps avoid transparency and helps those involved in interest group bargains to escape scrutiny. Thus, the true impact of private interest legislation is hidden by a plethora of little nicks in each member of the public's pocket—each one immunized from challenge by the difficulty of challenges to each small, isolated wealth transfer. Each single cut, therefore, evades medical intervention, even though the resulting body suffers a death by a thousand cuts.

Any individual willing to pay the information and transaction costs associated with fighting legislation would also be required to share the benefit

benefits to having additional information but there are costs, the individual rationally chooses to be ignorant on that topic.”). Zywicki also explains the concept:

This skepticism about the ability of democratic politics to control rent-seeking behavior is grounded in several factors. First, voters are rationally ignorant of politics. Because each individual's vote will have a trivial impact on an election, voters have little incentive to invest time, money, and effort to learn about the details of alternative policies. Given the small benefits to each individual in relation to the costs, few private individuals will educate themselves about the issues to be considered. Even if the public is able to monitor at a very high level of generality, it will be unable to understand all of the details of legislation and will be unable to retain the energy and interest to monitor subsequent amendments to the legislation and its implementation and enforcement

Zywicki, *Externalities*, *supra* note 174, at 855.

(the absence of legislation) with everyone.¹⁸⁹ Known as the “free-rider” problem, it is irrational for most individuals to incur the costs of fighting alone.¹⁹⁰ Identification of similarly situated individuals and collective action problems make it too difficult to form a group that could share the cost of a legislative fight to defeat the legislation.¹⁹¹ Thus, there will be little incentive for affected persons to come together to fight legislation or regulation, especially in light of the low prospects for success when facing more organized, pre-existing coalitions.¹⁹² As a result of the public ignorance, there are few repercussions for legislators that agree to play a part in interest group transfers.¹⁹³

Interest groups face no such information cost or spending barrier.¹⁹⁴ With a concentrated benefit on the line, the interest group involved has almost no information costs to identify that they like the legislation or what the legislation says—they, after all, propose, draft, and set the contours of the legislation themselves.¹⁹⁵ Moreover, the interest group hopes to win big so it is likely to spend big to get that win. The interest group will spend up to the amount of the large, concentrated benefit in order to obtain the rent, and this amount will almost always exceed what a rational individual who is sharing a diluted and dispersed cost would be willing to spend to oppose.¹⁹⁶ Thus, with

189. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 41–47 (1982); Macey, *Public-Regarding*, *supra* note 154, at 229–30 (“It is costly to acquire and disseminate information about these wealth transfers, and any gains from efforts in this regard must be shared with everyone. Consequently, rational members of the public will not try to acquire information about these transfers.”).

190. ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* 17 (1981).

191. *See id.* at 18.

192. As Macey explains, “Pre-existing coalitions and groups of allied individuals will be more effective than dispersed individuals in obtaining transfers of wealth from society as a whole to themselves.” Macey, *Public-Regarding*, *supra* note 154, at 229.

193. *Id.* at 232 (calling these low costs and resulting ease of cooperation “[t]he most disturbing feature of interest group theory”).

194. *Id.* at 229–30.

195. *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 587 (2002) (discussing interest group roles in proposing and drafting legislation).

196. As Marilyn Drees explains the consequences of the incentive differentials involved: “Since their payoff is big and their organizing cost relatively small, the concentrated interest group will coalesce. Their dispersed opponents, however, will not; the higher organizing costs and increased free-rider problems mean no one will find it worthwhile to mount an organized opposition.” Marilyn F. Drees, *Do State Legislatures Have a Role in Resolving the “Just Compensation” Dilemma? Some Lessons from Public Choice and Positive Political Theory*, 66 FORDHAM L. REV. 787, 805 (1997). *See also* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 147–48 (1965) (discussing the relative power differential between the interest group and general public constituencies); William M.

the imbalance of the interests and incentives, the calculus is tipped toward the actualization of rent-seeking success.

Interest groups can also control the flow of information better than the regular, individual citizen, especially on more complex issues, thereby encouraging positive reaction to their agendas in legislatures and to the electorate.¹⁹⁷ This gives them a competitive advantage for their agenda. The special interest is likely to have a larger influence in the political process and thereby able to offer more to legislators.

In recognition of the importance of information costs in determining the success or failure of interest group bargains, both legislators and interest groups have incentives to make the general public believe that their actions are public-minded and that the legislative agenda has nothing to do with private gain.¹⁹⁸ While this “masking” concept is discussed in greater detail in the next Part, a few words are instructive here. Both the suppliers (legislators) and consumer-demanders (interest groups) of legislation will engage in activities that erect barriers to the public discovery of the true nature of their actions and that increase the information costs for any of curious members of the public.¹⁹⁹ They will do their best to mask their activities in some public interest.²⁰⁰ While the actual effect of the legislation is a private interest transfer, the public face of the legislation is something that is harder to oppose (or in fact easy to support) and less likely to be investigated (even in the few instances where it might otherwise be economically rational to expend resources to oppose).²⁰¹ This is most successful when the public is deceived enough to believe there is no need for an investigation—*i.e.*, the public accepts the masking story.²⁰² It also works, however, when the mask itself is enough to make it too expensive for anyone to consider investigating and expending resources to get enough information to determine whether the outward-faced justification for the

Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975) (“The price that the winning group bids is determined both by the value of legislative protection to the group’s members and the group’s ability to overcome the free-rider problems that plague coalitions.”).

197. See NORMAN ORNSTEIN & SHIRLEY ELDER, INTERESTS GROUPS, LOBBYING AND POLICYMAKING 75–76 (Robert L. Peabody ed., 1978); GRAHAM K. WILSON, INTEREST GROUPS IN THE UNITED STATES 113–14 (1981); Easterbrook, *supra* note 172, at 70.

198. Morriss et al., *Choosing*, *supra* note 10, at 225 (“Politicians . . . seek to minimize their own costs when acting on behalf of interest groups or the general public.”).

199. Kysar, *supra* note 21, at 563 (2009) (“[I]n the special interest context, lawmakers have strong incentives to obscure the true nature of the provision intentionally by masking it in public regarding terms; accordingly, one should expect ambiguity to arise often as a result of such subterfuge.”).

200. *Id.*

201. Macey, *Public-Regarding*, *supra* note 154, at 233.

202. *Id.* at 232; Morriss et al., *Choosing*, *supra* note 10, at 225–26 (describing acceptance of a legislative label and/or the choice to remain rationally ignorant).

legislation is or is not true.²⁰³ Those high information costs make masking work, which in turn makes rent-seeking successful.²⁰⁴ Part IV deals with masking a bit more, with a specific emphasis on its role at defeating the effectiveness of achieving virtue under any predicted virtue-centered regime for testing legislative legitimacy.

Interest group investments and competition for the creation of legislation or regulation (or the defeat of legislation beneficial to a competitor) involves an inefficient allocation of resources and, rather than creating a useful product demanded by market forces, the process simply creates legislation or regulation.²⁰⁵ These rent-seeking actions make no independent economic contribution to society and in fact severely tax the overall economic growth.²⁰⁶ The money expended seeking legislation is itself an inefficient and unproductive use of resources, while also diverting resources from their more efficient allocations in the marketplace through the private interest transfers accomplished in rent-seeking.²⁰⁷ A few typically benefit, while many usually lose.²⁰⁸ Zywicki calls these costs imposed on the general public “political externalities.”²⁰⁹ As Macey states, the rent-seeking model illustrates that “government will enact laws that reduce societal wealth and economic

203. Macey, *Public-Regarding*, *supra* note 154, at 229, 232. See also Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 24 (2003) (discussing the large organizing and information costs for the general public and concluding that “[d]istortions in organization strength lead to distortions in voice, which in turn lead to distortions in information and argumentation”).

204. John O. McGinnis, *The Bar Against Challenges to Employment Consent Decrees: A Public Choice Perspective*, 54 LA. L. REV. 1507, 1530–31 (1994) (explaining the means by which politicians can raise the information costs for those opposing their actions by disguising the true objectives of their actions).

205. FARBER & FRICKEY, *supra* note 155, at 33–34 (discussing the inefficiencies of rent-seeking).

206. Hasen, *supra* note 170, at 231 (“Though it is hard to quantify how much rent-seeking legislation costs the U.S. economy indirectly in the form of distorted government decisions . . . the overall effect is likely great—producing inefficiencies at rates many times the few billion dollars each year spent directly on lobbying expenditures.”).

207. *Id.* at 197 (“Lobbyists threaten national economic welfare in two ways. . . . One common form of rent-seeking occurs when individuals or groups devote resources to capturing government transfers, rather than putting them to a productive use, and lobbyists are often the key actors securing such benefits,” and “[s]econd, lobbyists tend to lobby for legislation that is itself an inefficient use of government resources.”).

208. Macey, *Public-Regarding*, *supra* note 154, at 230 (“The economic theory of legislation does not predict that all laws will enrich the few at the expense of the many, but it does predict that this will be the dominant outcome.”).

209. Zywicki, *Externalities*, *supra* note 174, at 854 (“Through manipulation of the political process, benefited groups are able to impose externalities on the public without paying full compensation for the imposition of those externalities.”).

efficiency in order to benefit [specific] economic groups.”²¹⁰ Simply put, rent-seeking leads to a misallocation of societal resources drawing down the efficient functioning of the marketplace.²¹¹ It creates “deadweight losses” both as a result of the unproductive expenditures to create legislation²¹² and the increased costs to “consumers” as a result of the rents created.²¹³ Moreover, spending to obtain or defeat legislation is diverted away from more productive ways to use those resources.²¹⁴

If the public choice critique is accurate, there is little room for the “public interest” or similar concepts like the “interest of virtue” as controlling ends of legislation. The process is not well designed for these goals to command the production of legislation. While rent-seeking may not always be present in every piece of legislation, and although when present it may sometimes be ineffective and some publicly beneficial legislation can be created, it remains that legislation is often produced in accordance with the demands of private interests that seek to obtain advantage through the legislative process above what they could obtain paying for their desired outcomes outside of the legislature. And that legislation in the end tends to not just ignore the goals of greater good—such as is defined in an ethic favoring the public interest or another standard like virtue—but also to subvert it. While the foregoing Part

210. Macey, *Public-Regarding*, *supra* note 154, at 229–30. Macey details some of the problems:

First, “special-interest organizations and collusions reduce efficiency and aggregate income in the societies in which they operate and make political life more divisive.” Second, interest group coalitions organized to effect wealth transfers “slow down a society’s capacity to adopt new technologies and to reallocate resources in response to changing conditions and thereby reduce the rate of economic growth.” Finally, distributional coalitions increase “the complexity of regulation, the role of government, and the complexity of understanding,” thereby retarding the social evolution of a society and raising the costs of all forms of economic activity.

Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 479–80 (1988) (quoting OLSON, *supra* note 189, at 74).

211. Tollison, *Economic Theory*, *supra* note 156, at 74. Tollison explains:

The social cost arises because the resources used for transfer seeking have a positive opportunity cost somewhere else in the economy with respect to engaging in positive-sum activities. Transfer seeking is at best a zero-sum activity in that it simply shuffles dollars among people and groups, and is probably negative-sum if traditional deadweight costs result as a by-product of such activities.

Id.

212. Peter H. Aranson, *Theories of Economic Regulation: From Clarity to Confusion*, 6 J.L. & POL. 247, 270–72 (1990). *See also* Tullock, *supra* note 157, at 228–30.

213. Tullock, *supra* note 157, at 225–26.

214. Alm describes the necessity for even those in unregulated industries, to expend resources to influence or block legislation. *See* James Alm, *The Welfare Cost of the Underground Economy*, 23 ECON. INQUIRY 243, 258 (1985).

explained some of the reasons these wealth transfers are successful, the next Part focuses on the one tool for success most troubling when associated with any effort toward a controlling theory of aretaic ends for legislation.

IV. MASKING AS A TOOL FOR RENT-SEEKING BEHAVIOR

Perhaps the most important component of public choice theory for purposes of this Article is its revelation about the use and dangers of “masking” in the drafting and passage of legislation. Masking is the means of creating an outward *appearance* for legislation with *claimed* beneficiaries and promised positive public effects that are different from the inner motivations of the legislation with actual private beneficiaries and real negative effects on the public.

As noted earlier, the ruse, façade, or charade as it might be called is accomplished in a manner that has taken many names in the literature, including a mask, curtain, cloak, or veil of legitimacy.²¹⁵ Given the way that legislation is produced as explained by the public choice model, if the public demands “virtue” legislation, the legislators and interest groups have an incentive to continue engaging in the rent-seeking game for personal gains but these groups will need to channel their efforts through a new “virtue mask.” The likelihood that the substance behind the mask will be virtue-centered, however, is low given all that we have learned from the public choice school about the production of legislation described in the previous Part.

This Part will explain how masking generally works to disguise the true nature of legislation in order to deceive the public and to increase information costs about the true private nature of any legislative deals. Hence, any legislation that is labeled as “virtue”-based under a regime that adopts virtue as a commanding metric for the substance of legislation may be only that—a label. There is little reason to believe—in light of what we know about masking—that any legislation that receives a type of “virtue-based stamp of approval” is any different from other legislation that is actually designed to advance a private interest. In fact, the danger lies in the use of such a label to insulate the legislation from more exacting review. Some idea of virtue sounds unobjectionable. In fact, that is precisely what makes it a particularly dangerous ethic for the purposes of masking legislation.

The masking process is perhaps the most effective means for making private interest transfers successful²¹⁶ and raises serious concerns when we start establishing controlling labels for legitimate legislation, such as “virtue.” With successful masking, the private interest transfer gets characterized as a

215. *See supra* notes 21–25 and accompanying text.

216. Macey, *Public-Regarding*, *supra* note 154, at 251.

benign or indeed advantageous public interest gain.²¹⁷ McGinnis and Mulaney explain masking as follows: Congress may create opportunities to create “factual findings” supporting their preferences and those of interest groups to shape interpretation of legislation and to also:

[P]rovide a façade to mask what is really driving the content of legislation. For instance, if a powerful company is asking for anticompetitive regulations, the committee may create a focus on consumer complaints in the area. In fact, public choice predicts that members of Congress will try to create information to confuse the opposition while pleasing concentrated interest groups.²¹⁸

The mask helps to increase the costs that opponents to legislation or the harmed general public must bear if they are to discover the underlying deal and effectively expose the private nature of the bargain.²¹⁹ These high information costs are part of why masking is effective—most deals never get the exposure that would defeat them.²²⁰

Legislators and interest groups each have an incentive to hide the private interest nature of political deals.²²¹ Exposure of the private interest nature and bargain in the production of any piece of legislation is harmful to the legislator’s sale to the electorate and concomitantly harmful to the interest group’s quest for durability because transparent private interest deals are more susceptible to challenge.²²²

217. *Id.* at 251 n.135 (discussing the “engrafting of ‘public value’ onto a statute to ‘justify the exercise of governmental power’”).

218. John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 95 (2008).

219. Macey, *Public-Regarding*, *supra* note 154, at 232 n.47 (“By masking the true purpose of a statute and claiming that it is actually in the public interest, legislators and interest groups lower the cost of passing statutes that transfer wealth to themselves.”); McGinnis, *supra* note 204, at 1530–31.

220. Zywicki, *Externalities*, *supra* note 174, at 890 (“[T]he average rationally ignorant voter lacks the time and resources to attempt to see behind this self-serving rhetoric and determine whether it is true, partly true, or even completely fabricated,” and “[w]here a voter has no incentive or reasonable ability to ascertain the truth of certain statements, individual preferences for government action are likely to be highly malleable and manipulable.”).

221. Macey, *Public-Regarding*, *supra* note 154, at 232. Macey explains masking as follows: Interest groups and politicians have incentives to engage in activities that make it more difficult for the public to discover the special interest group nature of legislation. This often is accomplished by the subterfuge of masking special interest legislation with a public interest facade. To the extent that this can be carried out successfully, the political costs to legislators of enacting special interest legislation will decline.

Id.

222. See Landes & Posner, *supra* note 196 (explaining interest groups’ desire for durability in legislation).

The point of public choice theory is not to say that all legislation is, in reality, incapable of being public spirited.²²³ A legislator indeed may sometimes cast, for example, a virtuous vote, especially when it has little cost to his overall self-interest²²⁴ or when it may in fact even advance his ability to establish a record that further adds credibility to the mask that he might place on non-virtuous legislation. An interest group's motives might also even be public-spirited and they may seek benefits without a design to deprive others or without consciously intending to cause redistributive harm. Research on confirmation bias, for example, reveals that it is very easy for individuals—whether they be leaders of interest groups or politicians—to rationalize that their decisions reflect sound policy or to believe that what advances their own interests also favors the greater good.²²⁵ But, as Hutchison warns, “It is crucial to closely examine aspects of society and government that many believe to be innately good in order to ensure that they are not masking abuses of power.”²²⁶ That is equally true for those things done in the name of virtue enhancement as it is in any legislation and its purported purpose.²²⁷

223. Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PENN. L. REV. 1, 66 n.303 (1990) (“Some public choice writers concede that some legislation may be public-spirited, rather than purchased by interest groups, but they treat the two categories as entirely separate . . .”).

224. GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING* 21 (1989). Tullock explains:

A voter in voting may be motivated not by actual outcome of the matter up for vote but by a desire to express his own emotions, feeling of virtue, and so on. The voter may, in fact, vote directly against his interest because he realizes that his vote has very little, if any, effect on the actual outcome of the election; hence, he can get a feeling of moral satisfaction out of casting a virtuous vote without significant cost to him.

Id.

225. See, e.g., Tom C.W. Lin, *A Behavioral Framework for Securities Risk*, 34 SEATTLE U. L. REV. 324, 343–44 (2011) (“When individuals favor a certain selection, be it a stock pick, political candidate, or public policy, they tend to search for and find characteristics that validate their positions and undervalue those that are contrary.”). Using stock investment as an example, Lin explains that “[c]onfirmation bias can lead to suboptimal decisions in the investment context. It can also influence investors to invest more money in a bad asset because they selectively see only those signs that affirm their initial selection of that asset.” *Id.* See also Donald J. Kochan, *Thinking Like Thinkers: Is the Art and Discipline of an “Attitude of Suspended Conclusion” Lost on Lawyers?*, 35 SEATTLE U. L. REV. 1, 21, 49–53 (2011) (discussing studies on confirmation bias). Similarly, interest groups and legislators may make suboptimal decisions and encourage investment in legislative outcomes that have detrimental effects that they simply cannot or do not wish to see.

226. Harry G. Hutchison, *Moving Forward? Diversity as a Paradox? A Critical Race View*, 57 CATH. U. L. REV. 1059, 1068–69 (2008).

227. GRAY, *supra* note 139, at 11–12 (“all modern states operate vast redistributive welfare systems . . . [and] exist[] in practice to satisfy the private preferences of collusive interest groups”); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 382 (1981) (arguing generally

It is almost always possible to make some claim of the public interest as advanced in legislation and it is difficult to see past the patina covering the real purpose even if that gloss is only thin.²²⁸ Furthermore, “the question [of] whether the legislative action has a public purpose is always one that the legislature purports to have decided affirmatively,”²²⁹ regardless of whether that is true. No rational legislator would admit openly to the general public the rent-seeking deal that lies beneath. And legislators will make efforts to ensure that the private transfer is transparent neither from the statutory text face nor from an examination of the supporting background materials like legislative reports or other pieces of legislative history.²³⁰ It is, therefore, exceedingly difficult to expose private interest motivations in legislation.²³¹ The more hidden the true nature of the deal, the harder (and therefore more expensive) it will be to find and thus the less likely it will be exposed.²³²

At the heart of the matters exposed by the public choice scholarship is the fact that most legislation reflects a private interest bargain “masked” in a claim of public interest.²³³ Lofty terms like social justice, environmental concerns, or the public good abound to mask private deals.²³⁴ Examples of “public benefit”

under the lens of interest-group theory that policies, if “evaluated honestly and realistically, would be found to lack any true basis in the public interest”).

228. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 271 (1985) (“[A]ll statutes have an ostensible public-interest justification, and even where the fig leaf is thin it is difficult for the courts to see through it.”).

229. Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 *TUL. L. REV.* 849, 868 (1980).

230. Macey, *Public-Regarding*, *supra* note 154, at 239 (“The interest group nature of a statute will not generally be available on the statute’s face or in the legislative history.”).

231. *Id.* at 251 (“The reason special interest legislation is so often drafted with a public-regarding gloss is because this gloss raises the costs to the public and to rival groups of discovering the true effect of the legislation.”).

232. *Id.* at 239 (“The cost of a statute that is a pure wealth transfer to some well-organized special interest group is much higher than the cost of a wealth transfer that is masked in public interest terms.”).

233. Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 *DENV. U. L. REV.* 1, 18 (2005) (Public choice theory “burst the bubble” of the civic republic model by explaining that “Laws adopted ostensibly to help the public are in reality the masked use of government to help one group at the expense of others—be it business interests who are helped by regulation of their competitors or outdoor enthusiasts aided by laws restricting private development in parklands.”).

234. Georgette Chapman Poindexter, *Land Hungry*, 21 *J.L. & POL.* 293, 319 (2005) (It is a “reality that the most vocal advocates of [sprawl] legislation are purely self interested actors. Reliance on the more politically palatable arguments of the environment and of social justice masks the true motivation of preservation of their own land value and way of life.”).

are questionably forwarded in eminent domain actions as another prime example.²³⁵

Similarly, non-governmental organizations are often perceived as public-interested even if they have the same self-interested agenda as any other interest group:

NGOs have a political ideology. Most believe that the private sector cannot solve environmental problems and that government must control economic decision-making to protect the environment. This belief may be quite sincere, but it is also rooted in self-interest. Many NGOs depend on governments for jobs, money and power. They seek out grants and contracts from national governments and international agencies. They also bask in the recognition they receive from public agencies, which adds authority to their pronouncements and brings their leaders prestige.²³⁶

One identifiable motivation for NGOs seeking “results” is to sell the outcomes to their members and attempt to bolster budgets and self-perpetuate.²³⁷

Human rights and international law advocates fall into the same camp of interest groups with a public-interest face to the organization shielding their

235. See, e.g., Donald J. Kochan, *Public Use and the Independent Judiciary: Condemnation in an Interest Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998) (discussing interest group influences in takings). See also Baker & Krawiec, *supra* note 23, at 678 (“[R]esponsibility shifting is problematic precisely because it permits legislators to mask their true preferences through meaningless ideological statements, while at the same time satisfying interest group pressure or avoiding responsibility for difficult decisions. As long as Congress can engage in responsibility-shifting delegations, voters will find it more difficult to ascertain legislators’ true ideologies.”); Boudreaux, *supra* note 233, at 8–9 (“In a classic example of the public-choice criticism of putatively public welfare initiatives being a mask for private gain, these authorities seized private property—often lower-income and African American neighborhoods—in cities across the country. Shielded by the banner of housing reform, these seizures were spurred largely by the prospect of profit for private developers who sought subsidized land.”); Jim Rossi, *The Political Economy of Energy and Its Implications for Climate Change Legislation*, 84 TUL. L. REV. 379, 415 (2009) (Private utilities exercise profit seeking influence in the regulatory process and their agenda “is magnified, perhaps even masked, by environmental interest groups, who are allied with powerful incumbent firms in favoring state and local regulation of the industry.”).

236. JAMES SHEEHAN, *GLOBAL GREENS: INSIDE THE INTERNATIONAL ENVIRONMENTAL ESTABLISHMENT 2* (1998). See also JEREMY RABKIN AND JAMES SHEEHAN, *GLOBAL GREENS, GLOBAL GOVERNANCE* (1999); Sanford E. Gaines, *Global and Regional Perspectives on International Environmental Protection*, 19 HOUS. J. INT’L L. 983, 1000–03 (1997) (detailing the substantial role played by NGOs in the formation and structure of the North American Free Trade Agreement, Commission on Environmental Cooperation, and the North American Agreement on Environmental Cooperation).

237. Zywicki, *Baptists*, *supra* note 144, at 316–18 (“Their activities can be understood as being identical to those of any other interest group—namely, the desire to use the coercive power of government to subsidize their personal desires for greater environmental protection and to redistribute wealth and power to themselves.”).

rent-seeking activities from meaningful scrutiny.²³⁸ Countries too play the rent-seeking game at the international law level, and “any analysis of the demand for international law must account for rent-seeking by interest groups.”²³⁹

Sargent explains, “Assertions of fairness, ‘the public interest,’ social justice, and equality thus are often perceived within the law and economics tradition as masks for the self-interest, as rhetorical dodges deflecting attention from the play of conflicting interests.”²⁴⁰ Social causes or claims of ideological purity can serve as a shield from real critique of legislation or exposure of its true beneficiaries and consequent public costs.²⁴¹ Private bargaining is even more easily hidden when the public can chalk up a decision to these causes or the politician’s “ideological commitment” rather than to the private interest gain.²⁴²

Public perceptions matter and false impressions have real consequences. For example, some scholars have discussed the manipulability of an environmental ethic as the basis for legislation.²⁴³ People generally believe the

238. See, e.g., Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of NGOs and United States Courts*, 22 BERKELEY J. INT’L L. 240 (2004).

239. Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT’L L. & BUS. 681, 694–95 (1996–1997). Stephan states:

When discussing the demand for domestic rules, a conventional analysis incorporates the insights of public choice theory. This body of thought specifies the conditions under which cohesive minorities may obtain laws for their discrete benefit to the detriment of unorganized majorities. Similarly, any analysis of the demand for international law must account for rent-seeking by interest groups. . . . [I]n some instances interest groups may induce countries to engage in international lawmaking that disserves the populations of the nations promoting the legislation. The illumination of the conditions under which such outcomes occur is one of the central tasks of public choice theory.

Id. at 694–95.

240. Mark A. Sargent, *Utility, the Good and Civic Happiness: A Catholic Critique of Law and Economics*, 44 J. CATH. LEG. STUD. 35, 42 (2005). See also Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 106 (2000) (“the public choice literature . . . claims that statutes favoring special interest groups will use misleading language to mask the deal codified therein”); Stephen M. Bainbridge, *Law and Economics: An Apologia*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 208, 209 (Michael W. McConnell et al. eds., 2001).

241. Bainbridge, *supra* note 240, at 209.

242. Helen A. Garten, *Devolution and Deregulation: The Paradox of Financial Reform*, 14 YALE L. & POL’Y REV. 65, 91 (1996) (“ideology helps to mask the bargaining process from public view and criticism”); Mark J. Roe, *Delaware’s Politics*, 118 HARV. L. REV. 2491, 2539 (2005) (“As Gordon Tullock remarked, most citizens ‘realize that the government can be expected to do things in their personal interest only if it at least superficially fits the public image.’ Many are surely sincere in their ideology, but that ideology also matches their self-interest.”).

243. Zywicki explains:

mask provided by environmental groups that their desired legislation represents the “good” and is immune from the “evils” of interest group politics.²⁴⁴ Yet, there is no reason to believe that such interest groups casting themselves as representing something “bigger” than profit like environmentalism are operating and manipulating legislation any differently than any business-based interest group.²⁴⁵ Environmental groups too are seeking to get a benefit at a lower cost than would be necessary to pay if they were forced to bargain in a free market for their preferred outcomes.²⁴⁶ Yet, again, so long as the public believes that their legislative activities are public spirited, then that legislation will move forward.

Much the same can be said for the types of legislation that could be advanced in the name of virtue—another idea that sounds great to the public, is hard for the public to argue against (who is “anti-virtue?”), is difficult for any politician to say they oppose without electoral consequences for the same perception-based reasons, and as a result is highly resistant to review.²⁴⁷ If a group has a nice buzzword and a worthy sounding cause, the public perception is changed. The public does not perceive of that group as an “interest group” or a “special interest” at all, at least not in the “demeaning” or “derogatory” use of those terms. Instead, the public is even more inclined to believe that the legislation pushed by such a so-called public-minded group is for their benefit

Environmentalists often claim that environmental activist groups and environmental regulation is animated by the “public interest,” i.e., an outpouring of “civic republicanism” that causes individuals to overcome their narrow self-interest and to support wide-ranging environmental regulatory policies. . . .

. . . [A] brief review of the evidence suggests that the public interest model has little descriptive accuracy with respect to the behavior of environmental interest groups.

Zywicki, *Baptists*, *supra* note 144, at 325–26. *See also* POLITICAL ENVIRONMENTALISM, *supra* note 22, at 2; Adler, *supra* note 22, at 26; Macey, *Public-Regarding*, *supra* note 154, at 232 n.46 (“Even regulations that have long been thought to accomplish such worthy goals as improving the environment recently have been shown to benefit special interests.”); Zywicki, *Externalities*, *supra* note 174, at 856–88 (explaining empirically the political economy of environmental interests groups).

244. Zywicki, *Baptists*, *supra* note 144, at 336 (“[T]he stranglehold that environmental lobbyists exercise over environmental policy-making is the result of the public perception that these groups are, in fact, acting according to the public interest.”).

245. *Id.* at 349 (finding “little obvious difference between environmental activists who want more for their projects, and farmers, defense contractors, or thousands of others who use the political process to redistribute money from the public to the goals preferred by their well-organized and influential interest groups”).

246. *Id.* (explaining that the environmental rent-seeking helps the groups avoid marketplace alternatives where those “[n]on-political mechanisms, by contrast, force environmentalists to foot the bill for their preferences”).

247. *Id.* at 335 (“the traditional portrayal of environmental interest groups as selfless ‘Baptists’ seeking to advance the public interest is short-sighted”).

and the public will remain disarmed against and/or ignorant of the wealth transfers inherent in the relevant legislation.

Furthermore, even where virtue-based interest groups may exist, their purity is compromised in many circumstances by the cooptation of their movement from those who seek to pervert the legislative process for non-virtuous gains. Here, I speak particularly about the phenomenon known as “Baptists and bootleggers.”²⁴⁸ Bruce Yandle first described this “bootleggers and Baptists” concept in a 1983 article where he explained the forces behind the generation of certain laws—known as the Blue laws—that required the closing of liquor stores in southern states on Sundays.²⁴⁹ The Baptists supported these closing laws on moral-based and indeed virtue-based grounds.²⁵⁰ The bootleggers supported these laws because in the absence of open, legal liquor stores, consumers of alcohol would seek out the illegal substitute.²⁵¹

This same coalition continued in the support of outright Prohibition for the same independent reasons. The bootleggers could obtain a monopoly in the black market for liquor while the Baptists seemingly thought the ban on alcohol sales and consumption altogether would improve the moral stock and virtue of all citizens.²⁵² Yandle posits that neither the Baptists nor the bootleggers in the Sunday closings and Prohibition stories could have obtained the legislative restrictions on liquor sales acting alone, but together they were able to achieve their mutually desired outcome even if their respective desires were based on diametrically-opposed rationale.²⁵³ Interestingly too, though, is that the bootleggers’ hope—to create a black market monopoly on alcohol and presumably to continue to supply and have customers consume alcohol—conflicts with the Baptist goal to use Prohibition as a means to curb consumption.²⁵⁴ Nonetheless, the Baptists went along and provided the requisite cover for the bootleggers’ rent-seeking efforts in the legislature to

248. The original work describing the Baptist and bootlegger phenomenon is: Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, 7 REG., no. 3, May–June 1983, at 12. The concept has since been further explained and applied in numerous works. See, e.g., Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RES. L. REV. 583, 608–09 (2008) (discussing generally the Baptist and bootlegger theory in relation to environmental law); Morriss et al., *Choosing*, *supra* note 10, at 222 (“‘Bootleggers and Baptists’ regulation theory explains how successful lobbying efforts often result when one supporting group, the ‘Baptists,’ takes the moral high ground while the other group, the ‘bootleggers,’ seeking to gain competitive advantage, provide political resources.”); Zywicki, *Baptists*, *supra* note 144, at 316–17 (explaining the Baptists and bootleggers phenomenon).

249. Yandle, *supra* note 248, at 12–15.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 14.

254. Yandle, *supra* note 248, at 12–15.

obtain a regulation that put the bootleggers at a competitive advantage over legal suppliers because, well, legal suppliers were legislated out of existence after Prohibition.²⁵⁵

Since the original Yandle article, many have used the terms “Baptists and bootleggers” as symbolic labels to attach to similarly-situated coalitions, with the Baptist label attaching to whatever seemingly do-good or cosmetically public-spirited interest group involved in a coalition, and with the label bootlegger going to the ally that is more directly seeking some private gain and wealth transfer from the legislative deal.²⁵⁶ These seemingly unlikely combinations are sometimes termed as unholy alliances or described as strange bedfellows.²⁵⁷

The inclusion of a “worthy” interest supporting legislation increases the likelihood that the legislative push will succeed because it can persuade the public that the legislation is in the interest of social welfare²⁵⁸ or at least it will raise even further the costs of discovering the private interest bargain also attached to the deceptively positive legislation. The coopting bootleggers will seek out Baptists to provide a public-spirited “face” for the legislation, at least partially immunizing such legislation from scrutiny.²⁵⁹ And, the Baptists are self-interested too, as explained earlier, but even presuming that they are somehow pure in their ideals and believe that they are acting in the public interest, they will be persuadable to provide that face due to the substantial financial backing the bootleggers may be able to bring to the cause.²⁶⁰ The principled can be compromised or manipulated.²⁶¹

The public interest cover that the “Baptists” are able to provide for these pieces of legislation that, like most legislation, involve transfers of wealth from the many to a concentrated private interest, can deceive the public into

255. *Id.*

256. *See infra* notes 259–73 and accompanying text.

257. Andrew P. Morriss et al., *Green Jobs Myths*, 16 MO. ENVTL. L. & POL’Y REV. 326, 345 n.58 (2009) [hereinafter Morriss et al., *Green Jobs*].

258. Bruce Yandle & Stuart Buck, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENVTL. L. REV. 177, 188 (2002) (“[T]he push for any given regulation will be most successful if at least two quite different interest groups are working in the same direction—‘bootleggers’ and ‘Baptists.’”).

259. Erin Ann O’Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL’Y 229, 242–43 (2005) (“The ‘Bootleggers’ need a public interest face to make their reforms seem more popular, and the ‘Baptists’ need a group with a significant personal stake in the outcome to relentlessly finance or otherwise help to push through the legislation.”).

260. *Id.*

261. Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2620–21 (1994) (“Although there is no necessary reason why legislators may not take principles into account when fashioning legislation, experience supported by public choice theory suggests that they will often give them short shrift.”).

continuing to believe that legislation is produced in their best interest.²⁶² Attaching an actual “public-interest looking” interest group that can claim some higher-value agenda (like virtue) can give even the most sinister wealth transferring legislation a sufficient “cover story” so that private interest legislation can sneak through the legislature and under the radar of the rationally-ignorant public.²⁶³

We should predict the existence of Baptist and bootlegger coalitions if a theory of aretaic legislation became dominant—virtue groups would emerge as Baptists and yet could easily be controlled or coopted by non-virtuous interest groups interested in a non-virtuous wealth transfer. This was in fact even true with the events giving rise to the name of the theory—much of the campaign in support of Prohibition characterized it as designed to prevent the “pervasive deterioration in the virtue of [the] citizenry” caused by the consumption of alcohol.²⁶⁴

Baptist and bootlegger coalitions abound in law. These coalitions allow for the “exploitation of moral—or social-cost arguments for private economic (or political) gains.”²⁶⁵ Commenters have noted various examples of such coalitions, including: environmental groups providing cover for a whole host of private interests;²⁶⁶ ethanol subsidies where producers coordinate with environmentalists and energy security advocates;²⁶⁷ child labor laws with coalitions between rights advocates and labor leaders wishing to increase

262. Morriss et al., *Choosing*, *supra* note 10, at 222 (“The ‘Bootleggers and Baptists’ theory . . . explains how some people might perceive the public interest model of regulation as still valid.”).

263. Andrew P. Morriss & Benjamin D. Cramer, *Disestablishing Environmentalism*, 39 ENVTL. L. 309, 357 (2009) (discussing how the Baptists provide “‘theological’ cover for what would otherwise be naked rent-seeking”). *See also* Yandle & Buck, *supra* note 258, at 190 (discussing the “cover story” the Baptist interest can provide).

264. Robert L. Hampel, *Massachusetts Society for the Suppression of Intemperance (MSSI)*, in 2 ALCOHOL AND TEMPERANCE IN MODERN HISTORY: AN INTERNATIONAL ENCYCLOPEDIA 401, 402 (Jack S. Blocker et al. eds., 2003) (explaining prohibition in part driven by a view that noting the alcohol consumption was “part of a pervasive deterioration in the virtue of [the] citizenry,” primarily advanced by the Massachusetts Society for the Suppression of Intemperance).

265. M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517, 1533 (2009).

266. *See, e.g.*, Zywicki, *Baptists*, *supra* note 144, at 345.

267. Hahn, *supra* note 160, at 463 (“There is another important reason policies to promote ethanol may receive widespread political support. They are not only supported by interest groups who directly profit from such government intervention, but also by some interest groups concerned with energy security and the environment that primarily support cellulosic ethanol in particular.”). *See also* Morriss & Cramer, *supra* note 263, at 356–57 (describing ethanol subsidies and explaining that “ethanol’s self-interested proponents have successfully hijacked the rhetoric of Environmentalism in their pursuit of government support, as have myriad other ‘green energy’ interests.”).

wages;²⁶⁸ crime victims groups and prosecutors at seeking criminal law, criminal procedure, and evidence rules reform;²⁶⁹ campaigns for green jobs legislation with coalitions between environmental groups and mass transit construction companies along with unions;²⁷⁰ Obamacare and health reform legislation saw coalitions of social rights and public health advocates coupled with medical industry groups;²⁷¹ health care agencies and social welfare advocates for cleaner lifestyles joined with plaintiffs' attorneys seeking tobacco regulation;²⁷² and global climate change legislative efforts have seen environmentalists paired with "companies, interests, and countries" that stand to gain from their competitors being taxed by climate change regulation.²⁷³

So either with masking alone or with masking coupled with a Baptist and bootlegger coalition, interest groups hide the true character of legislation. These phenomena are problematic for obtaining public interested legislation and for monitoring against rent-seeking. Such problems would present themselves just as strongly if, instead of desiring public interested legislation,

268. Henderson, *supra* note 265, at 1533 (providing examples of child labor laws in England and tobacco legislation in the United States as examples with Baptist and bootlegger coalitions).

269. O'Hara, *supra* note 259, at 243. *See also* Tom Lininger, *Bearing the Cross*, 74 *FORDHAM L. REV.* 1353, 1396–97 (2005) (describing the bootlegger/Baptists coalitions in victim rights' advocacy but that the "purity" of the movement is impossible because "[o]ne consequence of crime victims' dependence on prosecutors to further the legislative agenda is the inability of either partner to effect reforms without the approval of the other").

270. Morriss et al., *Green Jobs*, *supra* note 257, at 345 ("Before policymakers adopt green jobs strategies, they need to be aware that these proposals are often simply part of a 'Bootleggers and Baptists' coalition to achieve unrelated policy aims of the labor movement.").

271. Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope?*, 75 *LAW & CONTEMP. PROBS.* 75, 78 (2012) (describing the promotion of health care mandates as a Baptist/Bootlegger issue combining "public health advocates and industry interest groups").

272. Bruce Yandle et al., *Bootleggers, Baptists & Televangelists: Regulating Tobacco by Litigation*, 2008 *U. ILL. L. REV.* 1225, 1281 (2008) (describing the bootleggers/Baptists alliances used to call for greater regulation of tobacco, including health agencies and plaintiffs' attorneys).

273. Yandle and Buck's explanation of Baptists and bootleggers in climate change includes the following:

Global climate negotiations have been rich with bootlegger-Baptist coalitions. The Baptists are the active environmental groups pushing for ratification and enforcement of the treaty, and working to prevent backsliding. They are passionate and persuasive to the public as they argue that cutting back on carbon emissions is a moral necessity.

. . . .

The bootleggers are the special interest groups that are positioned to gain from regulatory enforcement and stringency or that must fend off losses that spring from proposed rules. . . . Environmental activists provide the cover story on which media attention is focused, while companies, industries, and countries work quietly in the background to gain benefits.

Yandle & Buck, *supra* note 258, at 189–90.

we were somehow specifically directing legislatures to produce aretaic legislation.

One author, Michael Fitts, has discussed one of the problems associated with trying to enforce “civic virtue” requirements through legislation as positioned against the real world complication of masking.²⁷⁴ In his work, Fitts asks whether courts could police legislative motives and control masking.²⁷⁵ Fitts is skeptical of a rule of judicial interpretation that would allow *courts* to determine whether the legislature acted in a manner consistent with civic virtue precisely because the legislature could slap the virtue label on legislation and otherwise attempt to deceive the courts and the public.²⁷⁶

As Fitts explains, in such an interpretive regime there is a concern with “the problem of deception—how do the courts determine whether in fact the relevant actors in a legislature, once identified, are indeed engaging in the type of principled decision making that is the heart of the civic virtue ideal.”²⁷⁷ Fitts explains that one can paper the record with “evidence” of virtuous intent that could simply be a mask.²⁷⁸ As a result, a virtue “label” could serve to shield legislation from more effective scrutiny.²⁷⁹ He concludes that “the civic virtue theorists raise the specter of government actors masking their true intentions behind a smoke screen of public-regarding verbiage. It simply is not possible to ensure that people *are* public-regarding merely because they defend or rationalize their actions on those grounds, or alternatively, that legislative actors are private-regarding simply because” their actions help a private interest.²⁸⁰ This critique of civic virtue legislation should equally apply to aretaic legislation. There is no reason to believe the results would be any different under an even broader virtue-based legislation command modeled around the virtue jurisprudence and aretaic push.

In the end, we should expect that legislation will be masked. We should be suspicious of all legislation as a result, no matter if it is clothed in the ideals of virtue or claimed to serve some other broad social policy. Legislation tagged as advancing the ideals of virtue risks directing our attention away from the realities of the legislative process and interest group bargaining,²⁸¹ and

274. Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1598–1601 (1988).

275. *Id.*

276. *Id.*

277. *Id.* at 1600.

278. *Id.* (“In a world of paper records, it is quite easy for legislators, like their administrative counterparts, to create a paper record that bears little relationship to what in fact is going on in the internal legislative deliberations.”).

279. Fitts, *supra* note 274, at 1600.

280. *Id.* at 1601.

281. Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1340–41 (1994) (Easterbrook explains the difficulties of

therefore may in fact lead us to be deceived into believing the tags placed on legislation rather than their true goals and motivating forces. Our analysis and investigation of legislation needed to expose its true nature then becomes dangerously muted as we become distracted away from seeing the necessity of being vigilant in that review.

V. PUBLIC CHOICE AND VIRTUE—SOME FINAL SYNTHESIZING THOUGHTS

Public choice has become a dominant mode of analysis²⁸² for evaluating the production of legislation.²⁸³ Politicians, political parties, and interest groups all act self-interestedly.²⁸⁴ Legislators are almost always seduced into the interest group bargaining game because unilateral disengagement has little utility—it deprives the legislator of the personal gains in the process and even if they are civic-minded it would deprive her constituents of the benefits to be gained in pork—in fact the rational constituent might even want their legislator to play the game if they knew the costs of disengagement.²⁸⁵ The prevalence of private interest legislation is in large part the result of the failure of a collective public virtue to act as any effective check on the interest group process.²⁸⁶

operating government based on idealistic notions of virtue: “[W]e must concern ourselves with the functional questions that occupied Madison Public choice theory suggests that this whole debate is beside the point. The choice is not expertise versus vigor and coordination. These are ideals, claims based on virtue in government. Proposals based on these ideals—to appoint better people, to produce more openness in government, and so on—miss the point of Madison’s argument: *ideals* of virtuous administration may direct attention away from how government operates in practice.”)

282. Yandle & Buck, *supra* note 258, at 188 (“The economic theory of regulation is so instructive that, as one economist observes, ‘opposing theories of regulation have been pretty thoroughly driven from the scene.’”).

283. On public choice theory, see, for example, KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1963); BUCHANAN & TULLOCK, *supra* note 155; OLSON, *supra* note 196; MAXWELL L. STEARNS, *PUBLIC CHOICE & PUBLIC LAW: READINGS & COMMENTARY* xviii–xxiii (1997) (summarizing major schools of public choice scholarship); Stigler, *supra* note 152.

284. Gardner, *supra* note 141, at 167 n.348 (“[T]here are good reasons to doubt whether political parties are capable of behaving in the way the responsible party model presupposes. A substantial body of public choice literature claims that parties, like other political actors, behave self-interestedly.”).

285. Michael A. Fitts, *Can Ignorance be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 947 n.102 (1990) (“If the constituents should elect a civically virtuous representative, she alone would not be able to change the nature of the regime or political bargains, but could only deprive her constituents of their piece of the pie.”).

286. Easterbrook, *supra* note 281, at 1334. (Easterbrook summarizes the barriers public choice realities pose for the attainment of a government based on virtue: “Private interest legislation is common today, much more so than in 1787, and more common at the national level than among the states—the opposite of Madison’s belief about what would happen. This predictive failure can be explained as the result of a variety of factors well known to public choice theory: limits on representatives’ freedom from factions’ influence; increased specialization in

Factions destroy that open space where virtuous legislators—even if they could possibly exist—could operate.²⁸⁷

Public choice theory is grounded in a belief that legislation should *not* be presumed to be in the public interest.²⁸⁸ There is no doubt that it presents a cynical view and offers little optimism for those that wish to introduce noble metrics like “virtue” into the political decision-making process.²⁸⁹

Within the available literature on virtue theories, an article by Eric Claeys provides the best support for a public choice critique of virtue enhancing legislation.²⁹⁰ Claeys is dealing with imposition of virtue as a controlling ethic for legitimate rule making, although much of his focus is on judicial and common law rules.²⁹¹ Unlike Claeys’s valuable examination of the development of virtue theories, this Article concerns itself only with their application to legislation and the masking phenomena that is perpetuated by using virtue as a justification for or guiding principle of legislation. Claeys does not mention masking per se or specifically reference interest group theory, but his conclusions share several similar bases especially when he discusses what he terms “virtue politics.”²⁹²

For example, Claeys contends that “the legal system does have, and may tolerate, a little virtue-centric regulation,” but follows that “there are also important reasons to be pessimistic that a legal system can remain humane while promoting actively ‘virtue’ or some of the virtues.”²⁹³ There is, according to Claeys, a natural tendency to manipulate “virtue” for selfish ends if it becomes a metric in the domains of law and politics because “competing religious, ethnic, or partisan factions find it hard to resist the temptation to use virtue theory as an ideological tool, to establish hegemony over rival factions in their local communities.”²⁹⁴ Specifically, he touches on the concept of

production; free rider obstacles to political participation; the considerable advantages to interest groups of obtaining national legislation; and the failure of collective virtue.”).

287. *Id.*

288. Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1765 n.18 (1999) (“Public choice theory . . . counsels skepticism about whether there exists such a phenomenon as ‘public-regardingness’”).

289. FARBER & FRICKEY, *supra* note 155, at 2 (“[O]n initial acquaintance with the public choice literature, the reader is likely to come away with a feeling of despair about the political process.”).

290. *See, e.g.*, Claeys, *supra* note 11.

291. *Id.*

292. *Id.* at 946–47.

293. *Id.* at 891.

294. *Id.* at 892. When Claeys discusses factions, he seems concerned with more extreme power grabs than the more nuanced use of masking in the legislative process. For example, where this Article is concerned with the soft-tyranny of subterfuge, Claeys is often talking about the hard usurpation of the concept by actual and more overt tyrannical rule imposition. Consider the following, for example: “Virtue-based regimes encourage the tyrants and the totalitarians

interest groups—or factions—briefly in the above passage and a few other parts of his general critique of virtue-centric theories in a way largely consistent with the conclusions reached here:

Politics often involves large struggles in which some factions seek to acquire control or superior status over others. In practice, theories centered around virtue reinforce such factions' drives to be factious and acquire hegemonic power. Virtue theories can therefore be extremely destructive and inhumane. This possibility does not make all virtue regulation inappropriate. But it does make virtue theory problematic as a dominant category in politics.²⁹⁵

From this passage it appears that Claeys perhaps leaves more room for virtue centered regulation than the conclusions in this Article might call for. Moreover, I would contend that it is difficult to see how one would logistically be able to distinguish between appropriate and “inappropriate” virtue regulations, especially as all legislation and regulation are capable of the same public choice critique. However, Claeys's ultimate conclusion lies in his defense of liberalism as superior to any value-laden virtue-centric theories.²⁹⁶ He finds support for that preference in the work of John Locke as well, who he contends “deliberately structures Lockean liberalism to compartmentalize virtue as far away from politics as possible.”²⁹⁷ Virtue must remain an individualized pursuit;²⁹⁸ it cannot be commanded by politics.²⁹⁹

We cannot expect interest groups to be virtuous in the ends sought or lawmaking to be virtuous in the commodities offered and produced. In fact, even the production of virtue-based regulation itself is likely to involve factions seeking self-interested transfers masked as some universal virtuous end hiding the truth that the legislation is instead feeding their private agenda.

straightaway. In not only their worst but also their bad cases, virtue-based politics embolden a control group to wage civil war, to acquire comprehensive political control, on the pretext of wanting to compel everyone else to be virtuous.” *Id.* at 927. While I agree that this hard danger too should be cause for concern, I think the more likely danger is through seemingly benign legislation masked in the public interest that leads to even greater inefficient transfers of wealth.

295. Claeys, *supra* note 11, at 917.

296. Claeys concludes that:

[I]n the political, religious, and ethnographic conditions that inform modernity, liberal politics is probably more humane and prudent than pure virtue politics. Liberalism refers to a political regime that creates space for each citizen to think about or believe what he finds most needful. To do so, liberalism organizes politics not around the pursuit of virtue but the protection of rights.

Id. at 927.

297. *Id.* at 928.

298. *Id.* (“Liberalism is defensible in a virtue framework as the most humane and prudent means realistically available to secure the most virtue and *eudaimoneia* possible.”).

299. Claeys, *supra* note 11, at 917 (“Principles that work well as hypothetical rules of practical conduct for individuals may not work as well as compulsory rules of practical conduct for citizens.”).

Furthermore, agency rules even after the passage of legislation further risk cooptation of the virtue concept as bureaucracies tend to exhibit self-perpetuating behavior,³⁰⁰ and if we give them a new mandate like virtue they are likely to exploit it.³⁰¹

Easterbrook contends that self-interest will always prevail over virtue and that cognitive dissonance will allow political actors to convince themselves that their self-interest is aligned with virtuous behavior.³⁰² Such self-deception ensures that any virtue-enhancing metric employed will be self-defeating and virtue will become manipulated in a decision maker's mind to equate with self-interest rather than to act as a check against it.

The mantle of virtue will be championed by advocates of all sorts. The term will be claimed and coopted by multiple and sometimes divergent causes. As Claeys soundly concludes, “[w]hen politics is about legislating virtue and not about securing rights, it tempts sectarian believers to gain political power to compel subjects to be virtuous as defined by the teachings of their particular sect. Since Enlightenment philosophy is universalist, non-religious political ideologues can suffer from the same temptations.”³⁰³ There is this danger where the privilege of power might be used to impose one's own “rule” by their individualized concept of “virtue” veiled in a standard that has been adopted as supreme. This could very easily occur when adopting an aretaic ethic for testing the legitimacy of legislation. Determining who are the good virtue imposers versus those that are the bad ones is an incredibly difficult task and as such further facilitates rent-seeking due to the inability to identify those pieces of legislation one should scrutinize.³⁰⁴

In a world where virtue is the stated dominant legislative end, we will see “virtue lobbyists” who will be no different than any other shills for an interest. Lobbyists will pervert virtue for their own ends and utilize the mask to slide through their private agendas. In fact, we already have this occurring where folks use a virtue-like shield for their legislation, even though we are not yet

300. See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY & REPRESENTATIVE GOVERNMENT* (1971) (arguing that bureaucracies seek to maximize their budgets); GEORGE C. ROCHE, *AMERICA BY THE THROAT: THE STRANGLEHOLD OF FEDERAL BUREAUCRACY* (1983); LUDWIG VON MISES, *BUREAUCRACY* (1944).

301. Zywicki, *Externalities*, *supra* note 174, at 890 (“Bureaucrats seek larger budgets and greater power for themselves.”).

302. Easterbrook, *supra* note 281, at 1330 (“People care more about themselves than about others. . . . [S]elf love dominates even when people know intellectually that virtuous conduct would be better. When the conflict between self and virtue is irreconcilable, cognitive dissonance leads people to conclude that civic virtue and personal ends coincide.”).

303. Claeys, *supra* note 11, at 926.

304. Henderson, *supra* note 265, at 1533 (“Distinguishing between bad nanny types (or between good and bad nannies) is difficult. The more difficult it is to sort ex ante between good and bad, the greater the opportunity for nannies to rent seek and profit from imposing nanny rules.”).

operating under a system where virtue is raised to some heightened status (as perhaps could occur with the adoption of a virtue jurisprudential theory of aretaic legislation. Adopting a command for the production of aretaic legislation would only provide a vehicle for masking and the abuse of the concept will occur for purposes of private wealth transfers.³⁰⁵

In the end, the overuse of “virtue” also risks the dilution of virtue as a meaningful term and risks leaving strategies for its advancement with little resulting value. In fact, adopting a virtue-based legislation metric is dangerous because if virtue is set up as legitimate criteria with heightened status it will create cover for and insulate from review private interest rent-seeking. Often in these transactions with a social agenda attached, not only does the private interest transfer skew the true reason for the legislation but often the diversion of resources accomplished actually harms the potential to achieve the stated goal.³⁰⁶ We should also expect to have Baptist/bootlegger issues where the virtue Baptists will help cloak the private interest agendas of the bootleggers who have no interest in virtue but wish to piggyback on the virtue clamor.

In the political sphere, the supposed or stated advancement of “virtue” should not be a decision rule. Virtue should receive no special status, but instead at most should just be one of many metrics within the open public discourse

Of course, whenever government starts to compel individual behavior in a “nanny” type way as it might in a world where virtue legislation dominates, they may be unable to evaluate where to set the rules to achieve positive social benefits.³⁰⁷ Worse yet, imposing virtue standards could backfire and encourage more non-virtuous behavior. The rise of black markets for booze and the criminal syndicates that came with it during prohibition is one such example of where legislating virtue has a “Whac-A-Mole” effect, hammering one thing down only to cause a different or worse vice to pop up in its place.³⁰⁸

305. Claeys, *supra* note 11, at 922 (“When politics encourages citizens to use law to make citizens virtuous, it encourages factious citizens to use ‘virtue’ as a political and ideological bludgeon to help their own factions acquire dominancy and to subordinate rival factions.”).

306. Zywicki, *Externalities*, *supra* note 174, at 849–50 (explaining that the concentrated benefits from environmental rent-seeking hurts the dispersed public but also crowds out more innovative solutions by stifling “competition and entrepreneurship” in the provision of environmental goods).

307. Henderson, *supra* note 265, at 1532 (“[N]annyism, whatever its source, may be socially suboptimal. The first type of bad nanny is one with good intentions that makes mistakes in calculating the social costs and benefits from particular behaviors.”).

308. Henderson, *supra* note 265, at 1532–33 (describing Prohibition as a time during which “[t]he government as nanny believed that it could reduce the costs imposed by drinking without raising other costs and distorting natural behaviors in unpredictable ways. In other words, the cost-benefit calculation done by the regulator excluded the dynamic costs that arose from the regulation itself.”).

While Madison believed in part that virtue could prevail, Easterbrook explains that the faith in virtue was misplaced:

[T]here is a more fundamental explanation for the failure of Madison's predictions regarding the interplay between public and private interest in national government. The core of Madisonian resistance—the common weal to be found and implemented by virtuous legislators—turns out to be empty. It is not simply that Rousseau's concept of general will is hollow. It is that there is no virtuous way to aggregate private wills into collective decisions. People of good will have no common ground around which to rally! They have their own conceptions of the public interest but no way to insist that the *collective* choice necessarily reflect their views. We are doomed by the logic of majority voting to aggregate private preferences rather than to find a common public good.³⁰⁹

We simply cannot find and then implement a common good through legislative processes. We may be faced with the impossibility of virtue evolving at least from legislation if not an impossibility in all of law and politics.

The American Founders believed in virtue and many were influenced by the works of Aristotle.³¹⁰ A problem inherent in the Aristotelian vision is that if one believes that “the best government, according to Aristotle, is the one that seeks the common interest or good, not private interests,”³¹¹ and “the political community exists to allow citizens to live virtuously,”³¹² yet one also recognizes the realities exposed by public choice, then it is impossible to conclude that virtue can be advanced within the political community without serving private interests over the common good. The lessons of public choice discussed in this Article help explain this impossibility. The only way to achieve the common good or interest then may be to produce the least laws and to develop mechanisms that minimize the production of laws or make lawmaking so costly and difficult that it is no longer economically rational to invest in rent-seeking behavior.

Because there is a high probability that any piece of legislation is non-virtuous legislation, focusing on limitations on the output of legislation may be

309. Easterbrook, *supra* note 281, at 1339.

310. Feldman describes the level of Aristotelian influence on the Founders and their design as follows:

[I]n *The Federalist*, Publius mentioned—but did not emphasize—that Americans possess sufficient virtue to maintain self-government and that our governmental leaders should be imbued with civic virtue so that they will naturally pursue the public good. This form of virtue is Aristotelian in nature: one must act prudently, sagaciously, and for the good of one's political community. The framers, moreover, believed themselves to be exercising civic virtue as they deliberated—as Aristotle had recommended—about the common good of America and how that common good should be embodied and protected in a constitution.”

Feldman, *supra* note 34, at 692–93.

311. *Id.* at 689.

312. *Id.* at 690.

the better means of encouraging virtue, in turn leaving individuals free to pursue virtue in the private sphere. Ultimately the most virtue-enhancing theory of governance would be one that keeps production of legislation low, based on the presumption that most legislation is necessarily virtue-inhibiting in that it involves self-interested wealth transfers.

CONCLUSION

Any theory of aretaic legislation must necessarily confront the public choice realities of the legislative process. This Article contends that most of the teachings of public choice counsel against holding much optimism that virtue could ever be seen as a realistic guiding metric for the creation of legislation. Although no comprehensive theory of aretaic legislation appears to be offered to date in the scholarly literature, those advocating more aretaic theories in the law seem to contemplate a place for virtue in our shaping or judgment of legislation.

Virtue is a concept that would be manipulated in legislation in the same manner as other terms like “public interest” have been in the past to attempt to mask the true nature of legislation, the private deals involved, and the true beneficiaries and purposes of any legislation regardless of its label. Should “virtue” become the popular new ethic, test, standard, aim, or end when it comes to legislation, public choice theory predicts that the term will lack any true substance and most legislation will be drafted to seem virtuous to the public on its outside but have the same interior filled with dangerous rent-seeking bounties.