

# Public Choice Defended

Saul Levmore†

*Democracy Defended*, Gerry Mackie.  
Cambridge, 2003. Pp xvi, 483.

## I. POLITICAL SCIENCE AND ITS DISCONTENTS

*Democracy Defended*, by Gerry Mackie, is the latest shooting star in the political science galaxy. The book, however, is fairly technical, and is therefore one that few lawyers, law students, or even legal academics will read. This is unfortunate because the book contains many terrific points, as important to lawyers who think about appellate decisions, legislative intent, and voting law as to the book's intended audience. That audience consists of political scientists, whether established or budding, who are locked in a long battle over the role of public choice theory, and even of rational actor models quite generally.

The contemporary graduate student in political science is asked to choose between a life of devotion to rational actor models and a life of war against all model builders.<sup>1</sup> The model builders are mathematically inclined, and fascinated with the irrationality of voter participation, the expenditure patterns of interest groups, and the path dependence of outcomes in democratic institutions. This last interest follows in the wake of Arrow's Theorem and an enormous literature on the inability of any collective choice, or preference aggregation, mechanism to promise consistency, so long as it also guarantees several other basic characteristics.<sup>2</sup> With their tools sharpened, and some

---

† Dean and William B. Graham Professor of Law, The University of Chicago Law School. I am grateful for conversations with Adrian Vermeule, Julie Roin, and Kevin Blackman.

<sup>1</sup> Undergraduates are often spared, or denied, this choice. Indeed, the battle within the academic departments is so great that most undergraduate students who arrive at law school have never encountered voting paradoxes or Arrow's Theorem—even though it is one of the most widely written about topics in the professional literature. Apparently, the profession is so divided that those who are not members of the rational choice fraternity decline to teach the basic tools and paradoxes in introductory courses. As a result, democracy does not need much “defending” against the gloomy version of public choice theory, discussed below, because only a few thousand persons even learn about the theory.

<sup>2</sup> Most readers who have come even this far will know that Arrow's Theorem says, in rough terms, that no mechanism can promise unanimity (if all voters want X, X should emerge as the winner), nondictatorship (the decision mechanism should not simply be that Smith always gets his way, or always gets his way when matters are disputed), range (decisions should not be reached by excluding alternatives), independence of irrelevant alternatives (if one prefers choco-

journals and university political science departments now secured, the model builders have turned their attention to international law, to the American presidency, and to virtually everything—including fields that had once been considered the province of specialists. In the manner of their economist cousins, or forebears, public choice theorists see the world of politics as an orchard with low-hanging fruit. Everything can be simplified and maximized, and every claim can be challenged as empirically unverified. Conventional wisdom consists of claims to be turned into testable hypotheses, with every result paraded as original.

Because of their hegemonic tendencies, these rational choice theorists and empiricists have created enemies, especially within the world of political science. Mackie's book is written on behalf of, and for, these enemies. Although the book is a bit technical for many of them, they are bound to love it, beginning with its title and cover picture.<sup>3</sup> Imagine that students in the humanities were told that a new book showed that Newton and Leibniz had made colossal and never-corrected errors in formulating the calculus. The book's author would be an instant hero if only because a large part of this audience suffers from math anxiety and would like nothing more than to be told that some of the basic assumptions of calculus could not withstand a bit of pressure. Some of Mackie's audience will take to his arguments with comparable enthusiasm, much as many of us would to a respectable scientist who "proved" that it was bad to be slim and that all the literature extolling physical exercise was based on flawed assumptions.<sup>4</sup>

---

late over vanilla ice cream, and then strawberry is offered, one might now ask for strawberry but should not now prefer vanilla), and transitivity (if a group prefers X to Y, and Y to Z, then it should be regarded as inconsistent or incoherent for the group to prefer Z over X). Unless these requirements are met, the outcomes of group voting are path dependent, which is to say largely a function of the order of consideration or of other historical facts. An accessible introduction can be found in Kenneth A. Shepsle and Mark S. Bonchek, *Analyzing Politics: Rationality, Behavior, and Institutions* 63–81 (W.W. Norton 1997).

<sup>3</sup> The cover photo is of the ten-meter-tall "Goddess of Democracy" statue, installed in Beijing by prodemocracy student demonstrators occupying Tiananmen Square. The implication is that this book defends democracy as something worth fighting for, whereas public choice theory, by implication, marginalizes democracy and its warriors because it claims that democratic institutions are arbitrary, or incoherent. The book's own blurb begins by asking "Is there a public good?" and describes the prevalent view of democracy in the political science community as "meaningless." Mackie has so much that is interesting to say that it is a shame the book is marketed with this silly claim. Dictators are almost sure to impose rules that no majority would support; the "incoherence" claim of public choice generally refers to a disequilibrium with respect to outcomes that could garner majority support. Mackie knows better, but then this book is part of a war, and all is said to be fair in such an enterprise.

<sup>4</sup> For one similarly welcomed study, see Emma Ross, *Another Reason to Eat Dark Chocolate; May Help Blood Vessels, but Watch the Weight Gain*, *Chi Sun-Times* 33 (Aug 30, 2004) (noting that such studies are "much to the delight of chocoholics").

The “occasional problem” with democracy for social choice theorists is that when a group engages in preference aggregation, neither simple majority voting nor any other procedure can guarantee some basic, intuitively appealing qualities. This is, of course, Arrow’s Theorem.<sup>5</sup> In order to avoid obvious and perhaps unacceptable restrictions on range and participation, democratic procedures must, therefore, suffer the possibility of cycling, or instability. In turn, the outcomes generated by majority voting, sometimes produced by conventions that appear to be designed to avoid instability, can fairly be described as arbitrary, in the sense that some undemocratic or unappealing means must be used to settle things down. If one imagines or defends democracy as desirable because it produces the “will of the people” or some such thing, then the idea that democratic processes can lead to arbitrary or path-dependent outcomes can indeed be troubling. It is precisely this trouble, this “problem” with democracy, that motivated Mackie’s work.

I turn first, in Part II, to the historical context of this problem with democracy, and then, in Part III, to the idea that democracy may need no defending, because even its incoherent and arbitrary patterns are superior to those produced by nondemocratic processes. Part IV deals with Mackie’s claims about the absence of historical evidence of cycling, or incoherence, in the U.S. Congress. Part V offers some novel explanations for the historical record, and draws attention to the ability of public choice theory to illuminate constitutional structure. Part VI concludes with some thoughts about theoretical and empirical work, and with the hope that lawyers will not ignore the theoretical insights of other disciplines as they await incontrovertible empirical evidence of their practical significance.

## II. ARROW’S SHADOW

As early as the eighteenth century, what we think of as the most fundamental voting paradox was recognized and explored by the Marquis de Condorcet.<sup>6</sup> It is perhaps unsurprising to learn, however, that, hundreds of years earlier, great thinkers had puzzled over the problem of choosing from among three (or more) alternatives, which

---

<sup>5</sup> See Kenneth J. Arrow, *Social Choice and Individual Values* (Yale 2d ed 1963).

<sup>6</sup> See Marie-Jean-Antoine-Nicolas de Caritat, Marquis de Condorcet, *An Essay on the Application of Probability Theory to Plurality Decision-Making (1785)* (Extract: Preliminary Discussion. Analysis of Part One. Fourth Example: An Election Between Three Candidates), in Iain McLean and Fiona Hewitt, eds, *Condorcet: Foundations of Social Choice and Political Theory* 120 (Edward Elgar 1994) (translated by editors).

is, of course, when voting paradoxes can materialize.<sup>7</sup> Condorcet's name is associated with the paradox that arises if, for example, there are three individuals or subgroups, 1, 2, and 3, with preferences of ABC, CAB, and BCA, respectively. With simple majority voting, A defeats B, B defeats C, and yet C defeats A.<sup>8</sup> It is not clear how many people understood this paradox or even became aware of it after it received Condorcet's attention. I am sorry to report that even today an overwhelming majority of entering law students, arriving from the nation's best colleges, and often majoring in political science, do not know of this or any other voting paradox. Other well-known paradoxes involve bundling of votes (and issues) and logrolling. These are even less familiar, but also indicative of "arbitrary," though seemingly democratically produced, results.<sup>9</sup>

An awfully good argument can be made for the proposition that most democratic practices must have been fashioned in ignorance of this problem. Thus, Thomas Jefferson, who corresponded with Condorcet and met him on a number of occasions,<sup>10</sup> drafted his *Manual of Parliamentary Practice* for the U.S. Senate.<sup>11</sup> It was an important influence on *Robert's Rules of Order*.<sup>12</sup> Careful research, focused on the direct evidence of correspondence and notes in books, as well as on indirect evidence, shows that he and James Madison neither understood the voting paradox nor proposed solutions to it.<sup>13</sup> A modern positive theorist might point to a number of features of Jefferson's parliamentary rules, and later rules as well, and argue that they deal rather cleverly with the voting paradox,<sup>14</sup> but this is a far cry from a

---

<sup>7</sup> See Iain McLean and Arnold B. Urken, eds, *Classics of Social Choice* 14–19 (Michigan 1995) (describing or imagining the strategic agenda-setting of Pliny the Younger while presiding over the Roman Senate).

<sup>8</sup> The uninitiated might take to the example most quickly by thinking of the voters' preferences as capable of any ordering. Although many people often think of political choices as points along a continuum that is increasingly or decreasingly attractive, for some matters it is easy to see that this is not the case. Thus, a voter might prefer an expensive bridge, but then no bridge at all over a modestly priced bridge, perhaps because this voter thinks that the noise and pollution generated by a modest bridge dominate the modest benefit. Only if all voters prefer bridges in increasing or decreasing order of expense will cycling not arise.

<sup>9</sup> See Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J Legal Stud 259, 263–68 (1999).

<sup>10</sup> See Iain McLean and Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 Pub Choice 445 (1992).

<sup>11</sup> Thomas Jefferson, *A Manual of Parliamentary Practice: For the Use of the Senate of the United States* (Joseph Milligan 2d ed 1812), reprinted in Wilbur Samuel Howell, ed, *Jefferson's Parliamentary Writings* 353–426 (Princeton 1988).

<sup>12</sup> Henry M. Robert, ed, *Robert's Rules of Order* 392 (Perseus 10th ed 2000) (first published 1876).

<sup>13</sup> See McLean and Urken, 73 Pub Choice at 455–56 (cited in note 10).

<sup>14</sup> See Saul Levmore, *Parliamentary Rules, Majority Decisionmaking, and the Voting Paradox*, 75 Va L Rev 971, 991–96, 1012–23 (1989) (suggesting that common legislative mechanisms

claim that Jefferson, Henry Robert, or Luther Cushing, father of many legislatures' parliamentary codes,<sup>15</sup> understood the paradox, or the problem of cycling, and drafted rules in response to it. Thus, motion-and-amendment voting of the kind that dominates our legislatures, and is the stuff of Jefferson's *Manual*, can be understood as an ingenious means of uncovering a Condorcet winner if one exists (which is to say an option that is not unstable in a majoritarian system, as it does not cycle but rather defeats all alternatives in head-to-head competition). But even if Jefferson and others had intuitions about these things, inclinations are a far cry from applications.

Returning to the evolution of public choice theory, there seems to have been a period of more than a hundred years in which anyone who noticed the voting paradox thought that it could be avoided, solved, or ignored. This is hardly surprising; whenever I have seen someone introduced to the basic voting paradox, the listener's reaction has been to introduce a point system or other device in order to try to avoid cycling. One of the great things about Arrow's Theorem is that no one ever seems to intuit it. Thus, Jean-Charles de Borda seems to have thought that his point-count system solved all difficulties.<sup>16</sup> The modern reaction is more likely to be a conviction that markets overcome Arrow.<sup>17</sup> In settings where our predecessors might have assigned points or switched to succession voting or approval voting, it is now more common to see the introduction of an auction with real dollars or with equal endowments of points or chits.

---

such as "motion-and-amendment" decisionmaking were developed against the backdrop of an intuitive understanding of voting paradoxes). See also Adrian Vermuele, *The Constitutional Law of Congressional Procedure*, 71 U Chi L Rev 361, 402–10 (2004) (analyzing voting rules and quorum rules).

<sup>15</sup> See Luther S. Cushing, *Manual of Parliamentary Practice: Rules of Proceeding and Debate in Deliberative Assemblies* (William J. Reynolds 4th ed 1845).

<sup>16</sup> Point systems are discussed in Dennis C. Mueller, *Public Choice* 61–64 (Cambridge 1979). Borda's name is attached to a point system of ranked preferences, but the idea seems to have originated with Nicolaus Cusanus some 350 years earlier. See Nicolaus Cusanus, *On Catholic Harmony* (1434), in McLean and Urken, eds, *Classics of Social Choice* 77, 77–78 (cited in note 7) (translated by editors) (describing a secret ballot point-count system). In Cusanus's point system voters are instructed to match the numbers 1 through 10 with each of ten candidates, and the winner is the candidate with the highest point total. According to Cusanus, such a system would produce the

candidate adjudged best by the collective judgment of all present. Nor will any surer method be discovered for reaching so infallible a formulation of collective decision. For this method takes account of all comparisons of candidate to candidate—in whatever groupings or combinations—that any elector can make. I have myself been unable to find a better method than this even after much effort; and you can safely take it that a more perfect method cannot be found.

Id at 78.

<sup>17</sup> Mackie is right to bemoan the tendency of political scientists and economists to slip into the suggestion that markets solve the problem of instability (pp 433–40).

But as all serious students of public choice know, Arrow's Nobel Prize-winning work showed that *no* decisionmaking device could be guaranteed to satisfy four fairly simple requirements, one of which was the transitivity requirement (such that if  $A > B$ , and  $B > C$ , then  $A > C$ ). Simple majority voting may be more attractive than other means of decisionmaking, but it cannot (always) avoid cycling. A point system might have its uses, but a little experimentation will show that it too can yield cycling, or incoherence. Single transferable voting might seem attractive, but it too cannot promise to avoid cycling, and especially so once strategic voting is contemplated. Arrow is everywhere, and the problem of cycling or instability looms large.

Once the message of Arrow's Theorem is properly absorbed, depression can set in. As a title, *Democracy Defended* very much reflects the view that if Arrow's Theorem is important, then democracy is under serious attack, because majority voting is "incoherent" and such voting is the centerpiece, or even essential characteristic, of democracy.<sup>18</sup> I am not sure that intransitivity or path dependence needed to be taken as an insult, but perhaps it was inevitable that claims or evidence of democracy's arbitrariness would be understood as arguments against our democratic institutions. William Riker is most strongly associated with these arguments that seem to puncture democracy's balloon, as he sought to demonstrate the pervasiveness of cycling by drawing attention to a number of votes in the U.S. Congress that appeared to demonstrate cycling in action.<sup>19</sup> Perhaps the most threatening attack on conventional conceptions of democracy comes from the idea, associated with Richard McKelvey,<sup>20</sup> that cycling is not just possible, but something that can *always* be generated. If cycling is not just a theoretical possibility, or an oddity, but rather an omnipresent feature of democratic decisionmaking, then incoherent and meaningless begin to seem like fair descriptions. But Arrow did not claim that every matter up for a vote, or other means of aggregation among three or more persons, will cycle or otherwise run afoul of at least one of his four basic requirements. Nine out of ten members of a community may

---

<sup>18</sup> A democracy might require more than such voting, because voting may not be worth much if there is no free press to inform voters. But this is hardly the place to work on perfect definitions. See Amartya Sen, *Freedom and Needs*, New Republic 31 (Jan 10 & 17, 1994) (extolling the effectiveness of democratic governments in avoiding large-scale disasters).

<sup>19</sup> See William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* 214–32 (W.H. Freeman 1982). Riker is, of course, known for a great deal of other important work, but it is this empirical work that attracts Mackie's attention, and is discussed below. For discussion of one of Riker's examples, the Wilmot Proviso, see Part IV.

<sup>20</sup> See generally Richard D. McKelvey, *Intransitivities in Multi-Dimensional Voting and Some Implications for Agenda Control*, 12 J Econ Theory 472 (1976).

prefer for taxes to be as low as possible, in which case this group will vote for low taxes, over high or medium taxes, if given half a chance to do so. An important empirical question is, therefore, the frequency of cycling, and a parallel question concerns the ways in which democratic institutions avoid cycling if, indeed, they do.

### III. LIVING WITH CYCLING

#### A. Avoiding Condorcet Losers

Even if cycling is ubiquitous, a means of combating Arrow's destabilizing result is to suggest that cycling is often of little consequence. Imagine, for example, that we ask a group to choose among Greece, Egypt, and Turkey as the recipient of \$1 billion of foreign aid. Let us continue to contemplate three groups of voters, and further consider the presence of an apparent Condorcet winner arising out of preferences of GET, ETG, and TEG (where G represents Greece, and so forth). Egypt is preferred in both head-to-head competitions. We would have a cycle if the last group's ranking had been TGE, but it is not. One way to think about the claim that cycling *always* occurs, so long as the range of inputs is unconstrained, is to think of what an opponent of foreign aid to Egypt might do. This voter, or politician, might try to break up the pro-Egypt majority by introducing a fourth alternative, such as a motion to provide the foreign aid to Egypt but only on the condition that Egypt spend the money in the United States. If parliamentary rules disallow this maneuver, they violate the assumption about range, or "universal domain." After all, one could always prevent cycling by limiting the number of permissible alternatives to two—as parliamentary, committee, and political party rules sometimes seem to do—and that solution, or bandage, ought not settle any misgivings about democracy's problem.

If the pro-Egypt preference survives the introduction of the fourth alternative, as it will if preferences are GEUT, ETGU, UTEG, where U refers to the alternative of aid to Egypt with the condition that the recipient's expenditures must be in the United States, then the opponent might introduce yet another alternative, such as a grant of \$1.2 billion, rather than \$1 billion, or a condition that Egypt cooperate in specified ways with a new antiterrorist strategy. Unless voters are inhumanly homogeneous, it is likely that any winning coalition can eventually be divided, and that intransitivity can be generated. The importance or prevalence of democracy's problem is thus quite contextual and perhaps subjective. Mackie would say that the difference between \$1 billion and \$1.2 billion (going to the same country, after all) may not be significant, and that cycling can therefore often be regarded as benign (p 114). It is, of course, difficult to know when the

small things that split groups are important. Two hundred million dollars is a significant amount of money to voters whose highest priority will go unfunded if the money is devoted to foreign aid. Similarly, a condition that expenditures must be made in the United States might matter more to workers in some industries than to other voters. If democracy needs defending, we can surely do better than simply to insist that instability is often unimportant because cycling voters sometimes disagree about very little (pp 114–15).

A better defense of democracy draws on public choice theory and a “compared to what?” manner of thinking. No thoughtful theorist claims that democracy’s incoherence problem makes it as bad as tyranny. No one writes that democracy is worth fighting *against*, or worth giving up without a battle, perhaps to the death. The public choice problem, or insight, is simply that in some situations, or even in all settings, the outcome of the democratic process may be one of several outcomes that could have been produced given the voters’ disparate preferences. The result we observe in any given situation is to a degree arbitrary—but it will always be drawn from that subset of possible outcomes that mustered *a majority’s* support. What emerges from a democratic process might be disfavored by a (or another) majority of the voters if they were permitted to compare this first outcome with an alternative, or with every alternative. To be sure, that seemingly preferred alternative would then also lose by majority vote to another alternative, and so forth. On the other hand, to repeat, a nice thing about the procedure most often used in our legislatures, puzzling as parliamentary rules may first seem, is that it will find the single Condorcet winner if one exists. Thus, if there is an alternative that is preferred to all others, it will prevail—and the same cannot be said for most other decisionmaking systems, and it certainly cannot be said for a tyranny.

Consider for example a group with the following preferences: Subgroup 1: ABCD; Subgroup 2: BCDA; Subgroup 3: CADB. As before, A defeats B, B defeats C, but C defeats A, and without violating other familiar and (I think normally) reasonable assumptions, no method of aggregating preferences can avoid this cycle. Some procedure, agenda setter, or randomizing device will determine the outcome, and this can fairly be described as arbitrary. On the other hand, there is nothing to be said for a method that produces D, which loses in head-to-head competition with every other alternative. D, the “Condorcet loser,” will not emerge as the winner in any reasonable democratic system, whereas a dictator or a random scheme could easily produce D as its outcome. There are, of course, thousands of D-like alternatives out there, and we might optimistically say that among the thousands of choices someone somewhere prefers, a democracy with



simple majority voting is guaranteed to narrow the field to a few that are not Condorcet losers. This can be framed as quite an accomplishment, though I am sympathetic with Mackie's observation that students and readers are often made to think that democracy is quite unimpressive because it is described as arbitrary and incoherent (p 4). A system that is arbitrary or procedure-driven within the class of the top few choices among thousands could just as easily be described as remarkably impressive.

Put slightly differently, it might be nice if our democracy did not give an agenda setter special power, did not allow some interest groups to outperform other claimants, and did not reward legislative seniority as much as it does. But all democratic systems have their problems, and a system that exhibits these scratches might still be vastly superior to a nondemocratic system. These flaws might be determinative where there is no Condorcet winner, for example, but a system that always produces outcomes that have mustered at least one majority vote is impressive enough.

## B. Democracy's Real Flaws

The idea just developed, that democracy is attractive even in the presence of cycling, raises the obvious question of whether democracy has attractive qualities other than its ability to avoid Condorcet losers. Democracy can be defended, as it were, by showing that the attack it faces is a weak one, but also by demonstrating that it has other advantages over its competition. On the other hand, a stronger defense might be required in the face of other flaws and attacks, whether or not Mackie takes note of them. I pause, therefore, to ask what it is, exactly, that Mackie is defending, so that it might be compared to alternatives as well as heralded or criticized on other grounds.

*Democracy Defended* is most usefully read, I think, if we define democracy as a system of government and decisionmaking in which majority votes decide many important matters. There are, to be sure, many niceties to be observed or avoided. Some democracies may use elected representatives to a greater degree than others, and a majority of these representatives may have been put into place, and continue to be controlled, by a well-placed *quarter* of the population, rather than by a conventional majority.<sup>21</sup> Some democracies may delegate more

---

<sup>21</sup> The idea originates with James M. Buchanan and Gordon Tullock, *The Calculus of Consent* 220–22 (Michigan 1962). It is that 51 percent of a legislature can enact bills, but each of the members can be elected by 51 percent of a geographic district. The other 49 percent in that district, as well as all the voters in the other 49 percent of the districts, might have voted against the legislators now in the bare majority. Bicameralism, executive vetoes, and many other devices might, of course, limit the minority's ability to impose costs on the majority. See Saul Levmore,

decisionmaking than others, and the delegation may be to unelected agents or to powers quite foreign to the electorate. Some democracies may limit the franchise, through restrictions on citizenship and other means. Some may give substantial power to minorities, often through a variety of supermajority requirements, and sometimes by allowing constituent states, or other groups, to control a disproportionate number of representatives. These countermajoritarian practices illustrate the more general point that many democracies abide by prearranged constitutional rules that are themselves countermajoritarian. Some of these rules may have been politically necessary at the time of the formation of the political entity, and others may simply have been deemed wise or just. A stubborn debater might insist that we do not really have a firm definition of democracy, so that it is impossible to proceed, much less to defend the undefined, but I will proceed under the assumption that most readers will be impatient with this question. Democracy to us simply means that many important things are decided by majority votes undertaken with a large and (somewhat) neutrally drawn segment of those most affected by these votes. In a democracy, a determined majority of the population gets its way, though repeated votes and instructions to agents may be necessary.

But in almost any form, democracy comes with a towering strength, as readers familiar with public choice know. The strength is that simple majority rule has a great deal to be said for it. Where preferences are at stake, majority rule (defined in a way that includes plurality voting)<sup>22</sup> is intuitively appealing: it is not biased in favor of any particular outcome or person, whether voter or dictator;<sup>23</sup> it is positively responsive to increased support (if there is a tie, and then a new voter prefers X over Y, X wins); and it does not restrict the range of what can be considered.<sup>24</sup>

---

*Bicameralism: When Are Two Decisions Better Than One?*, 12 Intl Rev L & Econ 145, 151–55 (1992) (exploring historical and logical explanations of bicameralism).

<sup>22</sup> For this triumph of plurality voting, see Robert E. Goodin and Christian List, *Unique Virtues of Plurality Rule: Generalizing May's Theorem* (working paper Sept 2004), online at <http://econwpa.wustl.edu/eps/pe/papers/0409/0409010.pdf> (visited Feb 14, 2005). Plurality voting, it should be noted, can miss some Condorcet winners that simple majority voting would yield (if the right options are put up for vote), but that is a topic for another day.

<sup>23</sup> These characteristics are known as anonymity and neutrality.

<sup>24</sup> This is sometimes known as universal domain, and we might take it to include admissibility, or the idea that voters can also rank the alternatives as they wish. These several requirements, or assumptions, and the conclusion regarding simple majority rule, are known as May's Theorem. The appeal of simple majority rule is great where the minority is unlikely to have more intense feelings, or preferences, than the majority. See Dennis C. Mueller, *Constitutional Democracy* 159–60 (Oxford 1996) (describing May's Theorem and noting that the anonymity axiom is "most appealing on binary issues for which it is reasonable to assume that the intensity of support" is roughly the same on both sides of the issue).

Where decisionmaking is not a matter of competing preferences, or preference aggregation, the strength of simple majoritarianism is, instead, that a majority is likely to get things “right.” Where voters are each more likely to be right than wrong, or where some are gifted in this manner and others are right and wrong at random, a simple majority is increasingly likely to get an increasingly large group to the correct result.<sup>25</sup> If we further imagine that most voters *want* to get the correct result, where the question at hand is one with a right and wrong answer, majority decisionmaking is even better because the voters are free to listen to experts or to delegate appropriately. It does not take too much optimism to say that simple majority rule is extremely attractive because it is either an attractive form of preference aggregation or a very appealing means of finding the right answer. The group need not know which of these two tasks it is engaged in, and that is especially useful if many decisions reflect some combination of right answers and preferences. These two characteristics undergird democracy’s towering strength. A dictatorship, or for that matter a supermajoritarian scheme, cannot claim these strengths; nor can they claim to avoid Condorcet losers.

Mackie’s defense is against the attack associated, rightly or not, with Arrow’s Theorem, though he might have prepared for an attack based on the low level of participation in many democracies or for one based on the agency problem confronting citizens who must delegate decisionmaking and execution to politicians and other agents. Neither problem falsifies the claims about democracy’s great strengths, but both make the boasts somewhat hollow. If, for example, only a few voters troubled themselves to be well informed and to express their preferences, we would be uninspired by claims of neutrality, universal domain, and avoidance of Condorcet losers. Simple majority voting might then even be worse than an alternative that tried to assess the preferences of the silent majority.

Even with considerable voter turnout, democracy might need defending if those who vote are a breed apart. Public choice—though not that part of the field inspected by Mackie—is famously interested in the question of why a rational citizen would vote. The chance of influencing the outcome of an election is, essentially, zero, so that it appears irrational to expend any energy at all on election day. The deep problem for public choice theory is that if we cannot explain participation, then we have no business building models based on rational, self-interested actors; whether these models focus on political

---

<sup>25</sup> This is the essence of Condorcet’s Jury Theorem, discussed at some length in Saul Levmore, *Voting with Intensity*, 53 *Stan L. Rev.* 111, 142–49 (2000).

or economic behavior, they are all suspect. But there is also a problem for democracy. If the best explanation for voter participation treats voting as a form of consumption,<sup>26</sup> then the product of such consumption decisions by a fraction of the eligible voters might not deserve much respect.

Agency problems present different problems for democracy's defenders. For most of us, agency problems make democracies yet less perfect, much as they add costs to most things we value, but we have no reason to prefer dictatorships or ubiquitous supermajority rules any more than before, inasmuch as they will suffer from agency problems of their own. But someone who sees democracy as severely assaulted by occasional cycling might also see it as vulnerable in the presence of imperfect agents. Moreover, the model builders' obsession with politicians as self-interested actors makes agency costs loom large. I might hope that politics attracts public-regarding persons, but one who thinks of all persons as self-interested must regard delegation and representation as troubling. Adam Smith, and the profession that followed him, was able to advance the idea that numerous selfish actors might, without realizing it, form socially useful markets. But it is much more difficult to argue that politicians, or other agents, contribute to the common good by being selfish.<sup>27</sup> It may be that such agents can be controlled at reasonable cost, and that political institutions should be understood as creating checks on these agents, but democracy would surely be even more attractive if politicians could fairly be described as out to serve the common good or, perhaps, if they could be paid in a way that aligned their economic well-being with the common good. Instead, we must hope that regular elections serve to discipline agents, and that restrictions on the ability of private principals to reach agreements with these agents can be drafted and enforced effectively. We can also fall back on the argument that any alternative to democracy will also suffer from agency problems. In any event, readers who expect *Democracy Defended* to take up this problem, or that of (rational) low participation, will be disappointed.

---

<sup>26</sup> See Michael E. DeBow and Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 *Tex L Rev* 993, 997 (1988) (analogizing satisfaction from voting one's preferences with satisfaction from consuming goods and services).

<sup>27</sup> The argument would need to be that politicians are rewarded through salaries and other means, that they keep their positions by pleasing the electorate or its median voter, and that by doing so they produce a string of Condorcet winners or "right" answers while keeping transaction costs low. But there are many hurdles to such an argument.

## IV. EMPIRICAL EVIDENCE

An important piece of Mackie's defense, and certainly the part of the enterprise to which he devotes the most effort and pages, is the argument that the problem of majoritarian incoherence, or intransitivity, simply does not materialize. William Riker had pointed to instances of congressional cycles. For example, Riker argued that there was a disequilibrium in the 1840s among three choices: an appropriation proposed by President Polk aimed at paying the Mexican army to accept a settlement of the war; the same appropriation with an amendment (the "Wilmot Proviso") providing that there would be no slavery in lands to be acquired from Mexico; and the status quo, of no appropriation (pp 241–42). Mackie proceeds with determination to debunk this evidence, and similar claims made by Riker with respect to a number of important votes throughout American history (pp 197–334). Readers with a taste for detail and for American political history will enjoy the arguments. I will not take issue with Mackie's hard work. Let us assume that Mackie is the perfect social scientist and historian, and that he has demonstrated that there is not a single example of cycling in the history of the Congress. What then should we make of the potential for "arbitrary" outcomes in the face of cycling preferences—if these cycles do not in fact arise?

Mackie's method of empirical criticism is familiar and is often found in second-generation work, by which I mean work that examines the theoretical breakthroughs of an earlier age. This is a common pattern in academic work: a first-generation insight works its way into conventional academic wisdom, and is then followed by a claim that the insight is of limited importance because it is overly theoretical, and not empirically important. The theorist tries to preempt such criticism by offering examples, or real-world applications, alongside the original insight, but the force of the theory need not, of course, depend on the quality or presence of the proffered examples.

The pattern is common in law and economics scholarship. Thus, a scholar might import the concept of moral hazard or risk aversion from the economics to the legal literature. In the first generation, the scholar "explains" or models things such that the reader can see that law may reflect, or appear to react to, these ideas. Thus, American law famously declines to reward rescuers or to penalize those who fail to effect (even easy) rescues. The law and economics scholar stresses behavioral effects, and introduces ideas like moral hazard and risk aversion by suggesting that law offers no rewards to rescuers because to

do so might generate excessive expenditures by rescuers.<sup>28</sup> The argument might extend to the claim that more “accidents” would be generated in the presence of rewards, as reward seekers might actually create situations where rescues would be required. Nor does law penalize a failure to rescue, the argument continues, for fear that potential (genuine and altruistic) rescuers will avoid locations where rescues are likely to be needed because of the threat of liability or other penalty.<sup>29</sup>

In the second round of scholarly consideration, a critic can be expected to ask whether there is any empirical evidence that more accidents will be generated by rewards, or that fewer rescues will materialize in the face of risk-averse potential rescuers. The absence of empirical evidence does not, I think, necessarily make the first theorist wrong. Law might, after all, be designed with a problem in mind, and drafters or judges might simply mistake the relative importance of conflicting behavioral effects.

Note that the first-round theoretical argument is often not normative in character. I suppose that if someone proposed a change in rescue law, then empirical evidence would be important. We might be disinclined to suggest a change in law without empirical evidence as to the presence of the moral hazard problem, say, or of avoidance (of a likely rescue spot) itself. Unfortunately, it may not be clear where to look for empirical evidence; a researcher who found no reduction in beach visits following a jurisdiction’s passage of a statute penalizing a failure to rescue might find some other setting where the original behavioral argument proved profound. The presence of numerous witnesses at the beachfront may give people confidence that they will not be mistakenly penalized for a failure to rescue, or the enactment of a penalty may simply keep rational beachgoers home because they share the intuition that rescuers will stay away. But, of course, the empirical inquiry might have confirmed the original insights if it had been undertaken at a different group of beaches or in an entirely different setting. The failure to find empirical support for the proposition that rewards generate more losses, or for the notion that a penalty attached to a failure to rescue will cause an increase in the number of casualties by discouraging would-be rescuers, raises some interesting questions. But such a failure does not make the original claim useless.

But what if repeated searching turns up no evidence of the moral hazard? Observers are free to suggest that the earlier theorizing was

---

<sup>28</sup> See William M. Landes and Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 *J Legal Stud* 83, 91–92 (1978).

<sup>29</sup> *Id.* at 119–24 (noting that if shipowners were liable for failing to rescue distressed vessels, there would be less shipping).

likely unimportant, but more cautious or supportive observers might argue that the moral hazard danger is implicitly or explicitly recognized in the world, so that there is no natural experiment. Wherever our researcher might have found the best evidence, rewards have already been withheld, and penalties not imposed, so as to avoid the very effects that the theorist predicted (or would in the future predict).

Imagine next that early theorists pointed to supposed examples or evidence in favor of their arguments as to the costs of rewards and penalties, but then closer inspection proves that these examples are beside the point or were even misreported. The theory might seem less useful because there is now some doubt as to whether supportive empirical evidence will ever exist, but there is no particular reason to dismiss the theory. A really good theory about obesity leading to heart attacks is not made useless by a discovery that the theorist's own evidence in the form of several obese patients who suffered heart attacks can be thrown out because of new evidence that what each patient experienced was not, in fact, a heart attack. William Riker's evidence that Congress engaged in cycling might have made his claims about cycling more impressive (though he did not, of course, discover cycling), but pulverizing this evidence does not make the theory wrong.

It would be another thing if, in a huge sample of obese patients, there were no heart attacks or simply fewer than in a control group. Indeed, this may be the structure of Mackie's claim: Congress engages in many votes, and if none appears to cycle, then cycling does not exist or cannot be important. There is some mystery as to where the burden of proof ought to fall. Even if it turned out that there were ten or twenty important examples in U.S. congressional history where cycling occurred, Mackie might argue that cycling is relatively unimportant because this number of occurrences is awfully small in a population of thousands of important votes. Similarly, the number of occurrences need not be zero to make the point that democracy does not produce unstable or arbitrary outcomes in any important way.

The problem, I think, is that congressional history is a terrible place to look for evidence of cycling. Mackie looks there, we might presume, because that was, for the most part, where Riker staked his empirical claim. But it was probably the wrong stage for both. Anyone with three or more strong-minded family members is acutely aware of cycling—and is likely to be of the view that cycling *will* (as opposed to *could*) appear everywhere. Any teacher who asks a class to vote on the format for a final exam, or on the date a makeup class should be conducted, would be astonished to encounter the claim that cycling is little more than a theoretical possibility. Similarly, and moving to more important votes, presidential primaries with numerous candidates of-

ten seem capable of cycling, though it is suppressed by single-round plurality voting. Pollsters who ask about hypothetical head-to-head competitions might point to likely cycles, but such polling is occasional rather than regular, and distorted by candidates' dropping out of the primaries after a poor showing in a few states. If we engaged in head-to-head competition, I think it likely that cycling would be a regular phenomenon. John Kerry might not have defeated every other candidate in pairwise competition in Iowa and in other caucuses and primaries in 2004; Jimmy Carter (1976), George H.W. Bush (1988), Bill Clinton (1992), and Ronald Reagan (1980) hardly seem likely to have been Condorcet winners in the full fields in which they might have competed at the party level. Multiple-candidate general elections might also produce frequent cycling; at various points in 2004, John McCain might have been able to defeat both George W. Bush and John Kerry in round-robin voting, in a general rather than one-party vote.

The reason that cycling is easier to identify in informal votes and in multiplayer primaries is that, in these contexts, range is less restricted than it is in Congress. Our two-party system, with some discipline, suppresses cycles in November elections very much as it restrains them in Congress. Motion-and-amendment voting further buries cycling. It asks a legislative body to vote yes or no, and with but two alternatives, cycling is impossible.<sup>30</sup> Nor is it possible to have numerous alternatives on the table at once.<sup>31</sup> Finally, members can normally move to divide questions, so that pieces of a bundle will be voted on one at a time, and this too is likely to reduce or eliminate potential cycling.<sup>32</sup>

We might expect the most frequent cycling in informal multiperson settings, next most in primaries with numerous candidates, some on the Supreme Court,<sup>33</sup> and the least in Congress—where parties,

---

<sup>30</sup> I have argued that the very point of the motion-and-amendment procedure might be not only to uncover Condorcet winners but also to suppress evidence of cycling, lest it lead to a dissatisfied and depressed citizenry. It is not simply the head-to-head format that suppresses evidence of cycling, but also the common restriction on reintroducing defeated alternatives. If motion A loses, and then motion B is defeated, in consecutive up or down votes, and motion C is then passed, it is not normally permissible to reintroduce A without supermajority support, though A might be preferred to C. See Levmore, 75 Va L Rev at 1022 (cited in note 14). This observation about motion-and-amendment voting suggests, in passing, that if we are to observe cycling in legislatures, it will need to be over time.

<sup>31</sup> *Id.* at 1022, 1026–27 (describing restrictions on the reintroduction of questions already decided, and theorizing that multiple alternatives are permitted precisely where a Condorcet winner is unlikely).

<sup>32</sup> *Id.* at 1004–07 (discussing rules on dividing the question).

<sup>33</sup> Cycling on the Supreme Court has become a subject of serious study, after some theorizing in an earlier generation. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv L



committees, and parliamentary rules all work to limit range. I have suggested elsewhere that this might not be accidental, and that range or pairwise comparison is restricted precisely where cycling is most likely.<sup>34</sup> But I will not rehash that argument here, nor argue about the frequency of cycling in given settings. I think it obvious that we would expect cycling to be less likely in Congress than in other settings. But the point is not simply to redirect empirical inquiry. It is to draw attention to the ways in which law pushes cycling further back in the decisionmaking process, and thus suppresses evidence of cycles in the most visible political and legal institutions.

## V. CONSTITUTIONAL STRUCTURE

I have already drawn attention to the ways in which a two-party system, motion-and-amendment voting, and rules against reintroduction limit consideration of multiple alternatives over which cycling is likely in a legislature. But the work of suppression is also done by many other rules, and an interesting empirical inquiry would aim to discover the relative contributions of these various tools. Moreover, I suspect that we have yet to discover many causes of “noncycling.” Consider, for example, single-subject restrictions, which require votes to be taken one matter at a time unless another subject is “germane.” Many state legislatures operate under such a restriction,<sup>35</sup> though germaneness is a slippery concept.<sup>36</sup> Referenda and constitutional amendments also, and more famously, normally require single-subject consideration.<sup>37</sup>

One explanation, or rationalization, for this rule comes from the literature on unconstitutional conditions, and it is that the ability to

---

Rev 802, 811–31 (1982) (applying Arrow’s Theorem to analysis of the Supreme Court and concluding that it explains the inevitability of institutional inconsistency over time). But cycling may also be suppressed at the Court, and stare decisis and standing rules may be the leading means of such suppression. See Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 Cal L Rev 1309, 1356–57, 1363–64 (1995).

<sup>34</sup> See Levmore, 75 Va L Rev at 1025–26 (cited in note 14) (noting that succession voting, rather than motion-and-amendment voting, is most likely to be employed when there are a large number of available alternatives for filling blanks).

<sup>35</sup> See Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 Harv J on Legis 103, 114–16 (2001) (describing the single-subject rule in state legislatures).

<sup>36</sup> For an example of a (flexible) court wrestling with germaneness, see *Kennedy Wholesale, Inc v State Board of Equalization*, 53 Cal 3d 245, 279 Cal Rptr 325, 330–32 (1991) (concluding that a tobacco-related initiative was valid, even where some of its spending measures were not directly related to tobacco).

<sup>37</sup> See, for example, Philip L. Dubois and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons* 127–29 (Agathon 1998); Daniel H. Lowenstein, *California Initiatives and the Single Subject Rule*, 30 UCLA L Rev 936, 949–53 (1983).

attach conditions, or logrolling of a sort, empowers factions.<sup>38</sup> Poorly organized majorities might more often prevail when given the opportunity to vote on matters one at a time. But single-subject restrictions might also limit cycling. One way to break up an apparent Condorcet winner is to divide the majority with a second subject, which may or may not be truly germane to the first. If, for example, foreign aid to Egypt is preferred over aid to either Greece or Turkey, then a dissenter who hoped to break up the seemingly invincible pro-Egypt coalition might add an amendment to the aid bill. Imagine an amendment to add three consular positions in Egypt, or one consisting of a resolution that called on the European Union to admit Turkey to its membership. Such add-ons might seem relevant to some voters, and even germane to courts (though we do not have single-subject restrictions on congressional bills). It is easy to see that these amendments could reduce support for the aid component and lead to cycling. In turn, a single-subject restriction can block this strategy and thus reduce cycling.

I do not mean to argue that single-subject restrictions are either good or bad—even if courts could rule on germaneness in a coherent and evenhanded fashion. Nor is the point to attack or defend democracy. It is, instead, to give a casual example of how public choice theory can inform constitutional law and invigorate comparative constitutional work. A variety of our institutions and rules can be seen against the backdrop of Arrow's Theorem, and from this perspective it is apparent that they restrict range or otherwise reduce cycling and instability. I should say that it is possible that single-subject restrictions do not reduce cycling, and indeed it is even plausible, though I think unlikely, that they exacerbate the "problem" of cycling by disallowing compromises that would emerge as Condorcet winners. Mine is an intuition, and empirical inquiry directed at this question might inform us as to the net effect of this and other rules.

Mackie, I should report in passing, is a devoted advocate for the unimportance of cycling rather than an inquirer into constitutional structure. To take but one example, he makes the very interesting point that deliberation can sometimes reduce numerous alternatives

---

<sup>38</sup> See Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv L Rev 4, 23–24 (1988) (noting the potential for majority factions to impose conditions that are onerous on minority factions). See also Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U Pa L Rev 1293, 1351–54 (1984) (focusing on the idea of evaluating conditions with historical baselines, but touching on the way in which conditions restrict sets of choices); Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 S Ct Rev 309, 349 (suggesting that the doctrine of unconstitutional conditions functions as a control on externalities).

to two (pp 389–92). A legislature or other group might be on its way to cycling with numerous alternatives, but deliberation might lead the group to see the advantage of some proposals over others on the table, or to see that some intense preferences can be satisfied with modest compromise. But, of course, it is also true—as Mackie must surely have seen—that deliberation can increase the propensity to cycle. We have all been in groups that thought they were voting on A versus B, until deliberation revealed clever “compromises,” or other options, that divided and reorganized voters and produced cycles where none seemed present in the first place. Deliberation and single-subject restrictions thus have something in common. We do not gain much by insisting that either of these realities, unincorporated as they are in Arrow’s Theorem, Condorcet’s work, or other centerpieces of public choice theory, ruins Arrow’s Theorem or destroys or defends democracy itself. We can, however, benefit from examining ways in which these and other facts on the ground promote or reduce consistency. With this information in hand, we might even advance arguments about whether such practices do more good than harm, and where they might best be encouraged.

## VI. LAW AND EMPIRICAL EVIDENCE

Political scientists, including Gerry Mackie, are obviously doing important and interesting work in evaluating and even debunking empirical claims about cycling in Congress. *Democracy Defended* makes a great deal of the absence of such cycles. My own intuition, developed by extrapolating from the world of informal votes and presidential primaries, is that cycling would occur often in Congress if permitted to develop. But other reasonable people might think that the basic theories are much less interesting if we see little evidence of cycling in Congress—and especially if the absence of cycling continues in periods when party discipline seems relatively weak. Still, these different reactions need not be seen as defending or attacking democracy. Political scientists have their own parochial reasons to battle over these things, but lawyers need not do so. Citizens and academics with an interest in constitutional structure have a great deal to gain from a public choice perspective, though empirical evidence from the public choice industry is likely to play but a small role.

This clash between theorists and empirical evidence, or between theorists and skeptics, optimists, or revisionists, as the case may be, is repeated almost everywhere an interesting insight appears in the world of law. In areas ranging from capital punishment to gun control, from speed limits to term limits, and from school vouchers to no-fault insurance, empirical evidence plays a remarkably small role in forming or changing views. It is easy to say and believe that empirical evidence

is important, but it might be fairer to say that we wish it could be so. At the very least, however, we can hope that our empiricists look for evidence where it is most likely to be found.

For some time now, academic lawyers have thrived on interdisciplinary study. Ours is an industry that has become accustomed to the manner in which law appropriates developments in other disciplines. The most frequent partners, often willing but sometimes not, have been economics, political science, and psychology, and such subfields as game theory, options, public choice, international relations, decision theory, and behavioral theory. The pattern is rather predictable, though I do not mean to make this style of scholarship look easy or trivial, for it is not. A law professor reads about an insight in one of these allied fields, such as the tendency of humans to give too much weight to recent experiences. Our legal academic then searches, as it were, for a legal application. At times the connection will produce normative work, perhaps of the form: "Judges should do X, because people on their own will do Y (citing the social science literature), and Y is something they would wish to be protected from." In other settings, or perhaps simply in different hands, the interdisciplinary venture will be positive in style, and perhaps of the following form: "Rule Q in law seems ill-formed or puzzling, but it may well be optimal once one realizes that people on their own would do Y, which is socially undesirable."

Interdisciplinary work has thus made academic law a profession in which there is a substantial payoff to versatility, and perhaps even to versatility over genuine expertise. The biologist, anthropologist, or psychologist who reads about information-forcing rules in the literature on contract law or about the different deterrence effects, if any, between strict liability and negligence in tort law, is unlikely to find this knowledge of much use when it is time to produce the next scholarly work in the reader's own discipline. In contrast, the law professor and lawyer who read in these other disciplines can take almost every new theory to the office. I suspect that this is so because law is a discipline that, more than any other, pays attention to how it took its present shape, how it can be understood, and how it might be reshaped. A lawyer might take from this Review an appreciation of the role single-subject restrictions can play in preventing cycling and unstable majorities, but this insight about constitutional structure may be of little use to the social scientist. Nothing in Mackie's book will or ought to dampen the lawyer's enthusiasm for interdisciplinary gain. The danger is that the work will be cited as standing for the proposition that voting paradoxes and Arrow's Theorem are theoretical moves with no real-world basis, and that law professors and their students will then choose to do without a truly important set of tools.