PUBLIC CHOICE, PHENOMENOLOGY, AND THE MEANING OF THE MODERN STATE: KEEP THE BATHWATER, BUT THROW OUT THAT BABY

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INTRODUCTION

Every political theory is premised on a psychology. The term "politics" refers to relationships among human beings, and such relationships cannot be described without a theory about the way that human beings behave. Some political theorists are explicit about their psychological presuppositions. Aquinas turned to law and politics in Summa Theologiae only after an extensive explication of the soul, intellect, and appetites.1 Hobbes devoted the first quarter of his Leviathan to a discussion "Of Man" before proceeding to "The Commonwealth."2 Raft prefaced his Metaphysics of Morals with the more influential Groundwork.3 Other theorists provide no such analysis—Montesquieu plunged into his discussion of laws4 and Robert Dahl into his discussion of democracy5 without psychological preliminaries—but these discussions are no less dependent on a theory of human behavior. Montesquieu premised his discussion on the idea that climate and culture shape people’s preferences while Dahl treated people as being governed by fixed and largely self-centered interests.

A psychology is not enough, however. While political science involves human beings, it is not a study of human beings in their individual capacity. Rather, it is the study of group behavior—of the governance institutions, ephemeral or permanent, static or dynamic, that human beings create, and of the collective actions in which they engage. Individuals can influence the politics of a nation, but only if

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1 St. Thomas Aquinas, Summa Theologiae (Fathers of the English Dominican Province trans., R&T Washbourne, Ltd. 1911).
they lead an institution or a social movement.6 Thus, a political theory must explain how individuals join together to form these institutions or movements, as well as the way in which individual psychology expresses itself in group behavior. This is the notorious macro-micro problem of social science.7

Legal scholars who identify themselves with public choice theory have been quite explicit about the microeconomic, or "Chicago School" psychological model that underlies their work.8 The essential and familiar components of this model are that human beings are instrumentally rational and motivated by self-interest.9 Consequently, they will try to maximize their self-interest in any situation,10 and will do so in a manner dictated by general principles of rationality.11 These two premises are linked to group behavior through the principle of methodological individualism, the claim that all such behavior is the result of individually identifiable action.12

6 For discussions of social movements in American sociology, see, for example, John D. McCarthy & Mayer N. Zald, THE TREND OF SOCIAL MOVEMENTS IN AMERICA (1973); Alberto Melucci, Nomad of the Present (John Keane & Paul Mier eds., 1989); Anthony Giddens, SOCIAL CONFLICT AND SOCIAL MOVEMENTS (1973); Alain Touraine, THE VOICE AND THE EYE: AN ANALYSIS OF SOCIAL MOVEMENTS (Alan Duff Virtue, Cambridge Univ. Press 1985).
10 Dennis C. Mueller, Public Choice II. 74 CORNELL L. REV. 1-9 (1989) ("The basic behavioral postulate of public choice, as for economics, is that man is an egoistic, rational, utility maximizing.").
11 Maximization is not a separate premise, but a consequence or implication of the premise that human beings are instrumentally rational. As David Gauthier stated: "Practical rationality in the most general sense is identified with maximization. Problems of rational choice are thus of two well-known mathematical types: one seeks to maximize some quantity subject to some constraint." DAVID GAUTHIER, MODELS OF AGREEMENT 25 (1986).
12 For general statements of this view, see Gary S. Becker, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1970); William H. Miller, Political Science and Rational Choice, in Perspectives on Positive Political Economy 168, 170-77 (James E. Alt & Kenneth A. Shepsle eds., 1990).
13 See James M. Buchanan & Gordon Tullock, THE CALCULUS OF CONSENT 13-14 (1962); Jon Elster, Introduction to Rational Choice 1, 5 (Jon Elster ed., 1986); Dennis C.
On the basis of these premises, legal scholars assert that public choice can predict political action. Because people are self-interest maximizers, they will always move in a direction that can be determined by external observation; because they are instrumentally rational, the means they select to move in this direction can be determined by any rational observer familiar with their situation. Consequently, public choice advocates claim that the theory promises to make political science a true science for the first time in its history.

The microeconomic model has never been uncontroversial, but the controversy has intensified as the proponents of that model have salied forth from their home territory of economic action and attempted to conquer new fields such as sociology, political science, and law. The counterattack to this movement has been so intense that both essential premises of microeconomics are now regarded as inviolable by a large part of the social science, psychology, and philosophical communities. As a result, some legal scholars reject public choice in its entirety, arguing that it is based on an unrealistic and perverse conception of human behavior. The majority of legal scholars, however, reject the microeconomic model but acknowledge that rationality and material self-interest explain some human actions in both the economic and political realms. In their view, one should not throw the public choice baby out with the bathwater. Rather, one should make use of public choice to the extent that its insights are persuasive, and look elsewhere when its conclusions cease to be convincing.

In this Article, I argue that rejecting the microeconomic model of human behavior has more severe consequences for public choice theory. The problem is that the microeconomic model implies a particular and contestable image of society. Once theorists acknowledge the
empirical weaknesses of the microeconomic model and reject its premises as a convincing account of human behavior, the image of society that forms the foundation of public choice analysis is open to attack. As a result, public choice theory cannot simply be modified by using a more complex and empirically accurate model of human behavior. Rather, political scientists and economists must reassess the theory in its entirety. They must begin with an alternative model of society, a different starting point for political analysis. The alternative will depend, as always, on the psychology that underlies it, and on the way that psychology is linked to group behavior.

The psychology that I propose as an alternative to the microeconomic model is based upon phenomenology. This model preserves the principle of instrumental rationality as a component of behavior, and also preserves the principle of methodological individualism as a solution to the macro-micro problem. Because both of these premises are highly attractive, their retention represents a significant epistemological advantage. Phenomenology diverges from public choice theory by challenging the second microeconomic principle of behavior, the idea that people are motivated entirely by self-interest. The alternative it proposes resolves most of the empirical difficulties that have besetted public choice, but also generates a different model of society in general.

This alternative model of society serves as the basis of this Article. The critique of public choice on the ground that its behavioral premises are unconvincing is already familiar, and widely accepted. What I want to argue is that the image of society that these premises imply is equally unconvincing, specifically because it misinterprets the basic nature of the modern administrative state. Replacing the microeconomic model with a phenomenological one thus provides a different and more convincing account of contemporary government.

Focusing on public choice’s image of society provides a means of refuting the most sophisticated effort to rescue public choice from the implausibility of its behavioral premises. Proponents of public choice sometimes argue that only the microeconomic model of human behavior provides predictability in political theory, and is worth retaining on that ground alone. It is advantageous, they maintain, to accept the microeconomic model of behavior to see how far it will lead and how much it can explain. The explanations obtained from this inquiry will reflect our most reliable form of knowledge, that is, knowledge that leads to confirmed predictions. Whatever remains, whatever cannot be explained by the microeconomic model, can be consigned to less satisfactory, less scientific explanations, and to the

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17 See Greer & Shapiro, supra note 14, at 51.
The unfortunate complexity of human behavior. This approach may be called presumptive public choice. 18

If the criticism of public choice's behavioral premises translates into a criticism of the image of society which sets the framework for public choice analysis, however, then the theory cannot be used in this presumptive manner. It is defective from the outset, and all its conclusions, no matter how fully they seem to be confirmed, will suffer from this same defect. Even if public choice theory advances predictions that are subsequently confirmed, those predictions may be nothing more than tautologies that confirm themselves, or observations that are better explained by an alternative approach. Even more basically, the underlying premise that accurate prediction is the test of a theory's validity is itself open to question. It is a pre-analytic assumption of public choice scholarship that depends on the same positivist behavioral premises as public choice itself, and it is subject to the same objections.

This does not mean that all of the conclusions reached by public choice scholars are wrong, or that the motivations that public choice ascribes to human beings never occur. Rather, the point is that its premises and conclusions should be set within a different analytic framework as special cases of a more general situation that must be described in other terms. This approach preserves some of public choice's insights, but in a diluted form; it keeps the bathwater but discards the baby.

Part I of this Article describes the public choice theory of human behavior. Part II offers an alternative theory of behavior, grounded in Husserl's phenomenology. Part III describes and compares the rival images of the state produced by these two behavioral theories. Part IV considers the implications of the two images for the agenda of legal scholarship.

I

The Public Choice Theory of Human Behavior

The behavioral premises of the microeconomic model on which public choice relies are familiar, and are the subject of an enormous scholarly literature. Nonetheless, it is useful to describe them briefly. The first premise, which the microeconomic model shares with all other rational choice theories, is the concept of instrumental rationality—namely that people try to achieve their goals in an optimal fashion. This is Weber's concept of instrumental rationality. In place of the utilitarian concept of reason that is so prominent in the Western

philosophical tradition, Weber treated rationality as a mode of social action and identified two different types. The first, instrumental rationality, is "determined by expectations as to the behavior of objects in the environment and of other human beings."19 The second type, values rationality, is "determined by a conscious belief in the value for its own sake of some ethical, aesthetic, religious, or other form of behavior, independently of its prospects for success."20 In other words, instrumental rationality is a mode of social action that determines the optimal means to achieve a particular end, whereas values rationality is a mode of social action that determines the end itself.21

The microeconomic model adopts this premise that people pursue their goals by acting in an instrumentally rational manner. In the absence of further assertions about human behavior, it is what John Ferejohn has referred to as a "thin" theory of rationality.22 All it argues is that people adopt the optimal strategy to achieve their goals,23 and that their goals are transitive and stable.24 Of course, it does not propose that people never make mistakes; the strategies that they

20 Id. at 24-25.
21 While Weber identified this mode of rationality and recognized its power, he certainly did not approve of it. For Weber, instrumental rationality without value rationality was an iron cage, an unconsidered and unsatisfying way to live one's life. Max Weber, The Protestant Ethic and the Spirit of Capitalism 181-88 (Talcott Parsons transl., Scribner 1958). According to Weber:

[...] the idea of duty in one's calling grows about in our lives like the ghost of dead religious beliefs. Where the fulfillment of the calling cannot directly be related to the higher spiritual and cultural values, or when, on the other hand, it need not be felt simply as economic compulsion, the individual generally abandons the attempt to justify it as all. In the field of its highest development, in the United States, the pursuit of wealth, stripped of its religious and ethical meaning, tends to become associated with purely mundane purposes, which often actually give it the character of sport.

23 See Gatfield, supra note 10, at 36-86; Mancur Olson Jr., The Logic of Collective Action 95 (1965); John C. Hartwig, Advances in Understanding Rational Behavior, in Rational Choice, supra note 12, at 81, 83-87.
24 See Arrow, supra note 7, at 11-17; Ekeland & Frisch, supra note 16, at 45-47. Transitivity means that if the actor prefers A to B and B to C, she will prefer A to C. Stability, or invariance, means that the actor's choices do not change on the basis of the way the choice is presented, or the actor's choice of strategy for achieving it.
adopt are optimal only within the constraints that act upon them. People must function with limited knowledge, within limited time, and with limited cognitive abilities, but the suboptimal choices that result from these limitations do not violate the premise of human rationality. We would describe a chess player as adopting an instrumentally rational strategy to achieve the goal of winning his game even if he did not know all the standard openings and lacked both the time and the intelligence to devise effective moves. He would be acting irrationally only if he did not make his own best move, defined as the move he was capable of making that was most likely to achieve his goal of winning. Similarly, the requirement of stable preferences does not mean that people cannot change their preferences over time to reflect altered circumstances or personal development. What would violate the principle of instrumental rationality would be to change one's goal as a result of the way the choice is presented, or as a result of one's own choice of strategy. Our chess player, for example, would be acting irrationally if he decided he no longer wanted to win once his unskilful quality of play cost him his bishop. The old joke about the man looking under a street light for a key he had dropped somewhere else because he could see better under the light is another example of this irrationality. Although this sort of behavior relates to goals, it can be treated as a failure of instrumental rationality, because changing one's goal for irrational reasons destroys the instrumental nature of the strategy.

Herbert Simon, and subsequently Oliver Williamson, have attacked the instrumental rationality component of the microeconomic model. They have argued that people's cognitive capacities are generally too limited for them to make optimal choices, even allowing for the constraints of time and information. According to Simon, individuals confronted with a complex array of options do not attempt to optimize; instead they satisfy, using heuristics to reach an acceptable solution. Mark Seidenfeld describes this as cognitive loading.

27 This is similar to the issue of a divergence between revealed and expressed preferences, because the chess player's expressed preference, as stated at the outset, is to win, and he has no rational basis for changing it. See Coase, supra note 10, at 28 ("If a person's revealed and expressed preferences diverge, then her values are confused and she lacks an adequate basis for rational choice.").
29 Simon, supra note 27, at 3-8.
Jeffrey Rachlinski and Cynthia Farina attribute it to cognitive illusions. It means that our chess player would not even think through all the plausible moves to the best of his limited knowledge, intelligence, and time; instead, weary or impatient with the effort, he would make the first non-disastrous move that occurred to him, or adopt some unproven heuristic (i.e., never move the same piece twice in a row). Impaired decisionmaking of this sort is sometimes described as bounded rationality, a term also used to describe the constraints on optimal decisionmaking (such as limited information) that a fully rational person experiences, and that comport with strictly neoclassic microeconomics. For clarity, scholars who use this term should specify whether they are referring to constrained decisionmaking or impaired decisionmaking, that is, to decisionmaking that is subject to informational and processing constraints, or to decisionmaking that is less than optimal even when such constraints are taken into consideration.

A second line of attack on the behavioral premise of instrumental rationality has come from cognitive psychologists, most notably Kahneman and Tversky. In a series of laboratory experiments, they discovered that people tend to rely heavily on heuristics, that their decisions are strongly influenced by extraneous factors, and that they do not even exhibit stable preferences. Instead, they suffer from a variety of cognitive illusions, such as the endowment bias, the hindsight bias, and the optimism bias. Thus, our chess player, in addition to following rules of thumb, will make a different move if his opponent moves his piece slowly rather than quickly, or will decide, after the opponent makes a particularly effective move, that he did not want to win the game at all, but only make it interesting.

These critiques of instrumental rationality seem convincing, but it is somewhat difficult to know what one should do with them. Certainly, they serve as a useful caution against naive assumptions of instrumental rationality. Additionally, these criticisms cannot be readily dismissed with the microeconomic argument that a functioning market will eliminate actors who consistently make suboptimal choices through the Darwinian process of competition. As rational choice

theorists readily, and even enthusiastically acknowledge, this process will not operate fully if the market is inefficiently regulated or otherwise impaired, and may not operate at all in non-market situations such as governmental action. Moreover, transaction costs, agency problems, path dependence, and network externalities make markets much less responsive than neoclassical economics claims.

The problem with this critique of instrumental rationality is that its scope and boundaries are indeterminate. As William Estes and John Perejohn observe in this symposium, it is difficult to know which bias will operate in a given situation. Moreover, few critics would be willing to abandon the idea that people are instrumentally rational on some occasions. If there are numerous examples of irrational behavior, there are certainly numerous others, perhaps a majority, where people's behavior perfectly comports with the model of instrumental rationality. When playing chess, most people play as hard as they can, and play to win. On reflection, as Lisa Heinzerling and Frank Ackerman note, the irrational behavior that cognitive psychologists observe occurs in a laboratory setting, where people lack the contextual clues that guide them in ordinary life. Finally, quite apart from the empirical problems with abandoning instrumental rationality, the epistemological problems are quite formidable. After all, how do we, as observers, know that someone is behaving irrationally unless we ourselves are capable of rational thought and can compare their behavior to the instrumentally rational solution?

The second behavioral premise of public choice theory is that individuals, in addition to being instrumentally rational, are utility maximizers. This premise incorporates the thin theory of rationality that represents public choice's first behavioral premise, but thickens this theory by asserting that rational actors are interested in maximiz-

ing a particular type of goal. In philosophic terms, it is related to the principle of egoism. 45

Several bodies of scholarship that are sometimes associated with public choice do not assert this additional behavioral premise. Social choice theory, which focuses on the aggregation of individual preferences, generally proceeds by recognizing that people have different preferences that they are attempting to realize, without making any assertions about the nature of those preferences. This approach has produced a number of notable findings, some of which are directly relevant to law. For example, social choice theory is used to explain how different voting schemes reflect or fail to reflect the preferences of the voters. 46 Another methodology based on rational choice is positive political theory. 47 It assumes that political actors like Congress or the President are motivated by the desire to maximize the implementation of their positions, but it does not depend on any particular assertion about the nature or origin of those positions. 48 This behavioral assumption is not fully realistic, and furthermore abandons the principle of methodological individualism. Nonetheless, it permits the direct application of game theory, a powerful mode of mathematical analysis, to political issues. Once again, many of its findings are directly relevant to law.

Precisely which of these rational action theories constitute "public choice" when applied to political issues is an open question, 49 although it is probably an uninteresting debate that can quickly be resolved by terminological clarity. But the term "public choice," as it appears in legal scholarship, refers to a thick rational action theory.

40 See supra note 22 and accompanying text. The incorporation is "a matter of practice, not logic. In theory, one could maintain that individuals are entirely self-interested, but are not rational about those self-interests. While there are a number of empirical studies that perceive such behavior, see, e.g., Colin M. Turnbull, The Mountain People (1971), it has not become the basis of a scholarly methodology.

41 See supra notes 10, at 86-87; W.D. Falk, Moulin, Selig and Others, in ETHICS 349, 571-75 (Judith J. Thomson & Gerald Dworkin eds., 1968); Allan C. MacIntyre, Epistemology and Ethos, in ENCYCLOPEDIA OF PHILOSOPHY 602, 603-61 (Paul Edwards ed., 1977).


44 For example, the Prisoner’s Dilemma, one of the standard tools of positive political theory, works just as well with sharits as it does with egoists. Assume that St. Peter and St. Andrew are both assigned by the Roman. Each is perfectly content to be martyred, but intent on saving the other. Denied the ability to communicate and given only one chance to play, they will end up with the same sub-optimal result as rational egoists; each will confess to Christianity to save the other, with the result that both will suffer a greater penalty than they would have had they remained silent.

that incorporates the additional premise of the microeconomic model, namely that people are motivated by the desire to maximize their self-interest.\footnote{See infra note 8.} Perhaps this results from the influence of Richard Posner,\footnote{See Posner, supra note 20.} or perhaps it reflects a deeper set of ideological commitments on the part of the scholars who adopted the microeconomic model. Certainly other rational action theories have appeared in legal scholarship—Claire Finkestein,\footnote{Claire O. Finkestein, Doing: A Philosophical Account of the Defense in Law, 37 ALQRI L. REV. 201 (1995); Claire Oleson Finkestein, On the Obligation of the State to Extend a Right of Self-Defense to its Citizens, 14 U. PA. L. REV. 1801 (1996).} Heidi Hurd,\footnote{Heidi Hurd, Legal Choice-Making in a Comparative Context, 93 YALE L.J. 1557 (1984).} Leo Katz,\footnote{Leo Katz, The Structure of the Social Lawyer, 70 MINN. L. REV. 117 (1985).} and Michael Moore\footnote{Michael Moore, Rights, Justice, and Political Theory, 63 J. POL. 449 (2001).} have used the thin theory of rationality to analyze certain jurisprudential issues; social choice theory has been used by Saul Lewinere,\footnote{Saul Lewinere, Role of the Public in the Process of Legal Change, 66 Va. L. Rev. 787 (1980).} Frank Easterbrook,\footnote{See infra note 20.} and William Mino,\footnote{See infra note 20.} and positive political theory has been used by Daniel Rodriguez and William Eskridge and Philip Frickey.\footnote{See infra notes 20 and 21.} None of these works, however, are typically regarded by legal academics as public choice scholarship. Within legal scholarship, public choice is used, with reasonable consistency, as a reference to the Chicago School model.\footnote{See infra note 20.}
There is a deep ambivalence within public choice scholarship about whether the interests that constitute self-interest for the purpose of its behavioral model are limited to material matters, or whether they extend to such discernible concerns as power, prestige, and leisure.\(^7\) Each position has its virtues, but each suffers from such serious defects that public choice scholars are continually motivated to oscillate between the two, thereby avoiding the crushing blow that they would suffer if they remained in one position by slipping away to the refuge of the other, or using the oscillation to create the illusion that both positions can be simultaneously maintained, as a sort of conceptual catchall.

The advantage of asserting that all human behavior results from the desire to maximize material self-interest is that such behavior is easy to understand, subject to fairly unambiguous observation, and easily modeled in terms of maximization.\(^8\) The disadvantage is that this model of human behavior is entirely implausible and readily disconfirmed in almost every effort to extend it beyond the economic realm. Within the political sphere that constitutes the subject matter of this Symposium, material self-interests: models have been energetically proposed and convincingly refuted in such disparate areas as voting behavior, social movement participation, legislative action, and judicial decisionmaking.

For instance, public choice scholars have hypothesized that citizens vote on the basis of their material interests.\(^9\) Yet for the past 2400 years, political theorists have wondered about the question raised in Aristotle’s *Politics*,\(^60\) why the majority of voters in a democratic polity do not vote for the radical redistribution of wealth from...
the wealthy to the general population. Studies of voting behavior repeatedly demonstrate that people do not vote in accordance with their economic self-interest. 61 A more recent conundrum, at least for thoroughgoing rational choice theorists, is why individuals take the trouble to vote at all, given the unlikelihood, even (or perhaps especially) after the recent presidential election, that their votes will affect the outcome. 62 With respect to social movements, Manuel Olson employed a material self-interest model in a 1965 book to explain why certain groups could coalesce to produce politically effective organizations, while other groups could not. Olson concluded that such organizations can be created and maintained if the group's members have an economic stake in the organization's goals, and the political entrepreneurs in charge can police the movement to avoid free-riding that is, gaining the benefits of group activity without incurring the cost of participation. 63 By 1968, however, this creative explanation was disconfirmed by the rise of the environmental, peace, and anti-nuclear movements, whose members generally had no direct economic stake in the movements' goals and participated enthusiastically without any policing mechanisms. 64 The subsequent development of the animal rights movement, the anti-abortion movement, the prisoners' rights movement, and the expansion of older efforts such as the international human rights movement emphasizes the point. 65 Theorists of

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61 In order to win the favor of the multitude [democratic leaders] trust the nobles unjustly and cause them to unite. Sometimes they make them split up their possessions or income in order to flatter public duties; sometimes they bring diabolical accusations against the rich with a view to confiscating their money. 

id. bk. V, v, at 311. Significantly, Aristotle defines democracy as the rule of the poor over the rich, not the rule of the many over the few, although he observe that the first will typically imply the second. Id. bk. III, vili & IV, iv, at 190-92, 244-45.


64 See Olson, supra note 23.

65 For discussions of these movements, see DAVID CONTRADICT, PEACE WORKER: THE CITIZEN'S ROLE IN ENDING THE COLD WAR (1990); BARBARA EMPATHY, POLITICIZE. PROTEST AND CULTURAL RESISTANCE (1991); ANDREW JASSMINE et al., THE MAKING OF THE NEW ENVIRONMENTAL CONSCIOUSNESS (1992); THOMAS R. ROCHON, MODELING FOR PEACE: THE ANTI-NUCLEAR MOVEMENTS IN WESTERN EUROPE (1985); STATES AND ANTI-NUCLEAR MOVEMENTS (Herbert H. Kitson ed., 1994); Stephen Corson & Andrew Dent, Environmental, Middle-Class Radicals and Politics, 28 Soc. Rev. 353 (1980).

66 For background on these movements, see HAROLD D. GUTH, ANIMAL RIGHTS (1998); JAMES M. JAMES & DONALD NEWDR, THE ANIMAL RIGHTS CRUSADE (1993); KRISTEN LAMBE, ABDICTION AND THE POLITICS OF MOTHERHOOD (1984); SUSANNE STACEYHORN, THE PRO-CHOICE MOVEMENT (1991). This observation can probably be generalized to the great ma-
social movements, particularly the resource mobilization school, have benefitted greatly from Olson’s insights, but few accept his univalent explanation of human motivation. Instead, they recognize that motivations such as social solidarity, identity formation, and ideological commitment can take the place of material self-interest. 68

Public-choice scholars sometimes assert that legislators are motivated solely by their desire to get reelected, 69 that is, their desire to obtain the material benefit of retaining their jobs. Yet almost every political scientist who has interviewed actual legislators has concluded that they display a variety of motivations, of which reelection maximizing is only one. 66 Most elected officials are quite concerned about reelection. Some—the “hacks” in William Mair’s study 67—are predominately motivated by a desire to be reelected. Yet ideology, respect from colleagues, and the desire to act conscientiously have all been empirically confirmed as determinants of political behavior. 68 Federal judges present an even more serious problem for the material self-interest model because their entire mode of compensation and tenure is designed to insulate them from material incentives. Landes and Posner initially postulated that judges act independently because

66 While issues of identity are more prominent in the Continental School of social movement studies, the importance of ideology is well recognized within the American, or resource mobilization, school. See, e.g., Gerald Markel & Pamela Oliver, The Critical Mass in Collective Action (1993); David McAdam, Freedom Summer (1989); Andrew S. McFarland, Common Cause (1984); John Wilson, Introduction to Social Movements (1971). Two of the leading scholars in the American school define a social movement as “a set of opinions and beliefs in a population representing preferences for changing some elements of the social structure or social relations, or both, of a society.” John D. McCarthy & Mayer N. Zald, The Nature of Social Movements (1977) (arguing that “reelection is the primary goal of the representative that the constituency controls”).


68 William K. Mish, Jr., Legislature: California’s School for Politics 150-77 (1985).

69 Id. at 155-56.
the legislature will reward them with higher salaries, but even Poster has since retreated from this implausible position. The advantage for public choice scholars of allowing a broader range of interests, such as power, prestige, or leisure, to count as self-interest is that it avoids many of these empirical implausibilities. One can then say that people have a taste for voting, that legislators seek prestige, and that judges like to inform events. The plausibility of this approach is that one then relinquishes public choice's claim to predictive ability and even conceptual coherence. Public choice scholars often assert that their approach is superior to other social science methodologies because it generates definitive predictions that researchers can confirm or disconfirm. Once one allows for the inclusion of disparate interests by substituting a general concept of utility for material self-interest, the entire theory becomes quasi-mathematical. To say that people maximize their utility says little more than that they want what they want, an assertion which yields few of the definitive predictions that constitute the self-declared objective of rational choice theory. One reason why recognizing a broader

72 See Posner, supra note 32, at 111.
73 To take just one example, consider the way Florina addresses the well-known fact that the rational, self-interested model of behavior is discredited in the case of citizen voting. Morris P. Fiorina, Voting Behavior, in PRESCRIPTIONS FOR PUBLIC CHOICE, supra note 13, at 291, because individual votes do not matter, he argues that "voting is not an investment decision but a consumption choice; it is a way for voters to express a preference. Many citizens rate satisfaction in such self-expression, in somewhat the same way that they enjoy rooting for the home team." Id. at 458. That Fiorina concludes that voting behavior is predicted by the rational choice perspective that underlies public choice research is not a counterexample." Id. at 464. In other words, the vote that people cast violates the rational voter model. However, because the fact that people vote in the first place also violates the rational voter model, the vote confirms the rational voter model by reflecting an individual preference for voting for one's home team, an action that also violates the rational voter model.
74 Moeller, in his discussion of the paradox of voting, puts the matter as follows: Any hypothesis can be reconciled with my conflicting pieces of evidence with the addition of the appropriate subsidiary hypothesis. If I find that the quantity of oranges were demanded increases following an increase in their price, I need not reject the law of demand. I need only set it aside, in this case by assuming a taste for "wheat appeal." But in so doing I weaken the law of demand, as a hypothesis set down as a law, unless I have a tight logical argument for predicting this taste for wheat appeal.
75 The criticism does not apply to another response to the empirical difficulties of the microeconomic model, which is the attempt to demonstrate that social norms such as trust are generated by instrumentally rational, materially self-interested behavior. See Elazar A. Posner, LAW AND SOCIAL NORMS 148-50 (2005); Robert Cover, En Good Law Made Good Claims: An Economic Analysis of International Norms, 88 Va. L. Rev. 1277, 1279-80 (2000). This effort begins with an acknowledgment that a rational, self-interested maximizing model cannot explain observed behavior, and that additional factors, such as social norms, must be considered. This further effort to explain the origins of social norms through rational
range of interests in a rational choice model renders the model quasistatistical n that it then becomes impossible to separate revealed preferences from action. This separation is only possible if a person’s interests are limited to material ones. For example, Max’s decision to buy a certain number of artichokes indicates his preference between ordering artichokes and the other things that he can obtain with money. It is easy enough to predict that if the price of artichokes rises but his income remains the same, he will buy fewer artichokes. It is also easy enough to conclude that he has suffered a loss of utility as a result, and moved down to a lower indifference curve. But this account, which is plausible enough in the commercial realm, does not work for political decisions, or for any decision that involves more complex choices.

Suppose Minnie is a legislator who declares her opposition to a particular development project when only one developer is supporting the project, but changes her position when a powerful coalition of business interests back the proposal. ¹⁶ Can we predict her change in position as a response to this lobbying effort? Can we say that she has suffered a loss of utility because the price of her original preference has increased to the point where she must move to a lower indifference curve? Public choice theorists assert that we can do so, but only if we assume that Minnie is motivated by the desire to maximize her material self-interest, in this case, her chances of being reelected. Once we substitute utility for reelection maximizing in this situation, any possibility of prediction is lost because her preferences cannot be separated from her actions. If she refuses to change her position, we can infer that she derived a decisive amount of utility from doing what she regards as the right thing, keeping her campaign promises, or simply not submitting to political pressure. If she does change her position, we cannot say that she has suffered a loss of utility because she may have changed her preference. Referring to the principles of instrumental rationality will not work in this context. If we assume that Max is rational, we can be sure that his decrease in artichoke purchase does not result from a short-term change in preferences, because a price increase is irrelevant to his taste for artichokes. But there is nothing irrational about changing one’s preference in re-

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¹⁶ The same analysis would apply to the motivation structure of a social movement’s leaders.
response to a considered argument; indeed, the primary purpose of arguments is to convince the listener to change her mind.77

We could, of course, ask Minnie what her initial preferences were, but this raises all the problems that a theory of revealed preferences is designed to avoid. The person may not be sure about her own preferences, and she may have an incentive—perhaps based on material self-interest, perhaps based on some other motivation—to conceal them. This is not a problem in Max’s case, largely because we can observe his actual behavior; in a commercial setting, one “puts one’s moneys where one’s mouth is.” More generally, material self-interest, maximizing is externally observable because one can measure increases and decreases in a person’s material well being. This holds true for reelection maximizing as well; notwithstanding some complex empirical questions, it is, at least in theory, the sort of goal that one achieves by means of observable behaviors. As soon as we substitute a concept of utility that incorporates “doing the right thing” or maintaining one’s integrity, the possibility of external observation disappears. Utility, or non-material well-being, is an internal state; the only way to determine a person’s level of non-material well-being is to ask her.

A further reason why recognition of a broader range of incentives draws rational choice models into tautology is that there is no stopping point, so no way to exclude any conceivable human motivation other than, by what Green and Shapiro call “arbitrary domain restriction.”78 If our model allows people to be motivated by the desire for prestige, why not allow them to be motivated by the desire to bring happiness to others? If we allow them to be motivated by the desire for power, why not allow them to be motivated by public interest? Public choice scholars never advance theoretical, or even pragmatic, bases for these distinctions. Instead, they rely on two types of arguments, both of which are illustrated by the public choice analysis of judicial behavior. The first is flat denial. Thus, Richard Posner, in his ongoing struggle to assimilate judicial behavior into his behavioral model, concedes that judges are motivated by the desire for prestige, power, leisure, and the pleasure of self-expression, but not by public interest.79 Why? Because, according to Posner, “[t]o include in the judicial utility function [the] desire to promote the public interest

78. Green & Shapiro, supra note 14, at 44-46.
would be inconsistent with treating judges as ‘ordinary people.’” In other words, ordinary people never engage in public-oriented behavior, or more specifically, an ordinary person, given legal training, a career in law, life tenure, and salary protection, would never engage in such behavior. However, Posner offers no evidence for this remarkable assertion; it is simply an appeal to the reader’s intuition. Yet most readers, I would guess, will find this idea highly counterintuitive.

The second argument for distinguishing between utility-maximizing and admirable behavior is recharacterization. At the beginning of their analysis of judicial behavior, Shughart and Tollison concede that

[the economic analysis of judicial behavior fundamentally assumes "that judges, like other people, seek to maximize a utility function that includes both monetary and nonmonetary elements (the latter including leisure, prestige, and power)." Not even the most imperious of economists would argue that the private interests of judges are the sole determinants of judicial decisions (i.e., that there is no room for noneconomic explanations of judicial decision-making).]

Shughart and Tollison, nonetheless declare that judicial behavior is self-interested, and account for it in terms of judges’ desire to create “an opportunity for promotion,” to "reduce the backlog on their calendar and ease their own workloads," and to "maximize their own utility by imposing their preferences and values on society." These self-serving motivations, however, are mere recharacterizations of the public-oriented motivations for judicial behavior that can be found in a high school civics textbook: the desire to do a good job, to administer the caseload efficiently, and to benefit society. What makes them sound selfish is nothing more than the language that Shughart and Tollison have used to describe them.

The title of this Symposium is thus well chosen. When public choice scholars relinquish their empirically implausible claims of material self-interest maximizing and acknowledge a broader range of motivations, the only thing precluding them from recognizing more admirable, less selfish impulses is their own commitment to cynicism. Shughart and Tollison declare that “[c]ompletely ‘selfless’

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60 Posner, supra note 35, at 116.
61 William F. Shughart II & Robert D. Tollison, Interest Groups and the Cents, 6 GEO. MASON L. REV. 553, 583 (1999); (quoting Richard A. Posner, ECONOMIC ANALYSIS OF LAW 509 (3d ed. 1988)).
62 Id. at 964.
63 While public choice seems to imply cynicism, it is important to guard against the idea that the concept is necessarily vile, namely that new cynical interpretation of official behavior support the public choice position. Many moral positions conflict with this theory. Of the many deadly sins, for example, only two—avarice and gluttony—are free combinants with material self-interest maximization. The others—envy, wrath, pride, lust, and anger—are inconsonant with the principle. The more fact that a legislator’s behavior can
models of judicial behavior are plainly non-scientific.\textsuperscript{94} But completely selfish models are equally unscientific, particularly when the only demonstration of the judge's selfishness is the way the public choice scholar characterizes his attitudes.

Another argument occasionally used to rescue public choice from its empirical implausibility is that it provides us with the only theory that promises to predict political behavior.\textsuperscript{95} Because prediction is regarded as the highest form of knowledge, any theory with predictive capabilities should be presumed to be correct and used to generate as many predictions as the model can yield. Those areas where the theory's predictions are confirmed will support valuable scholarship; those areas where they are not confirmed, or where no predictions can be generated, must be relegated to the otherworld of the impartially or inadequately explained. This approach is referred to above as presumptive public choice.

One difficulty with this argument is that it leads, once again, to arbitrary certain restriction—that is, the exclusion of certain problems from a general theory without any theoretical justification.\textsuperscript{96} The deeper problem with presumptive public choice is that it is self-contradictory. The claim that prediction constitutes our highest form of knowledge rests on a correspondence theory of truth, the assertion that true statements are those that describe external reality in the most accurate manner.\textsuperscript{97} Prediction is a test of empirical validity within that overall approach. It cannot rescue a theory whose basic premises fail the test of truth on which the value of prediction is based. Astrology, phrenology, and alchemy also offer definitive predictions, but the invalidity of their premises, on correspondence grounds, banishes them from the realm of scientific knowledge. Their predictions, even if occasionally confirmed, are dismissible as coincidence or concealed tautology. If public choice is based on an empirically invalid approach to human behavior, its predictions, even if confirmed, are similarly suspect. Nor can our desire for a predictive theory in the political realm serve as a basis for rehabilitating public choice on a presumptive basis. That would also violate the correspondence theory of truth; in fact, it is the most extreme form of social

\textsuperscript{94} Id. at 955. Of course, no one subscribes to a "completely" selfish account of legislators.
\textsuperscript{95} Cato & Shapiro, supra note 14, at 44.
\textsuperscript{96} Id. at 44-46. The reason for this result is that areas in which predictions are disconfirmed or no predictions can be formulated are unlikely to fit within a pattern that is itself predicted by rational choice theory.
\textsuperscript{97} See Robert Audi, Realism: A Contemporary Introduction to the Theory of Knowledge 21-4-17 (1993); Hilary Putnam, Reason, Truth, and History 54-56 (1981).
constructivism to assert that the truth value of a proposition is increased because we desire the proposition to be true.

II

THE PHENOMENOLOGICAL THEORY OF HUMAN BEHAVIOR

Husserl's phenomenology provides a model of human behavior that can serve as an alternative to the microeconomic model and resolve the theory's epistemological and empirical difficulties.\(^8\) I have previously described his theory and its general application to legal behavior.\(^9\) For purposes of this discussion, the important feature of the theory is the idea of individual and intersubjective meaning. Husserl begins from the premise that every individual is enclosed within her own experience of the world, which Husserl describes as the lifeworld. All human thought and knowledge occurs within this individual experience. Although enclosed within their own lifeworlds, individuals are not isolated from one another, but can communicate intersubjectively.\(^10\) Such intersubjective communication is the source of cultural continuity, but more importantly is also the source of the interpretive structure that controls the individual's experience of the world and makes high-level thinking possible. It is this simultaneous account of human individuality and connectedness that gives phenomenology an explanatory power. Phenomenology has a tendency to sound mystical to people schooled in Anglo-American philosophy, and its transcendental elements—Husserl's epoché—merits this description.\(^11\) But the theory's account of individual experience and intersubjective communication is firmly grounded in the empirically observable world, and has provided a methodology for a number of leading sociologists.\(^12\)

Because human beings are thinking creatures, their primary motivation, in Husserl's view, is the creation of meaning. At the momentary level of perceived sensation, people use their interpretive resources to make sense of these sensations and integrate them into

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10 Husserl, Crisis, supra note 8, at 112–15.

11 Id. at 138–40; Husserl, Interscultural, supra note 8, at 155–56.

unified impressions. Thus, our intersubjectively and experientially developed understandings enable us to interpret certain perceptions of differently shaped, differently colored objects as the same object viewed from different angles and in different levels of illumination. These understandings also enable us to recall past sensations and anticipate future ones, which allows the sensations we immediately receive, and that occur at the thin margin between past and future, to be integrated into a coherent impression of the world. As the more abstract level, similar understandings enable us to comprehend entities or events that lie outside of our immediate experience. Ancient Rome, World War I, and the motion picture industry all obtain their identity and contours from our intersubjective process of interpretation. Without this interpretive process, and without its intersubjective aspect, we would be unable to form any stable conception of these remote entities and events. At an even more general level of our life experience, we use our interpretive resources to create an account of our lives, and perceive ourselves as unified beings who exist through time, rather than as a locus of momentary and otherwise unconnected interpretations. We create a narrative of our lives and a sense of directed purpose; we ascribe value to ideas, events, actions, achievements, and other human beings. All these levels of cognition—the momentary one that enables us to make sense of perception, the more abstract one that enables us to understand remote or abstract entities, and the extensive one that enables us to make sense of our lives—constitute the creation of meaning. We are motivated to create meaning because each of us is an individual human being, enclosed in his or her own lifeworld, who must live entirely within that lifeworld. We are able to create meaning at the sophisticated level of modern life, because we receive intersubjective communications that provide us with the interpretive resources of a culture.

Weber's account of meaning is similar to Husserl's, but does not include Husserl's epistemological or psychological explanation. For

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94 Husserl, Ideas, supra note 88, at 141-43.
96 This sociological level of meaning is explored in Alvin Sch direct, The Phenomenology of the Social World 42-96 (George Walsh & Frederick Lehman eds., Northwestern Univ. Press 1967).
97 Unless we suspend what would through the phenomenological epoch, see Husserl, Crisis, supra note 88, at 135-37; Husserl, Ideas, supra note 88, at 155-57. Even so, however, we remain within the lifeworld and simply perceive it, and ourselves, in a different way.
Weber, meaning is the most basic sociological concept, the first term he discusses at the beginning of Economy and Society. While he does not explicitly define the term, he treats it as the self-understanding of the individual, the subjective process by which the individual relates to the world.\textsuperscript{98} The field of sociology, which includes political science in Weber's usage, is defined in terms of this subjective meaning. It is, according to Weber, the science of interpreting social action. \textquoteleft{We shall speak of \textquoteleft{action\textquoteright{ as the acting individual attaches a subjective meaning to his behavior—be it overt or covert, omission or acquiescence. Action is \textquoteleft{social\textquoteright{ insofar as its subjective meaning takes account of the behavior of others and is thereby oriented in its course.\textsuperscript{99}} Subjective meaning need not be the result of a rational process, but values rationality is necessarily based on the actor's ability to evaluate, and orient herself toward, the meaning of her actions.\textsuperscript{100}}

Husserl and Weber thus offer meaning-based theories of social behavior, also described as interpretive or hermeneutic.\textsuperscript{101} This constitutes the dominant theme in modern social science,\textsuperscript{102} with structuralism and rational actor theory playing subsidiary roles.\textsuperscript{103} In

\textsuperscript{98} Weber, supra note 15 at 4-5.
\textsuperscript{99} Id. at 6.

\textsuperscript{101} See, e.g., Suttles, supra note 96, at 7-10.

\textsuperscript{102} Interpretive approaches in social science are prominent in anthropology, as Clifford Geertz, The Interpretation of Cultures (1973); Victor Turner, Edens, Fault, and Metaphors (1974); in sociology, as Jeffrey L. Segal, Theoretical Logic in Sociology (1982-83); Rinaldo Collini, Conflict Sociology (1973); in social theory, as Anthony Giddens, Central Problems in Social Theory (1979), and in political theory, as Steven Bay & Douglas Kellner, Postmodern Theory (1991); Jean L. Cohen & Andrew Arato, Civil Society and Political Theory (1992); William E. Connolly, The Terms of Political Discourse (1974).

A large proportion of the leading social and political theories of our era are heavily or predominantly interpretive in orientation. See, e.g., Hannah Arendt, The Human Condition (1958); Pierre Bourdieu, The Logic of Practice (Richard Nice transl., 1990); Anthony Giere, Modernity and Self-Identity (1991); Goffman, supra note 95; Herek, supra note 77; Niklas Luhmann, Social System (John Beddall Jr. transl., 1990); Touraine, supra note 6. For general discussions of these developments, see Peter L. Berger & Thomas Luckmann, The Social Construction of Reality (Alban Berg transl., 1967) (1966); Richard J. Bernstein, Beyond Understanding and Reactions (1983); Metatheory in Social Science (Donald W. Fox & Richard A. Shwedale, eds., 1965); Peter Winch, The Idea of a Social Science (1964).

\textsuperscript{103} See James F. Ramsey, Against Relativism (1992). Harris often defines a \textquoteleft{modernist\textquoteright{, or the idea that objective truth exists, and can be discovered by human beings. His defense begins thus:

It is argued that the second half of the nineteenth century will be known to future scholars as The Age of Relativism or The Age of PostModernism. The academic world of \textquoteleft{classical\textquoteright{ or \textquoteleft{modernistic\textquoteright{ thinking have come from so many sources and from so many different traditions that just keeping up with all the multifarious forms of relativism has become an almost impossible burden. \ldots One factor which explains why there are so few people
legal academia, however, rational actor theory, and specifically public choice, appears to be the most prevalent theme. The two theories are not easy to compare, since most of the social theories derived from Husserl's phenomenology seen quite removed from public choice. Ironically, however, Husserl's theory in its original form bears a decided resemblance to public choice, although the two theories diverge at a crucial point. This overlap provides a useful basis for comparison and thus serves as a justification for going back to the source of phenomenology, rather than invoking one of the more familiar social theories derived from it.

Like microeconomic and legal public choice theory, the phenomenological model relies on methodological individualism to solve the macro/minor problem. Both approaches reject the idea that collectives can be treated as independent actors, and regard an explanation as complete only if it accounts for institutional behavior in terms of individual action. In microeconomics, however, this is simply an unexplained assumption, while phenomenology derives this principle from the 'basic epistemological claim that all thought and action is primordially grounded in individual experience.'

This is an appealing epistemological premise, because it dispenses with the vagueness and mysticism that infect theories of the general will or of emergent entities. Theories of a general will tend to be truly mystical; one thinks of the divine right of monarchy, of Rousseau's argument that "sovereignty is purely and simply the exercise of the general will," and "the sovereign is purely and simply a collective being, and can be represented therefore only by itself," and of Hegel's conception of the state as "the actuality of the ethical Ideal[...]. . . ethical mind was the substantial will manifest and revealed to itself, knowing and thinking itself." Theories that postulate emergent entities are usually more restrained, but they suffer from a similarly vague and open-ended quality. One can attribute a wide range of attitudes and behaviors to "Congress," or "the nation," or "the environmental movement," but one can never confirm these at-
tributions by questioning one of these entities or observing its defini-
tive behavior. While we need to use such terms as a linguistic
shorthand, treating them as independently existing actors raises epis-
temological difficulties. It seems preferable to dispense with them, as
both public choice and phenomenology recommend. This prefer-
ence, however, should only be indulged if one can develop plausible
solutions to the micro/macro problem that explains the enormous im-
portance and complexity of institutions on the basis of individual
action.

The phenomenological model is also consistent with the
microeconomic model in treating human beings as essentially rational
creatures. Phenomenology's concept of rationality is much broader
than the microeconomic concept of instrumental rationality, but cer-
tainly incorporates the idea. In fact, phenomenology links instrumen-
tal rationality at the action, or life experience level, to experience at
the momentary level in a manner that extends well beyond rational
choice theory. According to Husserl, perception itself is a conscious
act, not a passive receipt of sensory information. To be sure, a per-
sont who is awake is flooded with sensations. But to perceive an object
as an object, rather than merely having light waves impinge on one's
eyes or sound waves on one's ears, one must intend the object, that is,
one must interpret it in a purposive manner. This is, in effect, a
form of instrumental rationality. When we experience a particular
collection of light waves and sound waves, we interpret the bundle of
sensory signals as a cat, because this interpretation is part of the way
we make sense of the world. In other words, the way we perceive the
world around us is instrumental to our desire to make sense of that
world, to create meaning for ourselves. Of course, instrumental ra-
nationality at this momentary level is much more automatic than the
rational consideration of alternatives that occurs at the general, or life
experience level. The point is not to claim that the two are equivalent
or indistinguishable. But they do possess a structural similarity in phi-
omenology, and this structure suggests the reason that people are
instrumentally rational. It is a general stance toward the world.

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110 For example, one could say that the United States expressed its disapproval of French policy today, and this may be enough for many purposes. Yet it might not be what really happened. What might have happened was that the President, after consulting with his advisors, made a phone call to the United States Ambassador in France, instructed the Ambassador to go to the office of the French Minister for Foreign Affairs and deliver a particular message, and the Ambassador proceeded to do so. This might become impor-
tant if we later learn that a majority of American citizens, another group for which the United States serves as a linguistic shorthand, did not agree with the President's decision.

111 Husserl, Crisis, supra note 88, at 155–66.

112 See Husserl, Crisis, supra note 88, at 324–32.

113 See Husserl, Crisis, supra note 88, at 108.
around us, a way in which we think, and it emerges from our basic nature as conscious, purposive creatures.

Because they share the epistemological premise of methodological individualism, both phenomenology and microeconomics agree that the instrumental rationality of human beings is limited. In other words, people must function with limited knowledge, within limited time, and with limited cognitive abilities. Phenomenology, however, also accommodates bounded rationality, that is, impaired decision-making of the sort discussed by Simon and Williamson.114 While instrumental rationality is a general orientation toward life, it exists within individual experience. That experience also includes emotion, fatigue, instantaneousness, busyness, and other nonrational features that can impair or redirect instrumental decision-making.115 There is simply no reason to assume that instrumental rationality, which is based on the desire to achieve optimal results, will supersede these other feelings, although it may win out in particular situations.

Thus, phenomenology agrees with rational choice theory about both the epistemological premise of methodological individualism and the behavioral premise of instrumental rationality. It diverges from public choice theory, however, with respect to public choice’s second behavioral premise; namely that people are motivated by self-interest, material or otherwise. As stated above, phenomenology holds that, people are motivated by the desire to create meaning at the momentary, abstract, and life experience levels.116 At the momentary level, they interpret sensory impressions in a purposive manner, intending objects as comprehensible, intersubjectively learned entities in order to make sense of the world around them.117 At the more abstract level, they combine these momentary interpretations into meaning-laden generalities, such as France, or justice, or morality. At the level of their life experience, they make decisions so that their life will be meaningful to them.118 Sometimes, what is most meaningful is to maximize their material well-being more often, however, it is to maximize the material well-being of themselves and their children. In other situations, what is most meaningful is to serve God, to serve

114 SIMON, supra note 23, at 20-41; WILLIAMSON, supra note 58, at 6-7, 75-76, 288-58.
116 See supra notes 9-17 and accompanying text.
117 There is no conflict between lat theory of perception and public choice. The fact that the world is interpreted, as Dumas and Hetherington suggest, rather than objectively perceived, is simply a different informational starting point that serves equally well as a basis for instrumentally rational action. Nonetheless, there is an epistemological advantage of a theory of motivation as the life experience level that is united with the process of perception at the momentary level.
118 See supra note 58, at 65-96.
one's country, to become famous, to experience adventure, to prove one's masculinity or femininity, to help others, or to inflict pain on amphibians.

At the empirical level, this is a much more plausible theory of human motivation. The point is not merely that human behavior is multivariant, as Etzioni and others have argued, but that phenomenology provides a unified theory of behavior that accounts for the perceived variations in a plausible manner. In particular, it accounts for many observed behaviors that theories of self-interest maximizing find inexplicable.

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normal people will exchange material resources for aesthetic or lifestyle benefits that are more meaningful to them. More importantly, individuals often carry out their assigned roles in a conscientious manner, rather than try to maximize any personal advantage, because they want their lives, and the work that constitutes a large part of their lives, to be meaningful.

An important test for any theory of human motivation is whether the proponents of the theory would be willing to apply it to themselves. Most public choice scholarship is produced by tenured faculty at academic institutions. Why do these professors work so hard to publish this material instead of maximizing their leisure, or earning extra income through non-academic work? Why do more professors not offer high grades and recommendations in exchange for money or sex? The most plausible explanation is that they strive to be good scholars and good teachers, they believe in what they write, and they believe that their recommendations will advance the careers of worthy students. In other words, they want to perform their role in a manner that gives meaning to their efforts and their lives.

In the political arena, explanations predicated on meaning are considerably more plausible than those based on self-interest maximizing. Consider the four examples given above: voting, social movement participation, legislative behavior, and judicial behavior. People vote because it is meaningful for them to perform their civic duty. If it is not meaningful, if they are disaffected from or hostile to their country, they will not vote. Moreover, they cast their votes on the basis of their preferences, their overall sense of who they are and what they like.

Participants in social movements are even more obviously motivated by ideology, particularly in those movements that are unconnected with their personal well-being. Some public choice accounts suggest that they are being manipulated by the leaders of these movements, for whom the movement represents a path to material rewards. Once again, however, people with the leadership abilities of the magnitude needed to mobilize people in this manner probably could be given more utility in a more settled profession. The argument, moreover, applies only in a manner like the United

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123 These motivations are entirely inconsistent with a behavioral model of material self-interest. They can be interpreted into a model of more general self-interest or utility, but only at the expense of making the entire model tautological. See supra note 74 and accompanying text. The desire for meaning is a more direct, intuitively plausible account of such motivations. It provides some content to the account that can be related to other psychological trends, and is at least partially verifiable.

124 See e.g., Mueller, supra note 12, at 2-9.

125 See supra notes 98-102 and accompanying text.

126 See supra notes 89-96 and accompanying text.
States, where dissent is tolerated and often rewarded. In other nations, people who lead social movements are often risking their livelihoods or their lives.

Elected legislators concededly try to maximize their chance of re-election, but why do they do so? Not to maximize their material resources—most of them had much greater income earning potential in the private sector positions that they relinquished to run for office. In fact, a recent development, decried by many, are the plutocrats like Ross Perot, Stephen Forbes, or John Corzine, who expend vast amounts of their personal fortune in an effort to obtain elected office. The reason people seek these offices is to become famous, to exercise power, or to implement their ideology—namely to fulfill their personal desire for meaningful. Similarly, judges are motivated by the desire to act conscientiously in the role that they have assumed. Contrary to Posner’s assertion, this is exactly what ordinary people do in many different roles. Similar to legislators, judges undoubtedly use their authority to implement their own ideology to a certain extent. But such a motivation, far from being inconsistent with public-interested behavior is indistinguishable from that behavior in most people’s minds. An individual would need to be demonic or perverse to maintain an ideology that conflicted with her own conception of the public interest.

In addition to resolving these specific empirical dilemmas that bedevil public choice theory, the phenomenological model explains more general aspects of political activity. Among these are the discourse of governmental actors, the attitudes of citizens toward government, and the impact of government on citizens.

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127 This is a virtually unchallenged position in modern sociology. See, e.g., Peter M. Blau & W. Richard Scott, Formal Organizations (1962); Campbell, supra note 92; Goodman, supra note 92. While conceptions of role see, e.g., Chapter 1, supra, Politics and Justice 385–86 (3d ed. 1995); Nils Lehmann, A Sociological Theory of Law 63–64 (Elizabeth King & Martin Albro eds., Martin Albro ed., Kluwer & Regn Paul 1969).

128 The most common view among political scientists is that judges are policymakers, and that the primary motivation is to confer benefits upon society. See, e.g., Lawrence Baum, American Courts 293–95 (4th ed. 1998); Lee Epstein & Joseph J. Stoklosa, The Supreme Court and Legal Change 1–3 (1992); Robert A. Dahl, Liberalism and Social Philosophy: The Supreme Court as a National Policy Maker, 69 J. Pub. L. 279, 925–31 (1981). Of course, this is regarded by many legal scholars as the correct view, if it is true, as a vouchsafe of the judge’s true duty, which is to follow the law. See Ronald Dworkin, Law’s Empire 114 (1986); Owen M. Fiss, Against Swernism, 91 Yale L.J. 1078, 1092–65 (1984). The point is that most political scientists, in contrast to public choice scholars, see judges, like legislators, asights note 58 and accompanying text, as being strongly motivated by ideology and public-scientific concerns.

129 For phenomenologically based accounts of judicial behavior, see Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State 294–98 (1990); Douglas Kenney, A CRITIQUE OF AGRARIANISM (Far In Shrine 1997).
With respect to political discourse, no elected official admits that he made a particular decision because it will help him get reelected, and few lobbyists present their arguments to legislators in terms of naked political advantage. Rather, both officials and lobbyists speak in terms of the general benefits that will accrue to the citizenry in general. Public choice scholars may dismiss discourse as irrelevant, but that dismissal results from pre-analytic assumptions, not from any well-articulated theory. Moreover, even if discourse is irrelevant to the legislator's exercise of his principal authority, it is undoubtedly a behavior that requires some explanation. In addition, public choice fails to explain how public officials understand their role and feel about their actions. Again, this may be deemed irrelevant to their decisions, but it nonetheless requires an explanation. A theory that focuses on how people create meaning responds to these concerns by accounting for both their discourse and their understanding.

With respect to ordinary citizens, phenomenology suggests that political attitudes and behavior are part of a general process by which individuals create lives that have meaning for them. Because phenomenology relies on methodological individualism, it does not claim that the individual's relationship with the state is qualitatively different from her relationship with other individuals or institutions. This is an epistemological advantage because it enables the observer to base the assessment of the individual's relationship to the state on a general pattern of behavior, rather than forcing him to invent a new and specifically political psychology for this purpose. But phenomenology, unlike public choice, admits the entire range of human motivation and behavior into the equation. The individual can love or hate the government, just as she loves or hates other people. She can feel loyalty or disaffection, gratitude or resentment, approval or disapproval. Moreover, because of the enormous capacity of human beings to create meaningful accounts of their behavior, the individual can simultaneously feel opposing emotions, either at different times in her life or toward different components of the state. Thus, the phenomenological model explains why a corporate executive who favors severe punishment for violent crime can advise her company to violate a safety regulation, or why people who volunteer to fight for their country come home and cheat on their taxes.

Third, the phenomenological model explains the government's effect on individuals in a way that public choice cannot. While public choice may seem like a hard-headed theory, it contains a strong element of wishful thinking and wishful sentimentality. This resides in its implicit assertion that people, being motivated solely by material self-interest, are essentially identical in that they know what they want, and their wants are relatively stable. Were this true, it would be reassuring,
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as it implies that people will always maintain a wary, critical distance from government, and resist its more oppressive incarnations whenever possible. But, as the lugubrious history of the last two centuries attests, government is sometimes able to induce unquestioning obedience among its citizens, leading them into material ruin and personal destruction. It is often able to obtain at least moderate levels of self-sacrifice because each individual's perception of the world and system of values is fashioned from intersubjectively communicated information. In the end, every person must create his own life's meaning, as an individual experience. But for many people, some outside force that plays a particularly decisive role in constructing their system of values or sense of reality dominates their personal sense of meaning. The government, given its ideological and communicative resources, is often such a force.

While the phenomenological model recognizes the enormous impact of the state on the values, understanding, and ultimately the personality structure of the individual, it does not ally itself with theories such as structuralism that eliminate the individual and attribute all human behavior to the operation of social norms or historically generated forces. Because people are rational creatures motivated by the desire to create meaning for themselves, they always retain some capacity to engage in individualized thought and action and to reject intersubjectively established norms. In some cases, this divergent behavior consists of mere peculiarity and results in the individual's social ostracism. In other cases, it consists of material self-interest maximizing and allows the individual to gain some political or economic advantage over others. The phenomenological model of behavior is thus situated midway between individualistic accounts that dissolve the state into a series of ad hoc alliances, and the structuralist accounts that dissolve the individual into a locus for the operation of large-scale forces.

This account of the individual is directly connected to the phenomenological solution to the macro-micro problem. Like public choice and rational actor theories in general, phenomenology originates from the premise that all thought lies within the ambit of individual experience. In the phenomenological model, however, that experience includes the intersubjective communications that reflect both human connectivity and the continuity of culture. Through their interactions with each other, people develop similar ways of thinking and similar emotional commitments. Such intersubjective coordination can resemble the temporary alliance of self-interested

192 See id. supra note 90, at 94-95.
parties, but it can also run very deep, because our interpretation of the world that we experience and the structure of our thinking processes are determined by these intersubjective understandings. In the political realm, this coordination process explains how institutions acquire a permanence that makes them a force of nature, as opposed to the product of separate individuals. It also explains how social movements can mobilize separate and diffuse interests into coordinated action without the policing mechanisms that public choice demands. While the individual actors remain separate, each individual will have within his mind a set of understandings and commitments to the institution or the movement. She will think in institutional or movement terms, and thus act in coordination with others who share the same understanding and commitments.

Ultimately, these intersubjective understandings give substance, and are the only thing that give substance, to a human institution. In many cases, these understandings are supported by the external correlative of buildings, furniture, and written records. But if people's intersubjective understanding disages and they lose their commitment to the institution, the buildings will be abandoned, the furniture used for firewood, and the records discarded as irrelevant debris. In contrast, many important institutions have few external correlates and exist primarily in people's minds. When social movements begin, they are little more than intersubjective understandings; physical assets generally come later, and their ultimate scale is usually a poor guide to the movement's real strength.

By adopting the theory of motivation and institutional creation in place of material self-interest maximizing, the phenomenological model necessarily relinquishes public choice theory's aspiration to predict human behavior. However, this is not a serious sacrifice for at least two reasons. First, prediction is not as important as public choice scholars assert. The claim that prediction constitutes our highest form of knowledge rests on a correspondence theory of truth—the assertion that true statements are those that describe external reality in the most accurate manner. Prediction is a test of empirical validity within that overall approach. It cannot be used to validate a theory whose basic premises fail the test of truth on which the value of pre-

192 Once the sacrifice is made, it underlines the presumptive argument for public choice. This argument, noted at the outset, is that public choice provides us with the only theory that promises to predict political behavior. Any theory that claims predictive power should be presumed correct, and used to generate as many predictions as it can yield. Those areas where the theory's predictions are confirmed will then be known to us; those areas where they are not confirmed, or where no predictions can be generated, must be relegated to the netherworld of the empirically or inadequately explained.

193 See Aune, supra note 97, at 211-44; RICHARD RORTY, PHILOSOPHY AND THE MARKS OF NATURE 197-256 (1980).
diction is based. As stated earlier, astrology, phrenology, and alchemy also offer definitive predictions, but the invalidity of their premises, on either correspondence or consensus grounds, banishes them from the realm of scientific knowledge. Their predictions, even if occasionally confirmed, must be dismissed as coincidence or concealed mysticism.134

Second, the search for a predictive theory must be chimerical if human behavior is truly unpredictable. We are compelled to relinquish our aspiration for prediction if we cannot develop an empirically convincing model that achieves it. As stated above, this is in fact the case. Public choice, our only theory of political behavior that claims to generate verifiable predictions, is not an empirical success. While it successfully predicts certain political behaviors, too many of its predictions have been disconfirmed.

Phenomenology adds an epistemological argument to the empirical argument against predictability. Because all thought is contained within individual experience, the subject of the human sciences is operating at the same level of complexity as the observer, or potential predictor. As one level, this means that the academic cannot always simplify by describing less than the totality of the situation and supplementing that description with approximations and interpretations. At another level, it means that subjects will sometimes be influenced to adapt these theories to their own purposes, thus inevitably disrupting their predictions.135

III

INDIVIDUAL MOTIVATION AND THE IMAGE OF THE MODERN STATE

The phenomenological theory of behavior asserts that motivations other than self-interest maximizing control much of human behavior, but does not deny that self-interested behavior occurs. The claim, rather, is that people will engage in self-interested behavior

134 Nelson Goodman, Fact, Fiction, and Forecast (3d ed. 1973) (stating that predictions can be confirmed even if they violate correspondence theory in a certain aspect); Saul G. Mamet, Phenomenon or Natural Science 3-66 (1986) (observing that partial confirmation of hypothesis by data does not prove its truth according to a correspondence theory); Thomas S. Kuhn, The Structure of Scientific Revolutions 28-31 (2d ed. 1970) (commenting that rejected paradigms continue to explain many observed phenomena, according to a consensus theory of truth); Karl R. Popper, The Logic of Scientific Discovery 272-4 (1959) (observing that partial confirmation of hypothesis by data does not prove its truth according to a correspondence theory); Hilary Putnam, Realism with a Human Face 85-86 (James Conant ed., 1980) (noting that factual findings do not prove causal structure of science).

when they find it meaningful to do so. This will often be the case: while some people are ascetic, and others are dutiful or self-sacrificial, most people enjoy life's sensual pleasures and are readily able to incorporate them into their self-image. In a commercial society such as our own, income maximizing carries additional value, for we regard such behavior as a model of civic virtue and a valuable way of contributing to society. Adam Smith's Wealth of Nations is written as a moral justification of income maximizing behavior, and its familiar argument that private enterprise produces public wealth through the operation of an 'invisible hand' is widely accepted and highly regarded. Thus, the phenomenological model, while it recognizes other motivations, fully acknowledges the importance of self-interest maximizing and might well conclude that it is the single greatest source of personal meaning in a secular society like our own.

Given this recognition, it might appear that the phenomenological model would only amend, rather than reject, public choice theory as it is used in legal scholarship. That is, the theory might be seen as insisting that some political behavior must be explained in other terms, but acknowledge that much of it can be explained by rational self-interest maximizing. Yet this is not the case: the phenomenological model of behavior represents a challenge to public choice theory in its entirety. It demands that the entire idea of self-interest maximizing be set within a phenomenological framework based on meaning.

Within the political realm, there are two closely related reasons for this approach. First, theories of human motivation not only determine the method of assessing people's attitude toward their personal relations, but also toward remote events and institutions, such as political developments and the state. Second, one's theory of motivation not only determines one's assessment of people's behavior at the micro level—how they manage their personal lives—but also one's assessment of people's behavior at the macro level—how they join together to create institutions such as the state or its components.

In fact, the connection between micro and macro behavior is more crucial for public choice and phenomenology than for other theories because these two theories share the premise of methodological individualism, and thus deny the existence of intervening forces, such as emergent collectivities, between the micro and macro levels. The result is that, for both the public-choice scholar and the phenomenologist, her theory of human motivation fully determines her un-

demanding of the way people perceive political institutions and the way those institutions are created. Taken together, these factors comprise the scholar's own image of the state. For the most part, this image will be informed by her beliefs about the way the state was created and the way it is perceived by citizens. That image, in turn, underlies virtually all political analysis. Thus, if public choice has the theory of human motivation wrong, as argued above, it is likely to have a distorted image of the state. The result is that the entire theory is premised on a misconception. It is a baby that is best discarded, and the bathwater of its empirical conclusions should be reinterpreted within a phenomenological framework.

Public choice's misconception is best illustrated by considering its approach to the administrative state within our own country, not only because that system is of particular concern to us, but also because it is the system to which public choice theory has devoted the majority of its attention. The administrative state is characterized by extensive and self-conscious government regulation of the economic and social relations of its citizens. This regulation is implemented by administrative agencies, famously characterized by Weber as hierarchical organizations with designated jurisdiction, salaried employees, and continuous records. An administrative state can exhibit a variety of political forms while it cannot be a traditional monarchy or a direct democracy, it can potentially span the entire range from totalitarianism through autocracy to representative democracy. The present discussion can be limited to Western democratic governments.

Because public choice theory is based on the premise that people are motivated by the desire to maximize their self-interest, it asserts that this same motivation determines their relationship to the state. Thus, all people view the modern state as an impediment to their ability to engage in self-interest maximizing behavior. In addition, many people view the state as a source of benefits by which they can increase their material self-interest. These benefits may take the form of transfer payments, a good job, an economic subsidy for their business, or a regulation that grants them a rent or discomfits their competitors. Individuals will organize themselves into interest groups to seek such


129 This account of the modern state is widely accepted, and not a point of contention between public choice and other theories.

130 "Wemer, supra note 19, at 996-98.

131 Need-based transfer payments are typically described as benefits, but the term "benefit" will be used here to describe any advantage that can be secured from the state.
benefits, just as they will affirmatively avoid the intrusion on their autonomy that results from other state activities. Of course, because public choice theory argues only that their motivations are limited, and not their intellect, they will be fully aware that their wealth is not only maximized by their own self-interested behavior, but also by governmental intervention to enforce contracts, provide police, and protect the country from foreign invasion. Hence, this suggestiveness will not lead to either behavioral or attitudinal consequences. Fully willing to free-ride on these governmental programs, they will neither contribute to them nor comply with their requirements unless they are compelled to do so by the imposition of sanctions that impose penalties greater than the costs of contribution or compliance.

Given these attitudes, public choice theory resolves the macro-micro problem by concluding that the modern administrative state is created by interest group efforts to extract benefits from the state. Each new agency or program is the product of a different coalition's efforts. Organized labor obtains protective legislation and a Department of Labor is created; farmers obtain agricultural price supports and the Department of Agriculture is created; states band together to obtain pensions and subsidized medical care, thereby generating the Veterans Administration. The only groups that can organize to secure these benefits are those that can solve the free-rider problem. Because these groups are generally small and have clearly defined economic interests, the government becomes a staple of the successful special interest and operates to the detriment of the majority.

Other public choice explanations for the growth of the administrative state display a similar character. William Niskanen argues that the modern state has grown in size because administrators continually strive to maximize their budgets. Morris Fiorina suggests that legislators enact regulatory programs so that they can grant exemptions to powerful constituents ("casework") and thus obtain their support in the next election. According to Samuel Peltzman, the growth of government results from the desire of politicians to obtain votes by creating redistributive programs. Numerous other public choice

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143 See Olson, supra note 23, at 9-16.
144 William A. Niskanen, Jr., Bureaucracy and Representative Government 114 (1971).
scholars assert that bureaucrats can perpetrate "fiscal illusion" by systematically deceiving legislators and voters about the true costs of administrative programs.147

With respect to administrators, the officials who give the administrative state its particular character, public choice offers a variety of accounts. The best known is probably Niskanen's, described just above, which is that administrators attempt to maximize their agency's budget.148 There are obvious empirical difficulties with this position, most notably the fact that bureaucrats do not try to maximize their agency's budget.149 Migé and Bélanger have suggested that bureaucrats instead try to maximize their discretionary budgets, or budgetary slack.150 But this theory accounts for the observation by Miller and Moe that efforts by administrators to extract funds from the legislature could hardly proceed the way that Niskanen or Migé and Bélanger envisioned, given that the legislature is the agency's structural superior and is filled with politically sophisticated individuals.151 As Moe notes in a subsequent survey, this insight led to a series of public choice and positive political theory analyses that treat both legislators and administrators as strategic actors in a complex interaction.152

This public choice theory of the modern state's creation and growth is an unconvincing description of people's attitudes, and an equally unconvincing solution to the macro-micro problem. To begin with, the explanations that public choice offers regarding the attitudes of ordinary citizens are akin to conspiracy theories; they imply that people are constantly being fooled, and that they have unknowingly voted for and supported the massive growth of an administrative state over a period of two hundred years when they derive no benefits from it.153 But is it possible for rational human beings truly to be


148 NISKANEN, supra note 144, at 114.


152 Moe, supra note 140, at 459-60.

153 Pettit's theory of governmental growth, see Pettit, supra note 146, at 288-89, is something of an exception, because he views that politicians offer redistribution programs to obtain votes. However, this theory is not borne out empirically. See Romeo H. Franks & Philip J. Cook, The Wisconsin Taxpayers' Society (1995). Moreover, as Muller points out, it is difficult to see why the process of redistribution requires a particularly large government. See Muller, supra note 9, at 550-51. A tax authority and a police force should be sufficient. In fact, most of the institutions that we and many modern governments, such as the armed forces, the educational system, the criminal justice system, and the regulatory agencies, are not redistributive in any direct way. The legislation behind all these institutions benefits some people at the expense of others, as does any governmental program.
fooled for this long, and this extensively? Can one of the most significant developments in the history of the world really be attributed to an elaborate hoax?

Second, it is not clear that public choice theory offers any explanation at all for the macrophenomenon of the administrative state. While some administrative institutions may be plausibly attributed to special interest pressures, many cannot. Environmental protection agencies, for example, undoubtedly were created as a result of political pressure by environmental groups. But how did special movements representing such diffuse interests coalesce? An independent judiciary and an independent central bank are widely regarded as good public policy, but what special interest created them?

Finally, the public choice account of administrative behavior suffers from the same defect as its account of legislative and judicial behavior: it ignores the widely recognized observation that most people want to fulfill their assigned role in a conscientious manner. Moe's description of bureaucratic behavior in strategic terms avoids this problem, but does not depend upon the behavioral assumptions of public choice. Conscientious administrators will engage in strategic behavior of the sort Moe describes on behalf of their agency and the policies that their agency supports.

The phenomenological model of behavior provides a different, and ultimately more convincing image of the modern administrative

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\item[154] \textit{But unless those benefited are the poor majority at the expense of the rich minority, we are back to the conspiracy theory that the majority is being systematically misled.}
\item[155] \textit{For an explanation of the development of independent central banks in public choice terms, see Geoffrey P. Miller, \textit{An Interest Group Theory of Central Bank Independence}, 97 J. Legal Stud. 433 (1998). Miller acknowledges that the independence of central banks, which is increasingly common in the industrialized world, is a distinctive social policy. Id. at 433-34. The difficulty, however, is that Miller's thesis is only persuasive if one begins with a pre-empirical belief that a government program could not possibly result from collective efforts by public officials.}
\item[156] \textit{Public choice efforts to describe administrative behavior as selfish actions are not even considering their own terms. Niskanen's theory, as Robert Young points out, is not really a self-interest-based hypothesis, because the salaries of administrators in the United States are not directly related to their agency's budgets. Robert A. Young, \textit{Budget Size and Bureaucratic Careers}, in The Budget-Making Bureaucracy 33 (Moore & Stepnoe Eds. eds., 1991). Miguel and Retherford's theory is equally flawed, because a larger discretionary budget is also unrelated to salaries, and is only one component of power. See Miguel & Retherford, supra note 150. Anecdotal criticisms of bureaucratic behavior trend to report the central problem as what might be called "bureaucratic behavior," e.g., Terry M. Moe, \textit{The Politics of Structural Choice: Toward a Theory of Public Bureaucracy}, in Organization Theory 116, 143-66 (Oliver Williamson ed., 1990). But the idea of behavior is too vague, and the process of minimizing too complex, to be modeled in the form of selfish behavior.}
\item[157] \textit{E.g., Thomas K. McCraw, \textit{Prophets of Revolution} 300-09 (1984); Michael Perelman, \textit{Revolt against Revolution} 115-85 (1985). The same is true for judges. See Alexander M. Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} 195-263 (1962); Perera & Rubin, supra note 155, at 51-111.}
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state. With respect to people's attitudes toward the state, the model begins with the idea that people are impelled to create meaning at the instantaneous, abstract, and life experience levels. At the instantaneous level, individuals must confer meaning of some sort on their sensory impressions; at the more abstract level, they must confer meaning on conceptual entities. The state is a conceptual entity, and phenomenology suggests that it must possess subjective meaning for its citizens. With respect to the development of the administrative state, phenomenology suggests that these meanings are generated intersubjectively, and thus shared by large groups of citizens.157 These meanings produce a social consensus around certain issues, or broad-based social movements that agitate on behalf of other issues. The interaction among consensus, social movements, and economically inspired interest groups then generates the governmental structures that constitute the modern state.158 Thus, the phenomenological model provides a more plausible account of people's attitudes toward the state and the way that the state develops. Furthermore, phenomenology illuminates the organic linkage between the two, thus providing a more satisfying solution to the macro–micro problem.

Unlike public choice, which is essentially ahistorical, the phenomenological approach to political attitudes necessarily locates individuals in history, their intersubjective understandings are heavily dependent on temporally specific attitudes and the evolution of ideas from one generation to the next. One of the most crucial political developments of the modern era is the shift from the traditional religious view that society is a stable, divinely established ordering, to the idea that society is a contingent set of arrangements that can be altered through conscious social policy.159 The administrative state is both a product and a cause of this conceptual development. As the idea of conscious social policy developed, people envisioned a different and greatly expanded role for the government; it was expected to intervene in the economic and social realms to secure the welfare of its citizens. As the government assumed this role, it changed people's sense about the scope and purposes of governmental action. At the same time, government gradually lost the mystic, sacred character


159 See HABERMAS, supra note 77, at 149–77; Frederick Tegศึกษา(10,12),(995,987)
that it possessed in the Middle Ages. It came to be viewed as an instrumentality, not only was it expected to secure the welfare of its citizens, but that was its only function, and the source of its essential character. To put this perception in Weberian terms, people came to see the government as an instrumentally rational agent that was supposed to achieve the goals that they themselves established, either through value-rationality or through some less reflective choice.160

The administrative state developed as a means of restoring the balance that had been disrupted by the collapse of traditional society, and a means of protecting ordinary people from the depredations of the property-owning class. Capitalism, and perhaps democracy, would not have survived the nineteenth century in Europe without labor laws, unemployment compensation, welfare programs, public education, public health, and other widely dispersed benefits. Thus, the history that we observe is not one in which special interests continuously carve small slices from a structure that was previously created by some other unexplained mechanism. Rather, it is a history in which a massive governmental apparatus was created and developed to solve basic social problems and implement basic moral principles. Our current administrative democracy reflects the gradual but steady development of intersubjective understandings about political morality and the purpose of government.

This is the way that people interpret government in a modern administrative state. They regard the government as a problem-solving instrumentality, and they expect it to solve a wide range of economic and social problems. If individuals are subjected to discrimination, if the air is filled with smog, if the burglary rate is rising, if a horrific case of child abuse is reported, people's instinctive reaction is that the government 'should do something about it.' People once thought of floods as provoked by the fury of nature or the anger of God, and attempted to remedy the situation through prayer. Presently, we are more likely to wonder why the Army Corps of Engineers failed to prevent a catastrophe, or why the Federal Emergency Management Agency was so slow in combating its effects.

The ordinary people who staff the modern state as administrators share these attitudes. They believe that government should "do something" about the flood, or discrimination, or consumer abuse, and they believe that they themselves are doing it when they perform their regulatory roles. These culturally embedded attitudes are reinforced by their personal preferences. Like everyone else, they want to act in

160 I develop this argument more fully in a forthcoming book entitled \"Owning Populist: Rethinking Politics and Law for the Administrative State.\" See also supra notes 19-21 and accompanying text (discussing Weber's concepts of instrumental and value rationality).
accordance with their beliefs in order to give their lives meaning. This will lead them to act in a manner consistent with their beliefs about the purpose of government when carrying out their assigned roles. It will also lead individuals to alter their beliefs to fit their assigned roles. This approach may be inefficient in certain circumstances, but it is far removed from the behavioral model of public choice.

While people disagree about the proper scope of government involvement, their opinions are usually determined by their interpretations of the situation rather than their interpretations of government. For some people, the possible extinction of the spotted owl is a serious problem, but the shortage of domestically grown lumber is not for others, the reverse is true. Once people perceive a problem, however, they demand that the government take action to resolve it. This is why a person who favors deregulation of airlines or the loosening of environmental restrictions on industry can simultaneously favor massive increases in government spending to combat narcotics or to fight against crime. It also explains why the majority does not vote for massive redistribution of property from the wealthy to themselves. Individuals do not regard the state as an arena of economic conflict, but as a problem-solving apparatus. Thus, they may vote for some redistribution if they perceive poverty as a problem, but will go no further than they deem necessary to conform with their situational analysis.

Interpreting government as a problem-solving instrumentality not only generates expectations about institutional performance but also limits people's regard or respect for the state to those situations when it performs in an acceptable manner. As an instrumentality, the government loses its former claim to divine right, to the unconditional loyalty of its citizens or subjects. Such loyalty often exists, but it is directed to the nation rather than to the state, to the land and its inhabitants as a totality. Nationalism occupies the space that the administrative state has opened up between the people and their government. This attracts, for better or worse, the devotion that previously attached to the rulers of the state. The concept of government as an instrumentality creates a framework in which government is viewed as serving the nation rather than embodying it and can be evaluated on the quality of its performance. Thus, while it would be political suicide for any American politician to condemn the United States

161 For discussions of nationalism, see DAVID BROWN, CONTEMPORARY NATIONALISM (2000); WALTER CONNOR, ETHNO-NATIONALISM (1994); ISIDOR DOLLINS, THE BLACK MAN'S BURDEN (1992); EARLE EULORIE, NATIONS AND NATIONALISM (1993); AARON NATIONAL, THE CONSTRUCTION OF NATIONALISMS (1997); ROSE POOLE, NATION AND IDENTITY (1999); ANTHONY D. SMITH, NATIONALISM IN THE TWENTIETH CENTURY (1978); ANTHONY D. SMITH, THEORIES OF NATIONALISM (1971); WEIR, supra note 13, at 211–12.
as a nation, many politicians regularly condemn the national government.

In the last few years, legal scholars have begun to investigate the law's expressive quality, or its ability to convey moral positions or communicate meaning.163 This view amends Kelsen's idea that the law functions by imposing sanctions,164 and weakens Hart's amendment of Kelsen, which views the law as establishing guides for human conduct.165 A perceptive article by Lawrence Lessig goes further and suggests that law can alter preexisting social meanings through a variety of coercive and expressive methods.166 As Lessig notes, this is not new to sociologies, but it is unfamiliar to law-trained people, so unfamiliar that lawyers often regard this approach as a violation of the First Amendment.167 Lessig intimately regards this reaction as a conundrum, but it becomes explicable if one distinguishes between the state's creation of social meaning and the social meaning of the state, which is the topic of this discussion. The meaning of the modern administrative state for its citizens is that it is an instrumentality for achieving the goals that people independently identify. As such, the state is expected to exhibit instrumental rationality on its own, but its goals come from the choices of the citizenry. As a result of the state's expanded role in the economic and social realms, it will necessarily create meaning as a by-product of its efforts, and will sometimes manipulate social meanings at the micro level to achieve its policies. But it is not supposed to consciously manipulate the basic political choices of its citizens.

Clearly, this understanding of the administrative state overlaps with the idea of democracy that figures so centrally in the political attitudes of Americans and Western Europeans. The definitions of democracy, as I argue elsewhere, is so vague that scholars should dispense with the term and thereby avoid its complex connotations.168 For present purposes, democracy can be defined as a government that uses popular elections to determine the succession of its leading officials.


167 See id at 546-47.

168 See id at 546-47. "[I]n selecting officials, Congress and other political bodies are free to choose, in accordance with their judgment of what they deem to be the best needs to be done, and to act as they see fit. The scheme of expression which they may select is subject to no limitation of law that may not be consistent with the aims of the government."
cials and allows open interaction with the citizenry at both the legislative and administrative levels. This form of government developed contemporaneously with the administrative state in the late eighteenth and early nineteenth centuries, and this simultaneity is far from adventitious. Democracy represents a rejection of direct right and thus undermines any transcendental justifications for the government because the identity of its leaders represents a contingent choice by the people. The primary rationale that underlies this choice, and people's interaction with legislators and administrative agencies, is that the government is supposed to be responsive to people's preferences. As a result, the meaning of democracy is closely related to the instrumentalism that forms the meaning of the administrative state. Conversely, any understanding of our modern administrative system must recognize that this system is intimately connected with the democratic political process that is so suffused with meaning for Americans.

Varying theories of human motivation (and suggest different images of the modern administrative state as a totality. If one begins with the theory that people are motivated by material self-interest, one ends up with a state composed of a conglomeration of special interest deals that people perceive as an intrusion on individual autonomy and a source of special interest benefits. If one believes that people are motivated by the desire to create meaning for themselves, the administrative state emerges as a reflection of their intersubjective commitments and is viewed as an instrumentality for achieving these commitments.

Thus, not only is the starting point of the phenomenological model more plausible from an empirical perspective, but the endpoint is more plausible as well. Public choice tries to portray the modern state as a vast, diffuse conspiracy by narrow elites to mislead or divide the majority of citizens. It explains away all the regulatory initiatives that respond to citizen concerns as complex subterfuges. These accounts become increasingly elaborate when they confront initiatives impelled by modern social movements such as environmentalism or animal rights. The phenomenological model suggests that the growth of the administrative state resulted from an intersubjectively generated demand for public contro1 of the economic and social spheres. As the force of tradition waned, votes demanded that the mechanism

168 Id. at 705-91.
169 The point is our own nation. Many democracies over the last two centuries have also been administrative states. Many of these governments claimed to be democracies, but their real justification and the source of their appeal was nationalism, not administration or democracy as we understand it.
170 See id., supra note 155, at 120-21.
of the administrative state be used to redound situational perceived as societal problems. A historically grounded, widely felt belief of this nature seems more capable of generating the administrative state than the underhanded strategies of small groups of political elites.

The plausibility of this account provides an additional argument against the public choice model. One might argue that it is simply the same argument, that an inadmissible starting point will yield an implausible conclusion. But political theory is not a syllogism; it is a matter of judgment, of assessing the plausibility of explanations by partially intuitive criteria. The public choice theory of motivation may exhibit some serious empirical difficulties, but it cannot be definitively proven false. It is always possible to generate explanations that rescue public choice theory. In fact, phenomenology suggests that such explanations generally will be offered because people’s interpretive capacities are so extant in nature and so driven by their subjective need for meaning. Thus, the rejection of public choice on the basis of its theory of motivation must be provisional. The fact that public choice’s theory of motivation produces an image of the state that is equally implausible provides another locus of critique, and an independent reason why we need to move beyond public choice to formulate different theories of political behavior.

IV
THE IMPLICATIONS OF THE RIVAL IMAGES

Because one’s image of the state serves as a pre-empirical starting point for political and legal analysis, public choice and phenomenology lead scholars in distinctly different directions. The two theories generate different attitudes toward government and suggest different research agendas. Political scientists have recognized the importance of agenda-setting in governmental contexts for some time—an insight that they owe to collective choice scholarship.172 Agenda-setting in academics is equally important. Before the scholar begins an empirical journey, she must decide where she will go and what she will look for. These decisions are necessarily pre-empirical and generally pre-analytic. They operate at an intuitive level that scholars rarely perceive or understand, but which determines the entire direction of research. In so doing, they construct our image of politics itself and produce important effects on the political world.

This Symposium is appropriately titled Beyond Cynicism, because cynicism is invariably the attitude of public choice scholarship. Jonathan Macey argues that cynicism should be adopted as the normative stance of citizens and scholars.173 In fact, it is an unexamined and virtually unavoidable starting point if one subscribes to public choice. The dictionary defines cynical as "distrusting or disparaging the motives of others."174 If one treats the modern administrative state as meaningless and denies the meanings that citizens ascribe to it, then one is necessarily distrusting their motives and adopting a cynical position. There is nothing cynical about treating the owner of a business, or a consumer buying artichokes, as trying to maximize his material self-interest. The business owner or artichoke buyer would cheerfully agree that they are self-interest maximizing. An observer who regards him in this fashion is not being cynical or distrusting, but simply asking them at their word. But treating government officials as maximizing their self-interest is clearly cynical, because that is not what they are supposed to be doing, and not what they themselves believe that they are doing.

There is substantial self-interest maximizing among public officials, but public choice's blindness to the meaning of the modern state transforms this observation from an empirical finding to a pre-analytic starting point, and from an inevitable disruption of the governmental system to the essence of that system. This can be illustrated with the simple example of golf. Most golfers play because they find it enjoyable and obtain pleasure from improving their skills and defeating fellow golfers. In other words, golf has meaning for them. If one rejects the possibility that golf has meaning for these individuals, one must search for explanations that deny the golfer’s motives and possess an inherently cynical character. Perhaps the golfer is attempting to get a suntan, or avoid his family, or make business contacts among his fellow golfers. One might even obtain empirical evidence to support these ulterior motives. But the assumption that these alternative motives must be lurking within the golfer’s brain is a pre-empirical, pre-analytic assumption that results from the denial of golf’s meaning. Armed with this assumption (or more precisely, handcapped by it), the golf researcher will elevate every casual comment and fugitive gesture into a revelation of ulterior motive and construct elaborate hypotheses about the existence of such motives for which no empirical evidence is available.

Public choice scholars have done precisely the same thing in their analyses of the modern administrative state. Having begun from a po-

sition that denies that state its meaning, public choice scholars are
inspired to search for other explanations. The fact that these expla-
nations are based on self-interest maximizing does not represent an
empirical conclusion, but merely restates the assumption that led pub-
lic choice scholars to reject the state’s accepted meaning and begin
their search. In conducting such a search, no evidence for public-
oriented motivations is acceptable—it would be naive to accept it
when there must be something else behind it. Conversely, every way
of evidence for self-interested behavior is pursued, every vague possi-

ability amplified into a general explanation, and every puff of self-inter-
ested smoke assumed to indicate the presence of all-consuming fire of
egotiation or avarice. If no evidence is immediately forthcoming, elabo-
rate narratives of self-interest are constructed—tales of extraordinary
deviousness, coordination, and conspiracy. If necessary, tautological
conceptions of utility are employed in a desperate effort to avoid the
possibility that government officials might possess some modicum of
sincerity and act conscientiously. This is one reason why the
bathwater of public choice must be reinterpreted. While there is
some evidence to support public choice’s assertions, the assessment of
that evidence is skewed by the pre-empirical assumptions that consti-
tute public choice’s implausible baby.

A further difficulty with public choice analysis is that the scholar’s
necessary engagement with her subject matter dictates that public
choice proponents assign some meaning to the state and to political
processes in general. The fact that the public choice theory of motiva-
tion leads them to deny the meaning of the administrative state might
result in a conception of the state as the product of purely self-inter-
ested action by individuals. There is little to say about it, from a moral
perspective, just as there is nothing to say about the female black
widow’s practice of eating its mate after copulation. Psychologically,
this is a difficult view to maintain about the normatively charged politi-
cal environment in which we exist, and public choice scholars gener-
ally do not maintain it. What they do instead is inject unacknowledged meanings into the vacuum created by their denial of
the meaning to the modern state.

These imported meanings emerge from the political and legal
traditions that predate the modern state. Such traditions are embed-
ded in such basic political ideas as law, democracy, and legitimacy. They pervade our political and legal thought, and thereby obscure the
realities of contemporary administrative government. For virtually all
political scientists and legal scholars, these inherited meanings func-
tion as additional pre-empirical, pre-analytic positions from which that

178 See Mark Granovetter, Economic Action and Social Structure: The Problem of Embedded-
government is assailed, and frequently condemned.176 Public choice scholars are particularly vulnerable to this tendency because the modern state is particularly meaningless for them. Perceiving no purpose for administrative government and unwilling to describe the administrative state as a purely neutral occurrence, they fall back on inherited, pre-modern norms. These norms, which are necessarily hostile to the state that has displaced them, are adopted as an analytic starting point that is so obvious that it need not be argued for. In fact, there is a certain moralistic quality to public choice theory. Its proponents are scandalized by government activities that everyone else accepts without concern, such as regulation of the economy, the use of regulation for social purposes, and the delegation of authority to administrative agencies. Their unwillingness to accept those practices is couched as a concern for people’s real preferences, but its more likely origin is the inherited meanings that survive in the absence of any countervailing force.

Consider, for example, the public choice position that regulation represents an impediment to people’s ability to maximize their self-interest, unless they can use the regulation to obtain a benefit. This practice could be viewed as inefficient because one segment of the population profits at another’s expense. But public choice scholarship also treats government regulation as undesirable because it intrudes upon people’s autonomy or liberty. To put this another way, public choice theory strongly implies that people have a positive preference for autonomy, and that government regulation is presumptively undesirable because it conflicts with that preference.

This implication arises from natural rights theory, a leading mode of thought in pre-modern times. Beginning with the fourteenth-century debate over apostolic poverty,177 political thinkers maintained that people possessed certain rights as a matter of natural law, or as a result of the world’s general ordering that could be perceived through reason.178 Predominant among these natural rights was the right to liberty—that is, the right to possess one’s own body, and the right to determine one’s own course of action.179 It was this natural right to liberty that people exchanged for order and safety

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176 This is explored more fully in my forthcoming work. See Rubin, supra note 160.
179 Grotius, supra note 178, bk. 1, ch. LV, at 10; HOBBES, supra note 2, ch. 14, at 289–91; Locke, supra note 178, ch. 2, at 8–20; J.A. METAXAS, supra note 3, at 30–51; Pufendorf, supra note 176, at 140–48 (ch. II.9); ROUSSEAU, supra note 128, at 2.
when they created the social contract. The great debate, which extended through the entirety of the seventeenth and eighteenth centuries, was how much liberty people agreed to relinquish in this process. According to Grotius, they naturally forfeited their natural liberty. According to Hobbes, they relinquished most of their liberty, but retained the right of self-preservation. Therefore, Leviathan could not demand that the citizens condescend themselves or contest to a crime, and under most circumstances, had to give them the opportunity to buy their way out of military service. Locke insisted that people retained more of their natural liberty, including the right to obtain and preserve property. Rousseau then suggested that people did not relinquish liberty because the state, as the embodiment of the general will, made them truly free and thus provided civil liberty in place of natural liberty, a nifty solution that was also adopted by Kant.

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180 De Tocqueville, supra note 177, at 60–62.

181 Grotius, supra note 178, bk. I, ch. III, VIII, at 69 ("[W]hen may not a whole people, for the benefit of better government and more certain protection, completely transfer their sovereign rights to one or more persons, without reserving any to themselves?").

182 Hobbes, supra note 5, chs. 17–19, 21. In Leviathan, Hobbes observed: "If the sovereign command a man (though merely condemned) to kill, wound, or harm himself, ... yet such as that man the liberty to destroy. If a man be interrogated by the sovereign, or by Authority, concerning a crime done by himself, he is not bound (without assurance of pardon) to confess it. ... (A) man that is commanded as a soldier to fight against the enemy, though his sovereign have right enough to punish his refusal with death, may nevertheless in many cases refuse, without injustice; as when he shaming a sufficient scholar in his place.

183 Id. ch. 71, at 264–66.

184 In his Second Treatise on Government, Locke stated:

But though men, when they enter into society, give up the equality, liberty, and executive power they had to the state of nature, into the hands of society, to be so far disposed of by the legislative, as to the good of the society shall require; yet it is only with an intention in every one the better to preserve himself his liberty and property, the power of the society, or legislature constituted by them, is obliged to secure every one's property by providing again, when these defects are remedied, that made the state of nature to unsafe and unsafe.

185 Locke, supra note 178, § 131.

186 Jean Jacques Rousseau observed that "[n]either nature, through the social contract, has assumed liberty, along with an unlimited right to anything that he is tempted by and can get. He gains civil liberty, along with ownership of all he possesses." Rousseau, supra note 108, at 25.

187 As Kant observed:

In accordance with the original contract, everyone ... within a people gives up his external freedom in order to gain it up again immediately as a member of a community, ... And one cannot say the human being in a state has sacrificed a part of his innate outer freedom for the sake of an evil, but rather, he has relinquished entirely his evil, innate freedom in order to find his freedom as such unaltered, in a dependence upon laws, that is, in a right condition, since the dependence arises from his own willing will.

KANT, METAPHYSICS, supra note 3, at 95; see id. at 23–34, 59–65.
Very few contemporary thinkers explicitly subscribe to this approach with the notable exception of Robert Nozick. The problem is that natural rights theory conflicts with modern constitutionalism, modern social science, and the ethos of the administrative state. The principle of constitutionalism is that the people may create any government they want without constraint. It replaces the hypothetical social contract with an actual, operative agreement, and thus creates positive law rights in place of natural ones. The Supreme Court's efforts during the substantive due process era to defend the natural law right to property against the legislation of constitutionally established authorities have been decisively rejected in modern constitutional thought. In a surprisingly analogous manner, modern social science treats liberty as socially constructed. As Hume observes, there was no discrete moment when people entered into a social contract and agreed to give up their natural liberty to create a social order. Social contract theorists have subsequently made clear that the contract is hypothetical and intended as a moral argument rather than a description of actual events, but this is not a complete solution. As Hegel argued, the fact that our concept of liberty is the product of a historical process intertwined with the development of the modern state has moral significance itself. Once we recognize that our liberty is the result of a partially governmental process, the argument that government and liberty are opposing forces loses its moral force.

Finally, and most importantly for present purposes, the idea that governmental action impinges on people's liberty is inconsistent with the dominant understanding of the administrative state. Sometimes the state impinges on liberty, but at other times it establishes and protects individual rights. Workers look to the administrative state for...
protection from oppression by their employers. Labor organization laws, child labor laws, occupational health and safety laws, minimum wage and maximum hours laws, and workers compensation laws are all part of an elaborate regulatory framework established to temper the power of capital. Consumers look to the administrative state for protection against merchants. Citizens rely on government for protection against industrial pollution, infectious disease, and destitution in their old age. Minorities turn to government for protection against discrimination, women seek statutory protection against abusive spouses and prejudiced employers, and children depend on the government for protection against abusive parents. To include the ability to resist state seizure of one's property in the concept of liberty while excluding the ability to resist oppressive employers or abusive parents merely reiterates a pre-modern distinction that we no longer accept.

All this is familiar, of course. The point is that public choice is particularly prone to a pre-modern, ant Administratist moral stance because its motivational theory blings it to the meaning of the administrative state. The phenomenological model of the state suggests a different stance, and would channel legal scholarship in different directions. To some extent, these directions were present in legal scholarship before the advent of public choice. Most legal scholars, then and now, accept that public officials are motivated by the desire to fulfill their role in a meaningful fashion. But legal scholarship has always suffered from its own reductive assumptions and its own blind spots and distortions. One of the virtues of public choice is that it introduced social science literature into legal scholarship with the promise of rescuing legal scholars from their insularity. Having done so, however, public choice then diverted this initiative down its own peculiar paths, and thereby failed to realize the possibilities of interdisciplinary efforts. Phenomenology, with its close link to social science, offers a means of redirecting such efforts in more promising directions.

For example, public choice taught legal scholars to pay close attention to the non-legal actors that impact the legal process. Having done so, however, it reduced all these actors to interest groups, and assumed that they were motivated by self-interest. Public choice theory thus foreclosed legal scholarship from attending to the vast and varied scholarly literature on social movements that address many of the same topics as legal scholarship and use many of the same methodological resources.164 This literature tests social movements as distinct occurrences, and therefore perceives important differences between a trade association attempting to protect its members' eco-

nomics interests, and the civil rights, prisoners' rights, or environmental rights movements. What makes these movements distinct is that they appeal to the ideology of their participants and mobilize large groups of people who have no direct economic interest in the movement's goals. In other words, the participants are motivated by a desire for meaning that is unconnected with self-interest in anything but its tautological sense. The phenomenological model, which is attuned to the distinctions that serve as the basis of social movements research, would allow academics to incorporate this research into legal scholarship. The result would produce a better understanding of the political forces that influence many areas of law.

Public choice also offered to lead legal scholarship in a promising direction by shifting the focus of researchers to the policymaking process. Legal scholars were prone to overemphasize the importance of courts, and to treat legislation as a declaration of rights, rather than as a means of managing the state. Public choice promised to counteract this view, but proceeded to treat legislation as corrupt policymaking and an intrusion on the rights that it imported from the pre-administrative era. By depicting legislators as reelection maximizers, it foreclosed the possibility that one could ever address a normative discourse to them, that a scholar could serve any useful purpose by framing recommendations to legislators about the preferable way to design and draft legislation.

Public choice's failure to look beyond interest group politics in the legislative sphere represents a lost opportunity that the phenomenological model of the state might redeem. Legal scholarship is largely a prescriptive discourse that addresses recommendations to public officials. These officials are primarily judges, but legislators could also be the object of the legal scholar's efforts. It would be useful and illuminating to develop a body of scholarship that counsels legislators about the design and drafting of statutes given the dominant role of statutes in the modern state. The failure of scholars to do so thus far is partially attributable to the juris-crisis of legal scholarship, but public choice, having partially counteracted this tendency, can be blamed for then suggesting so strongly that the effort would be useless.

The phenomenological model offers a similar view of legislation, but a different view of legislators. It suggests that legislators are motivated by a wide range of specific incentives that cumulatively provide lawmakers with a sense of meaning. In addition to reelection, these

192 See supra notes 6, 64-65 and accompanying text.
193 See supra note 66. Members of trade associations are also motivated by a desire for meaning. The difference is that these individuals are able to construct meaning, at least in this specific context, in terms of their economic interests.
desires include implementing an ideology, serving constituents, and impressing colleagues. As a result, the phenomenological model suggests that legislators can be treated as *consistent* policymakers, and that recommendations about the design and drafting of laws can be usefully addressed to them.

With respect to administrators, public choice again established new directions for legal scholarship, only to divert academics down pathways of limited value. Legal scholars had always been aware, through the literature on capture, that regulators are strongly influenced by those whom they regulated. The advent of public choice not only brought this issue to the forefront, but gave it an importance that precluded most other considerations. Public choice created an essentially exaggerated dichotomy between expertise and pluralism, and then elevated pluralism to the dominant consideration. As a result, recommendations for improving the administrative process focused primarily on pluralistic issues, such as the way to limit or direct interest group pressures. Public choice itself offered few solutions; regulation, in its view, was so thoroughly dominated by interest groups that it was a lost cause. Under these circumstances, the best that could be done was to deregulate and leave matters to the market. Other legal scholars rejected this excessive fatalism and developed a literature that includes Philip Harter’s proposal for negotiated rulemaking, and Jody Freeman’s recommendations for collaborative governance.

Through the efforts of the now defunct Administrative Conference of the United States, Harter’s proposal was adopted and then codified, exemplifying the impact that legal scholarship can produce.

The influence of public choice focused the attention of legal scholars on such pluralist solutions and undervalued recommendations predicated on expertise. Here again, the phenomenological model of the state can restore balance. As noted above, the theory suggests that administrators are motivated by the desire to implement


an ideology, to perform their roles in an effective manner; and to act in other ways that reflect a desire to live meaningful lives. Legal scholarship need not restrict itself to recommendations that reshuffle interest group pressures. It can also frame recommendations to administrators about the way to draft effective regulations, the way to evaluate these regulations, the way to design effective enforcement strategies, and the way to respond to citizen concerns. The phenomenological model would tend to validate this mode of discourse, and thereby expand the possibilities for interdisciplinary scholarship in administrative law.

CONCLUSION

This Article does not argue that public choice is useless. In fact, rational choice theory provides valuable insights into the political process, and furnishes a powerful tool for policy analysis. In evaluating a governmental program, it is always useful to ask which interest groups it benefits and which ones it disadvantages. The public choice approach is not a complete explanation, however. Not only does it fail to provide a complete explanation of the entire range of political events, which is the usual criticism, but it fails to provide a complete explanation of any single political event.

The element of meaning will always be present. No matter how clearly a public official acts in accordance with his material self-interest or his self-interest generally, he will always be doing so as part of an overall framework of meaning. This generalization not only applies to transparent efforts to retain his job, but even to actions that go beyond the range of normal political behaviors in our society, such as taking bribes. As empirical studies have revealed, even first-degree murderers generally have a well-developed, deeply felt justification for their actions.198

Academics regard phenomenology, apart from its metaphysical aspects, as a theory of individual behavior.199 It has been influential in American sociology, but not in our political theory. In fact, as continental theory suggests, phenomenology has a great deal to tell us about the political system. Its theory of human behavior, coupled with our historical experience, provides a comprehensive account of the administrative state’s development and current operation. The

nomenology tells us that the evolution of government over the past two hundred years is not the result of inadvertence, or a mysterious cabal, or the perversion of government by special interest groups, but a structure of meaning which citizens share intersubjectively, and which represents their deepest individual commitments in the political realm. As such, it points the way toward new directions for legal scholarship that possess the same interdisciplinary emphasis as public choice theory, but go beyond its pre-empirical, pre-analytic cynicism.