

# CYNICISM AND TRUST IN POLITICS AND CONSTITUTIONAL THEORY

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## INTRODUCTION

The uneasy juxtaposition of cynicism and trust presents one of the most interesting and profound conundrums in political and constitutional theory. The conundrum is that both cynicism and trust seem vital to the long-term viability of a democracy, despite the fact that they appear to be mutually exclusive concepts.

Trust requires a firm belief in the honesty, reliability, and integrity of another person or institution. According to Francis Fukuyama, “[t]rust is the expectation that arises within a community of regular, honest, and cooperative behavior, based on commonly shared norms . . . .”<sup>1</sup> Trust increasingly is viewed as essential to prosperity and social stability. Trust fosters the growth and development of social capital, which is critical to economic development.<sup>2</sup>

By contrast, cynicism entails denying the sincerity of the motives or actions of others. By negating trust, cynicism prevents people from forming what Robert Putnam has described as “civic communit[ies],”

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<sup>1</sup> FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 26 (1995).

<sup>2</sup> James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 *AM. J. SOC.* S95, S117–18 (1988).

or communities based on connections other than kinship.<sup>3</sup> Cynicism, which manifests itself in the systematic distrust of institutions, causes people to be less civic-minded, less well-informed about current events, and less inclined to vote or otherwise participate in political life.<sup>4</sup> When cynicism manifests itself in this way, it can undermine democratic institutions and lead to fundamental instability.

But it is wrong to assume that cynicism has no place in a well-ordered constitutional system. In fact, the opposite is true. Cynicism about governmental abuse of power as well as the tendency of interest groups to influence and control government inspired the Framers. In fact, a dominant theme of *The Federalist Papers* is “the desirability of adopting the Constitution as a means of controlling interest groups.”<sup>5</sup> In *The Federalist No. 10*, James Madison “expressly embraced the notion that what would separate his constitution from those that had gone before it would be a more realistic [i.e., cynical] conception of human nature.”<sup>6</sup> As I previously observed:

The problem confronting the Framers was that, on the one hand, they did not want to organize another monarchy, but on the other hand, the earlier democracies had all been abject failures, nothing less than ‘spectacles of turbulence and contention.’ Madison’s view was that the problem with previous democracies had lain in the assumptions made by their organizers. Specifically, prior to the Federalists’ construction of our political regime, ‘the whole of political thought had turned on ways to inculcate virtue in a small class that would govern.’ In stark contrast, the government that Madison had in mind (and the one that ultimately emerged) would be based on the [cynical] assumption that the postconstitutional world would be populated by people motivated by self-interest rather than by virtue.<sup>7</sup>

The Framers frankly and self-consciously took the view that they had to construct the Constitution to deal with the corruption and ineptitude of the leaders who would govern the postconstitutional order.

The Framers’ distrust and suspicion of government was due in large part to their understanding of history. They also had an intuitive sense of the power of public choice theory, which models the po-

<sup>3</sup> ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 88 (1993).

<sup>4</sup> See *id.* at 90–107.

<sup>5</sup> Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 243–44 (1986).

<sup>6</sup> Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 55 (1987).

<sup>7</sup> *Id.* at 56 (citing THE FEDERALIST NO. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961)); see Irving Kristol, “The Spirit of ‘87,” 86 PUB. INT. 3, 3 (1987); Daniel Patrick Moynihan, *The “New Science of Politics” and the Old Art of Government*, 86 PUB. INT. 22, 23–24 (1987).

litical process as a negative-sum game in which politicians compete to supply powerful special interest groups with private benefits in exchange for political support.<sup>8</sup> In simple terms, the Framers' approach was to hope for virtue, but to expect and plan for corruption and self-interest. They organized the Constitution around this cynical perspective.

In this Article I reconcile the apparent tension between the Framers, who take a cynical perspective on government, and those who observe that trust and social capital are critical to social stability and economic welfare. The reconciliation derives from the realization that cynicism about government can coexist alongside tremendous faith and respect for private ordering, particular private institutions, and certain political institutions as well. Indeed, this coexistence is the key to understanding the American experience.

To illustrate the point, one need only contrast the reverence accorded the Constitution with the widespread public cynicism towards Congress. Furthermore, cynicism about government has become a favorite topic of the media, which seems to find a larger audience for stories of governmental corruption and ineptitude than for stories about honest, hard-working government officials laboring anonymously to serve the public interest. By now, cynicism about government is also featured in popular discourse. Currently, it is difficult to find anyone outside of academia prepared to defend an activist regulatory state *per se*. We have reached the strange state of affairs in which transfer programs and government safety nets remain extremely popular with targeted groups, while even the programs' beneficiaries view the agencies that administer them with distrust and suspicion.

The reality is that government actually works, at least sometimes. There is certainly strong disagreement about how often government programs work and how much the government can be expected to do. Nonetheless, the proposition that government programs never work is demonstrably false, just as there is no merit to the claim that government programs always work as well as one might hope.

One reason that richer theories of the regulatory state are necessary is that the extant theories are not particularly well specified. Governments have a tremendous amount of power. And, while it is certainly true that governments often abuse their power, it is also true that at least occasionally they do not. Researchers should focus their attention on the conditions and circumstances under which govern-

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<sup>8</sup> See generally Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988) (providing an overview of public choice theory).

ment can be made to serve the public interest, not the narrow interests of bureaucrats and special interest groups.

A second reason that new theories of the regulatory state are necessary is that governments differ dramatically from country to country and even within countries. For example, the United States government sometimes appears to embrace an “invisible hand” model, in which it views its role as enabling markets to function more efficiently by minimizing externalities, reducing transaction costs, and providing aid to businesses.<sup>9</sup> On the other hand, critics of the political process perceive the government as using its power simply to transfer wealth from the politically powerless to more powerful constituents who are well positioned to provide benefits to the government.<sup>10</sup>

This Article is divided into three parts. In Part I, I elaborate on Timothy Frye and Andrei Shleifer’s useful taxonomy of how bureaucrats and markets interact.<sup>11</sup> Frye and Shleifer argue that governments come in three forms. Some governments use their power to correct market failures, supply public goods, and enforce contracts. Other governments use their power to help businesses. Still other governments use their power to enrich themselves and their friends at the expense of the public interest. While their taxonomy is informative, I argue that particular governments can, and often do, use their power in all three ways simultaneously. Working within this framework, I articulate an account of the roles played by both trust and cynicism in the construction of a civil society.

In Part II, following the Framers’ cynical lead, I build on the ancient medieval principle known as Occam’s razor to formulate a new logical principle with which to analyze competing theories of government. Occam’s razor, sometimes referred to as the principle of parsimony, provides the basis for all scientific modeling and theory building. Occam’s razor dictates that when multiple explanations for the same data are possible, researchers should always select the simplest explanation.<sup>12</sup> Similarly, “Macey’s razor” dictates that when multiple explanations for the same governmental action exist, researchers should always select the most cynical explanation for that action.

Just as Occam’s razor may seem trivial, Macey’s razor may seem too cynical. However, in the same way that modern science would be impossible without Occam’s razor, the study of governmental

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<sup>9</sup> See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

<sup>10</sup> See, e.g., Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 56 (1992) (suggesting that the proper way to better a “wasteful political system in decline” is to “reduce the power of government to transfer wealth and dispense favors”).

<sup>11</sup> See Timothy Frye & Andrei Shleifer, *The Invisible Hand and the Grabbing Hand*, 87 AM. ECON. REV. 354 (1997).

<sup>12</sup> See Francis Heylighen, *Occam’s Razor*, at Principia Cybernetica Web, <http://pespmc1.vub.ac.be/occamraz.html> (last modified July 7, 1997).

processes will be improved both quantitatively and qualitatively if researchers adhere to Macey's razor. In developing Macey's razor, I point out that all governments attempt to persuade people that they act virtuously and charitably to the extent that they can. Yet the asymmetry between the level of information possessed by the government and the population as a whole, coupled with a host of other collective action problems, makes it difficult for people to accurately assess the efficacy and honesty of government. Therefore, public perception of government will almost certainly be either overly cynical or insufficiently cynical. Given the existence of such systematic error, it is better for people to believe that government is worse than it actually is.

Put differently, even if it were true that people are "too cynical" about government, it is by no means obvious that such cynicism is a bad thing. It might even be a good thing if popular distrust forces governmental actors to bear a heavier burden of persuasion when designing and implementing new programs. I argue that such cynicism can compensate, to a modest extent, for the lack of market discipline that typically characterizes government action. Indeed, cynicism is simply another form of dissent that shifts the burden of proof to the government to justify its actions.

In Part III, I argue that contestability is necessary to induce political actors to work for the public interest rather than for themselves. Specifically, I argue that governmental officials will be more accountable and responsive to the public interest when there is pressure to perform arising from the contestability of their jobs. For a job to be contestable, there must be (a) an unbiased, widely available source of information about what the government is doing, (b) some mechanism by which this information can be integrated into a political agenda, and (c) a low-cost mechanism for replacing bureaucrats, politicians, and other public officials who fail to serve the public interest.<sup>13</sup>

Contestability is vitally important to good government. But contestability is not possible without public cynicism toward government. Similarly, the widely acclaimed system of divided government championed by the Framers reflects a deep cynicism about government. From these two observations, it is easy to demonstrate that Macey's razor will improve the quality of government because it requires lobbyists, bureaucrats, and other governmental actors to do a better job of justifying their policies. Moreover, I will demonstrate that the

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<sup>13</sup> Cf. Enrico Colombatto & Jonathan Macey, *Information and Transaction Costs as the Determinants of Tolerable Growth Levels*, 155 J. INSTITUTIONAL & THEORETICAL ECON. 617, 620-26 (1999) (arguing that developed countries produce higher rates of growth because their societies have civil liberties, which, in turn, make politicians' jobs contestable).

Framers adhered to the principles behind Macey's razor when designing the Constitution for the new American republic.

## I

## INVISIBLE, HELPING, AND GRABBING HANDS

Entrepreneurs generate wealth. Bureaucrats "merely" transfer wealth. Because the actions of bureaucrats affect the incentives that face entrepreneurs, the interaction between bureaucrats and entrepreneurs is vitally important. Frye and Shleifer present three models that describe these interactions: the "invisible-hand" model, the "helping-hand" model, and the "grabbing-hand" model:

Under the *invisible-hand* model, the government is well-organized, generally uncorrupt, and relatively benevolent. It restricts itself to providing basic public goods, such as contract enforcement, law and order, and some regulations, and it leaves most allocative decisions to the private sector. . . .

. . . . Under the *helping-hand* model . . . bureaucrats are intimately involved in promoting private economic activity: they support some firms and kill off others, pursue industrial policy, and often have close economic and family ties to entrepreneurs. . . .

In the final, *grabbing-hand*[ ] model, government is just as interventionist, but much less organized, than in the helping-hand model. The government consists of a large number of substantially independent bureaucrats pursuing their own agendas, including taking bribes.<sup>14</sup>

A number of interesting insights emerge from this taxonomy. First, according to Frye and Schleifer, there is a direct correlation between the level of government activity in the economy and the amount of corruption.<sup>15</sup> Their assumption is that as regulations become more oppressive, regulated firms will be more inclined to pay bribes in order to avoid difficult regulations, requirements, and fines.<sup>16</sup> Needless to say, this is a highly cynical, though accurate, vision of government.

Another interesting feature of the Frye-Shleifer model is that the authors appear implicitly to assume a close correlation between private-sector corruption and public-sector corruption. The idea is that each government official is a potential bribe-taker. As the number of potential bribe-takers increases, so too will the number of bribes.<sup>17</sup> While this analysis seems correct in the case of a corrupt government,

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<sup>14</sup> Frye & Shleifer, *supra* note 11, at 354 (citations omitted).

<sup>15</sup> *See id.* at 354–55.

<sup>16</sup> *See id.* at 357.

<sup>17</sup> *See id.* (citing Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599 (1993)).

if one assumes that government actors have an incentive to be honest, the notion that the number of governmental actors corresponds to the incidence of corruption seems dubious. For example, one would assume that overall corruption would decrease if we were to increase the number of federal judges and Department of Justice officials examining official corruption (although this does not appear to have been the case during the Clinton administration).

The Frye-Shleifer conclusion is that bigger government means more corruption.<sup>18</sup> This inevitably leads to the conclusion that the invisible-hand model of government is preferable because it facilitates relatively little corruption. The invisible-hand form of government is followed qualitatively by the helping-hand form of government, which exhibits organized corruption, and finally by the least desirable grabbing-hand form of government, which exhibits disorganized corruption. In fairness to Frye and Shleifer, their argument is limited to governments in transition.<sup>19</sup> And, while they may be right in this limited context, it is by no means certain that their theory has more general applicability.

Of course, the size of government is not the only thing that affects the level of corruption in a society. The presence or absence of professional norms also will play a pivotal role in determining whether an administrative agency will be plagued with corruption. As James Q. Wilson observed in his classic study of government:

In a bureaucracy, professionals are those employees who receive some significant portion of their incentives from organized groups of fellow practitioners located outside the agency. Thus, the behavior of a professional in a bureaucracy is not wholly determined by incentives controlled by the agency. . . . Because the behavior of a professional is not entirely shaped by organizational incentives, the way such a person defines his or her task may reflect more the standards of the external reference group than the preferences of the internal management.<sup>20</sup>

In other words, the professionals who control policymaking within government bureaucracies are constrained by the institutional norms of the bureaucracy as well as the norms of their particular profession. Environmental engineers at the Environmental Protection Agency are inclined to adopt engineering solutions to problems, while lawyers within the agency are more likely to adopt an approach that permits them to utilize their legal skills. The lawyers' orientation reflects not only the lawyers' desire to utilize their professional training

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<sup>18</sup> See *id.* at 354.

<sup>19</sup> See *id.*

<sup>20</sup> JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 60 (1989).

and experience, but in many cases, also reflects "their desire to use the skills they develop . . . to land a job with a well-paying, prestigious law firm."<sup>21</sup>

The point here is that corruption is not the only thing that causes government actors to deviate from pursuing action that furthers the public interest. Bureaucrats and other governmental actors have competing visions of the public good, and these competing visions reflect distinct professional cultures and their human capital investments in training. While bureaucrats often personally benefit from bringing their own professional norms to bear on policy issues, such personal benefit is not necessary for bureaucrats to skew policy decisions toward their own personal perspectives. Rather, bureaucrats act the way they do because they have been socialized, or programmed, to internalize the norms of their external professions. Not surprisingly, this internalization creates tension within bureaucracies, as lawyers, engineers, economists, and other professionals lobby to have agencies discharge their duties in the way that best reflects the norms of their respective professions.<sup>22</sup>

If we apply the Frye-Shleifer taxonomy to a modern welfare state such as the United States, we see that all three models operate simultaneously. When government auctions the spectrum to the highest bidders or uses tradeable permits to control pollution, it is conforming to the invisible-hand model. When government provides subsidies to businesses and advocates enterprise zones, it acts according to the helping-hand model. When government officials trade political favors for campaign contributions, they conform to the grabbing-hand model.

Cynicism serves the salutary purpose of maximizing the incidence of government action that conforms to the invisible-hand model because voters in a democracy generally will not tolerate corruption. Moreover, cynicism induces citizens to be on their guard against corruption, thereby raising the probability of detecting such activities.

The argument is even more persuasive when compared to possible alternative approaches. For example, one might simply reject the possibility that government actors might be corrupt, but this would be counterfactual and irrational. Alternatively, one could accept the fact of government corruption in the abstract, but reject the possibility that American bureaucrats and politicians are corrupt. While it certainly seems true that bureaucrats and politicians are no *more* corrupt in the United States than in other countries, there is certainly no reason to believe that corruption and self-interest are absent from the

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 60-61.



American political scene. And once we recognize that corruption (or even the unconscious promotion of one's own world-view) is possible, it seems that cynicism about governmental action is warranted because it leads to greater vigilance.

In other words, once we recognize the possibilities of self-interest and corruption, cynicism about government can lead to better government, while eliminating cynicism can only lead to reduced monitoring of governmental action, and consequently more bad government. After all, the opposite of cynicism is naiveté, and it is impossible to imagine that naiveté about government can generate good public policy outcomes.

#### A. Cynicism and the Courts

Frye and Shleifer present an interesting examination of the effectiveness of the court systems in Moscow and Warsaw.<sup>23</sup> If government is working properly, courts are an effective device in resolving disputes that arise between private parties and the government as well as among private parties. Frye and Shleifer argue that when government is corrupt, courts are rarely used because parties are unlikely to achieve a just resolution of their disputes.<sup>24</sup> Conversely, they posit that when government is not corrupt, private parties will have faith in the court system and increase their use of the courts.<sup>25</sup> This depiction is not entirely accurate. Frye and Shleifer are correct that, as corruption declines, people will increase their use of the courts to defend government-granted rights such as property rights, freedom of assembly, and freedom of the press. However, if government misbehavior manifests itself in empire-building and turf-grabbing, private parties may be forced to utilize the courts to confront the bureaucrats. For example, Frye and Shleifer found that fifty-seven percent of the Moscow shops they surveyed had hired legal counsel (compared to only thirty-six percent in Warsaw, which is relatively less corrupt).<sup>26</sup> The most likely explanation for this result is that "lawyers are needed in Russia to deal with bureaucrats."<sup>27</sup>

Of even greater concern are the ramifications of James Q. Wilson's work addressing the influence of culture and beliefs on human behavior. In particular, Wilson documented how professional norms, cultures, and belief systems of governmental actors affected their policy decisions.<sup>28</sup> Applying this analysis to the legal profession, it is easy

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<sup>23</sup> Frye & Shleifer, *supra* note 11, at 355–57.

<sup>24</sup> *Id.* at 355–56.

<sup>25</sup> *Id.* at 356.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> WILSON, *supra* note 20, at 50–71.

to demonstrate that lawyers who become judges are likely to believe that legal solutions, engineered through the prodigious use of lawyers and litigation, are the best way of engineering solutions to whatever conflicts arise among litigants. Judges are likely to believe more strongly in the social value of law and lawyers than most people.<sup>29</sup>

Thus, when people lack cynicism about government at the same time that lawyers, judges, and government bureaucrats believe that they can help people by increasing overall levels of regulation and litigation, productive activity in general and wealth creation in particular are stifled. Cynicism about the efficacy of government serves as an invaluable antidote to the natural proclivities of governmental actors to pursue their own highly programmed (and often skewed) visions of the public good.

#### B. Cynicism and Activist Government: Transaction Costs and the Hidden Agenda

To the extent that cynicism about government leads to caution about accepting the common liberal nostrum that government programs accomplish their ostensible objectives, cynicism can be viewed as a transaction cost that impedes the expansion of government. Those who prefer to see the level of governmental activity increase will, of course, oppose cynicism. This hidden agenda should be exposed, and those who oppose cynicism should explain the basis for their opposition. The motives of those who favor cynicism are quite clear: we think the burden of persuasion should rest firmly on the shoulders of those who favor expanding the size and scope of government.

While promoting cynicism has obvious appeal to libertarians and conservatives who favor a smaller role for government, cynicism should also attract those eager to utilize the government's power to do good. This is because cynicism will not only reduce the size and scope of government, but also will improve the quality of government programs by forcing bureaucrats to adhere to higher standards when designing and implementing legislative programs.

In the private sector, a wide variety of devices are available to ensure that products and services are of a high quality. In particular, competition in product markets, capital markets, labor markets, and perhaps above all, the market for corporate control, works to ensure that managers and workers do their best to offer high-quality products and services at low costs. Unfortunately, in the public sector, it is much more difficult to identify the constraints that deter politicians

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<sup>29</sup> For an analysis of how the process of preference formation begins during law school, see Jonathan R. Macey, *Civic Education and Interest Group Formation in the American Law School*, 45 *STAN. L. REV.* 1937 (1993).

and bureaucrats from engaging in corrupt or selfish policies. Even worse, collective action problems, such as rational ignorance, cause citizens in democracies to tolerate poor governmental performance until it becomes rational for voters to displace the incumbents.<sup>30</sup>

One way that government can convince people that it is doing a good job is to produce economic prosperity. Prosperity signals the electorate that government policies are working.<sup>31</sup> But few would argue that merely contributing to (or more accurately, not impeding) the growth of the private sector provides a sufficient basis for applauding the actions of government. Unfortunately, the other goals that government attempts to achieve, such as promoting a more just and equitable society, providing greater opportunities for the disadvantaged, reducing externalities, promoting social cohesion and solidarity, and reducing suffering, are much more difficult to monitor. Because government operations are often difficult to observe, "the problem of moral hazard arises: the [government bureaucrat] may shirk or subvert" her publicly articulated tasks.<sup>32</sup> To the extent that people are cynical about the performance of government, they will do a better job of monitoring governmental actors, thereby ensuring that such actors perform better.

It seems clear that the least advantaged and most vulnerable members of society should be encouraged to express the most cynicism about government. These are the people least able to monitor governmental actors and exert a controlling influence on the behavior of politicians. Cynicism about the motives of governmental actors is likely to benefit these groups disproportionately.

The larger point here is not that government is always bad. The idea is simply that government is not always good. As discussed below, it takes little or no effort to organize a government in which politicians and bureaucrats act with the purest of motives. The challenge is to organize a government populated by ordinary people with ordinary human frailties. Approaching government with a healthy dose of cynicism is the appropriate weapon for dealing with this challenge. The benefits of such an approach are enormous, while the costs are trivial, if not negligible.

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<sup>30</sup> See Pierre Salmon, *Democratic Governments, Economic Growth, and Income Distribution*, in UNDERSTANDING DEMOCRACY 144, 147, 153 (Albert Breton et al. eds., 1997).

<sup>31</sup> See Colombatto & Macey, *supra* note 13, at 621.

<sup>32</sup> WILSON, *supra* note 20, at 159.

### C. The Role of Trust

Cynicism about government creates much needed space within society for private virtue<sup>33</sup> by creating a demand for the development of social capital. Social capital is the ability of people to work together for common purposes through the medium of non-governmental groups and organizations.<sup>34</sup> This is the most important, and certainly the most constructive role that cynicism plays in civic life. The more people distrust government, the more they will be forced to invest in social capital by trusting each other instead. As Fukuyama observed:

The concept of human capital, widely used and understood among economists, starts from the premise that capital today is embodied less in land, factories, tools, and machines than, increasingly, in the knowledge and skills of human beings. . . . [I]n addition to skills and knowledge, a distinct portion of human capital has to do with people's ability to associate with each other, that is critical not only to economic life but to virtually every other aspect of social existence as well. The ability to associate depends, in turn, on the degree to which communities . . . are able to subordinate individual interests to those of larger groups. Out of such shared values comes trust, and trust . . . has a large and measurable economic value.<sup>35</sup>

Government certainly has a role to play in enforcing contracts and maintaining social order. But government is not enough. In Fukuyama's words, "reciprocity, moral obligation, duty toward community, and trust" are equally critical to ensure the proper functioning of democracy and capitalism.<sup>36</sup>

Unfortunately, dependence on government eliminates people's incentives to invest in social capital. For example, Edward Banfield observed that in the Italian village of Montegrano during the 1950s, wealthy residents were unwilling to provide badly needed institutions such as schools and hospitals although they clearly had the resources to do so. The town's reluctance to fund these facilities arose from a conviction that it was not their responsibility, but the state's responsi-

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<sup>33</sup> Thoreau argues that a lack of cynicism for government detracts from moral virtue, observing that "[I]aw never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice." HENRY DAVID THOREAU, *THE VARIORUM CIVIL DISOBEDIENCE* 33 (Walter Harding ed., Twayne Publishers 1967) (1866).

<sup>34</sup> See Coleman, *supra* note 2, at S98-S100; see also Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 67 (1995) ("[S]ocial capital refers to features of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit.").

<sup>35</sup> FUKUYAMA, *supra* note 1, at 10 (citations omitted).

<sup>36</sup> *Id.* at 11.

bility to finance these institutions.<sup>37</sup> By undermining citizen dependence on government, cynicism thus creates a forum for virtue.<sup>38</sup>

At the outset of this Article, I noted the odd juxtaposition of cynicism and trust, and observed the paradox that both cynicism and trust seem vital to the health of society. Now we can see that there is a symbiotic relationship between cynicism and trust: cynicism about the state makes room for civic virtue and private philanthropic initiative.

Nowhere is this unlikely relationship more readily observable than in the United States. Cynicism about government is reflected in this country's "strong antistatist tradition, evident in the relatively small size of the American public sector when compared to virtually all European nations, and in opinion polls that show Americans expressing decidedly lower levels of confidence in and respect for government than do citizens of other industrialized nations."<sup>39</sup> Many have observed the apparent anomaly that alongside the American public's unusual hostility to government regulation, taxation, government oversight and intrusion, and state ownership of productive resources, is the public's equally distinctive ability to create and maintain "very large, cohesive *private* organizations."<sup>40</sup> Both Alexis de Tocqueville and Max Weber remarked on the huge success of voluntary associations in America.<sup>41</sup> Of particular relevance is de Tocqueville's famous observation:

Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.<sup>42</sup>

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<sup>37</sup> See EDWARD C. BANFIELD, *THE MORAL BASIS OF A BACKWARD SOCIETY* 30-31 (The Free Press 1965) (1958).

<sup>38</sup> Goldhagen notes that although German society was heavily anti-Semitic, by readily following the Nazi movement, citizens "subscribed to the underlying Nazi model of Jews and . . . were 'Nazified' in their views of Jews," losing what social virtue they had. DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS* 87 (1996).

<sup>39</sup> FUKUYAMA, *supra* note 1, at 51 (citations omitted).

<sup>40</sup> *E.g., id.*

<sup>41</sup> *Id.* at 50.

<sup>42</sup> 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 114 (Phillips Bradley ed., Vintage Books 1945) (1835).

A central insight of this Article is that there is a causal connection between American's cynicism about government and their skill at voluntary association. Put plainly, cynicism about government does not mean the abandonment of faith in and dependency on institutions. In fact the opposite is true; cynicism requires the construction of alternative institutional arrangements.

Cynicism about government has given rise to the image of the American as rugged individualist. But the American penchant for associational life has always counterbalanced these individualistic tendencies.<sup>43</sup> Francis Fukuyama has observed the interesting juxtaposition between American individualism and the American penchant for communal arrangements:

Although Americans commonly characterize themselves as individualistic, most serious social observers have noted in the past that the United States historically has possessed many strong and important communal structures that give its civil society dynamism and resilience. To a greater degree than many other Western societies, the United States has a dense and complex network of voluntary organizations: churches, professional societies, charitable institutions, private schools, universities, and hospitals, and, of course, a very strong private business sector.<sup>44</sup>

By contrast, the absence of cynicism about government leads to the destruction of a civil society characterized by voluntary associations. For example, socialism requires a complete lack of cynicism about government. One cannot be cynical about government and simultaneously support state ownership of the means of production, as well as the government's plenary authority to make capital allocation decisions. And, as Fukuyama has observed, "[p]erhaps one of the most devastating consequences of socialism as it was actually practiced in the Soviet Union and Eastern Europe was the thorough destruction of civil society that took place there, a destruction that has hampered the emergence of both working market economies and stable democracies."<sup>45</sup>

Voluntary associations, including small businesses, family farms, unions, churches, newspapers, and the myriad of voluntary associations, all subtly compete with the state as sources of authority. That is why "[t]he Leninist state set about deliberately to destroy all possible competitors to its power."<sup>46</sup> When people lose their cynicism about the state and come to depend entirely on the government, they lose their public-spiritedness as well.

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<sup>43</sup> See FUKUYAMA, *supra* note 1, at 283.

<sup>44</sup> *Id.* at 50.

<sup>45</sup> *Id.* at 54.

<sup>46</sup> *Id.* at 54–55.

## II MACEY'S RAZOR

The considerable benefits associated with adopting a cynical approach to government lead inexorably to the principle of Macey's razor, which, in turn, owes a large intellectual debt to the principle of Occam's razor. As noted above, Occam's razor holds that when scientists are forced to choose between competing plausible explanations for a particular data set, they should select the simplest explanation.<sup>47</sup> According to Francis Heylighen:

[This] principle is absolutely essential for model building because of what is known as the "underdetermination of theories by data." For a given set of observations or data, there is always an infinite number of possible models explaining those same data. This is because a model normally represents an infinite number of possible cases, of which the observed cases are only a finite subset. The non-observed cases are inferred by postulating general rules covering both actual and potential observations.

For example, through two data points in a diagram you can always draw a straight line, and induce that all further observations will lie on that line. However, you could also draw an infinite variety of the most complicated curves passing through those same two points, and these curves would fit the empirical data just as well.<sup>48</sup>

In this situation, Occam's razor instructs researchers to select the simplest explanation for the relationship, which, in this case, is the straight line representing the linear relationship among the data points.<sup>49</sup>

Macey's razor holds that when more than one explanation for the same governmental action is possible, policy analysts should always select the most cynical explanation for that action. The most cynical explanation for a governmental action is the one that presumes that such action is motivated by the private interests of the groups affected by the action, rather than by public-spirited motives. Thus, when a particular governmental action ostensibly serves some public interest, but also can be explained on other, more cynical grounds such as bureaucratic turf-building, or successful "rent-seeking"<sup>50</sup> by a special interest group, Macey's razor holds that the more cynical explanation

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<sup>47</sup> Heylighen, *supra* note 12.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Rent-seeking refers to the lobbying process by which special interest groups attempt to procure legislation that transfers wealth (economic "rents") in excess of what the members of such groups could earn in the competitive marketplace to themselves from the public at large. For a discussion of rent creation, rent-seeking, and an introduction of the concept of "rent extraction," see FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 7-13 (1997).

should be considered first. Generally speaking, while some believe that government regulation is designed to cure market failures and to solve other problems that cannot be redressed by the private sector, others view governmental action more cynically as involving expressions of the narrow self-interest of the relevant decisionmakers. It is this special-interest-group-oriented vision of government<sup>51</sup> that Macey's razor characterizes as the more cynical.

Macey's razor is not based on the assumption that all governmental action is predicated on nefarious motives, but on the supposition that government functions optimally when political initiatives are interpreted from a cynical perspective. The premise for this insight is simple: government in general and laws in particular are necessary because human beings cannot regulate their own actions. However, because laws are made by human beings who compose the government, political regulation and legislative restraint are critical. Because cynicism about government provides these constraints, adopting the perspective that Macey's razor counsels is sound policy. Another reason that it is advisable to adopt the perspective counseled by Macey's razor is that government action necessarily displaces private action, and displacing voluntary initiatives to solve social problems has devastating consequences, including the twin evils of rampant corruption and governmental excess. Moreover, as the following section of this Article demonstrates, cynicism about human nature explains the basic architecture of the U.S. Constitution.

### III

#### CONSTITUTIONAL AND PSYCHOLOGICAL PERSPECTIVES ON CYNICISM ABOUT GOVERNMENT

Cynicism about government is ubiquitous. As I observed previously, "[t]oo often the [political] process seems to serve only the purely private interests of special interest groups at the expense of the broader public interests it was ostensibly designed to serve."<sup>52</sup> It appears, however, that cynicism about government is not constant over time. Rather, it seems that distrust of government reigns supreme during periods of peace and economic stability, while people become desperate for government-driven solutions during crises. This desperation creates windows of opportunity for entrepreneurial politicians and special interest groups, because such desperation induces people to abandon cynicism and embrace the fantasy that the government

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<sup>51</sup> ROBERT E. McCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT 3-11 (1981).

<sup>52</sup> Macey, *supra* note 5, at 223.



will generate solutions to their problems.<sup>53</sup> However, in calmer times, people can craft constitutional rules that provide protections against opportunistic politicians.

In this section of the Article, I will turn to constitutional theory and the literature on social psychology to support my view that cynicism about government should be encouraged for two reasons. First, it reduces the incidence of bad law by stemming the flow of bills that are enacted into law. Second, public cynicism improves the quality of the laws that are passed.

#### A. Constitutional Theory

The U.S. Constitution reflects the Framers' views of human nature as well as their profound cynicism about government. As James Madison famously observed, "[i]f angels were to govern man, neither external nor internal controls on government would be necessary."<sup>54</sup> However, because the people who would be in charge of governments were unlikely to be angels, strong protections against governmental corruption and excess were necessary.<sup>55</sup>

In fact, the Framers took a very cynical view of human nature. As Martin Diamond observed, cynicism was at the core of the new political science embraced by the Framers:

Ancient and medieval thought and practice were said to have failed disastrously by clinging to illusions regarding how men *ought* to be. Instead, the new science would take man as he actually *is*, would accept as primary in his nature the self-interestedness and passion displayed by all men everywhere and, precisely on that basis, would work out decent political solutions.<sup>56</sup>

Indeed, the miracle of the U.S. Constitution is that it adopted a realistic, that is to say cynical, view of human nature. As Madison observed, the Constitution was designed to reflect the fact that "[e]nlightened statesmen will not always be at the helm" of the fledgling republic.<sup>57</sup> The Framers recognized that corrupt, short-sighted, and venal politicians and bureaucrats were a serious threat to the new republic. Failure to instill a high level of cynicism in the citizenry would inevitably

<sup>53</sup> See ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 17 (1987); Jonathan R. Macey, *Regulation and Disaster: Some Observations in the Context of Systemic Risk*, in BROOKINGS-WHARTON PAPERS ON FINANCIAL SERVICES 405, 413 (Robert E. Litan & Anthony M. Santomero eds., 1998).

<sup>54</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

<sup>55</sup> See, e.g., *id.* ("In framing a government which is to be administered by men over men . . . you must first enable the government to control the governed; and in the next place oblige it to control itself.")

<sup>56</sup> This passage appears with attribution, but without citation in Moynihan, *supra* note 7, at 23.

<sup>57</sup> THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

have led to the same problems of faction and interest-group politics that created massive problems among the various pre-Revolutionary War state governments.

As Alexander Hamilton observed in *The Federalist No. 15*, the reason that people need government is that “the passions of men will not conform to the dictates of reason and justice without constraint.”<sup>58</sup> The Constitution’s purpose was to constrain government actors. The Framers recognized that cynicism was a critical element of justice because they understood that, while it would be a “happy” event if decisionmakers (including themselves) were “directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good,” such a rosy view of the constitutional formation process was “a thing more ardently to be wished than seriously to be expected.”<sup>59</sup>

It is hard to be more cynical than Hamilton, who viewed men as “ambitious, vindictive, and rapacious,”<sup>60</sup> yet John Jay went even further in *The Federalist No. 4*, when he attributed war to a “disgraceful” aspect of human nature.<sup>61</sup> According to Jay, “nations in general will make war whenever they have a prospect of getting anything by it.”<sup>62</sup> Thomas Sowell observes that the Framers do not attribute wars to “misunderstandings,” as pacifists claimed throughout the twentieth century, and that “wars are not going to be prevented by ‘seeing others as people like ourselves’ or by symbolic acts of goodwill. Wars are prevented by making it too dangerous for others to attack you.”<sup>63</sup> Conversely, according to Hamilton, a weak nation “forfeits even the privilege of being neutral.”<sup>64</sup> In other words, Macey’s razor applies not only to domestic politics, but to foreign policy as well.

This point is recognized by other scholars as well. Bruce Ackerman observed that the great insight of the Framers of the U.S. Constitution was the cynical view that “the future of American politics will not be one long, glorious reenactment of the American Revolution.”<sup>65</sup> Similarly, Cass Sunstein asserted that the problem of interest group control over government has been “a central concern of constitutional law and theory since the time of the American Revolution.”<sup>66</sup>

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<sup>58</sup> THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>59</sup> THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>60</sup> THE FEDERALIST NO. 6, at 54 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>61</sup> THE FEDERALIST NO. 4, at 46 (John Jay) (Clinton Rossiter ed., 1961).

<sup>62</sup> *Id.*

<sup>63</sup> Thomas Sowell, *The Federalist Papers Revisited* (Jan. 2, 1997), at <http://www.townhall.com/thcc/content/sowell/sowe010297.html> (last visited Nov. 12, 2001).

<sup>64</sup> THE FEDERALIST NO. 11, at 87 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>65</sup> Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1020 (1984).

<sup>66</sup> Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29 (1985).

The Constitution contains a wide variety of mechanisms that reflect the Framers' cynicism. In particular, the constitutional system of checks and balances, of which the separation of powers is the most prominent part, reflects a healthy cynicism about government. Rather than assuming that government will consistently generate benign laws and regulations, the constitutional structure raises politicians' costs of passing laws in a variety of ways. Moreover, the Constitution's constraints on the legislative process are structural in nature, making them relatively immune from opportunistic misinterpretations by subsequent political actors.

One example of a structural feature of the Constitution that reflects cynicism is the bicameral legislature with significant differences in the size of the two houses.<sup>67</sup> The fact that the House of Representatives is quite large and that there is a significant disparity between the size of the House and the size of the Senate is rather significant. As Mancur Olson explains, the cost of decisionmaking by a collective body such as a legislature increases nonlinearly.<sup>68</sup> This means that the costs of making decisions increase at a faster rate than the growth in the size of the legislature.<sup>69</sup> The implication of this analysis is that, holding the total number of representatives (senators and congressmen) constant, increasing the size of the House of Representatives raises an interest group's costs of obtaining agreement in that chamber by an amount greater than the group's savings in the other house.<sup>70</sup>

It is also well known that the independent judiciary<sup>71</sup> and the presidential veto<sup>72</sup> are features of the U.S. Constitution that reflect cynicism about the merits of unfettered governmental activity. These structural features are not random. The bicameral legislature, the relative sizes of the House and Senate, the independent judiciary, and the executive veto all raise the costs of passing legislation. The benefit of such a system is that it reduces the efficacy of interest group activity.

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<sup>67</sup> See U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 3, cl. 1.

<sup>68</sup> MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53–54 (1965).

<sup>69</sup> See *id.*

<sup>70</sup> MCCORMICK & TOLLISON, *supra* note 51, at 44–45.

<sup>71</sup> See, e.g., THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Th[e] independence of the judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men . . . have a tendency . . . to occasion dangerous innovations in the government . . .”); see also Macey, *supra* note 5, at 266–68 (examining the independent judiciary from an interest group perspective).

<sup>72</sup> See, e.g., THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (basing the need for the presidential veto on the fact that “the love of power may sometimes betray [the legislature] into a disposition to encroach upon the rights of other members of the government [and] a spirit of faction may sometimes pervert its deliberations”).

The downside is that these features make it more difficult for less cynical politicians to pass laws. The Framers were clearly aware of this downside, but were convinced that the benefits of cynicism outweighed the costs:

It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. . . . The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.<sup>73</sup>

Thus, the Framers would not view cynicism about government as a social problem, but as a realistic, sensible, and constructive public policy perspective. The danger is not too much cynicism, but too much idealism. Pure Marxism probably is the most idealistic form of government, and it has not exactly been a resounding success in Russia, Eastern Europe, North Korea, Cuba, or any other venue. In the United States, however, where cynicism about government reigns supreme, people barely trust the government to act as silent guardian over markets, and the result has been incredible prosperity.

#### B. Social Psychology and Cynicism

Just as economic theory fueled the public choice analysis of constitutional theory above, the field of social psychology is similarly proving to be a rich source of insights into law. For example, the prospect theory, developed by Amos Tversky and Daniel Kahneman, predicts that people will not respond rationally to the risks of low-probability events.<sup>74</sup> In general, people will tend to either underestimate a relatively high-probability risk, or to overestimate a relatively low-probability risk.<sup>75</sup> This cognitive bias permits opportunistic politicians and interest groups to exploit rationally ignorant citizens by convincing them that costly, draconian legislation is necessary to address low-probability risks. The overestimation of low-probability risk also seems to explain the incredible success of government-sponsored lottery programs. These programs are highly regressive taxing vehicles that prey upon people of modest means by taking advantage of their cognitive

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<sup>73</sup> *Id.* at 443–44.

<sup>74</sup> Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 *AM. PSYCHOLOGIST* 341, 343–45 (1984).

<sup>75</sup> *See id.* at 345 (presenting illustrations of people demonstrating risk-seeking behavior when confronted with unlikely gains and risk averse behavior when threatened with unlikely losses).

biases, which, in this case, manifest themselves in the form of their hopes for winning the lottery.

Entrepreneurial politicians can gain public support by creating the specter of an imminent crisis and then claiming that they have a legislative solution. Unfortunately, this "solution" generally takes the form of some costly and wasteful regulation which only transfers massive government funds to lawyers, lobbyists, bureaucrats, and special interest groups who provide political support to the entrepreneurial politicians.

For this reason, disasters provide entrepreneurial politicians with the opportunity to gain public support by "taking charge of [a] disaster" and claiming that they can "enact legislation that will reduce the probability that such a disaster will occur in the future."<sup>76</sup> Perhaps worst of all, governmental actors even have an incentive to create artificial disasters in order to stimulate demand for or reduce opposition to regulations that they favor.

Unfortunately, as I observed in the context of regulating the financial services industry, the regulation that follows a disaster often bears no relation to the remedy needed to respond to the disaster. Instead, such legislation responds only to the interests of discrete, highly organized groups that are able to exploit the panic and concomitant suspension of cynicism toward government that frequently follow a disaster. As I observed previously:

Not surprisingly, one of Congress's responses to the widespread public sentiment and outrage that accompanies disaster is the promulgation of legislation that conforms to the needs of narrow, focused interest groups that advocate misplaced regulation as a response to public attention on the current disaster. Interest groups can bring about drastic regulatory change in a fraction of the time normally required to pass such regulation as a result of the public outrage to the disaster.<sup>77</sup>

For example, the congressional hearings that followed the collapse of the Bank of Credit and Commerce International (BCCI) created the false impression that the U.S. banking system faced a massive threat from rogue international bankers.<sup>78</sup> Despite the fact that no U.S. creditors lost money when BCCI became insolvent (indeed, the U.S. government made over \$250 million in profits in the form of

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<sup>76</sup> Macey, *supra* note 53, at 415.

<sup>77</sup> *Id.* at 416.

<sup>78</sup> At the congressional hearings, Senators Kerry and Brown argued that BCCI was a "case study of the vulnerability of the world to international crime on a global scope that is beyond the current ability of governments to control." *Id.* at 420 (quoting JOHN KERRY & HANK BROWN, *THE BCCI AFFAIR*, S. DOC. NO. 102-140, at 17 (1993)).

“fines” levied on the insolvent bank),<sup>79</sup> the collapse of BCCI was used to garner support for the Foreign Bank Supervision Enhancement Act of 1991 (FBSEA).<sup>80</sup> This statute did not make banks safer, but it did benefit domestic banking interests by raising entry barriers to U.S. banking markets by foreign competitors.<sup>81</sup> Of course, cynicism about the motives of government can be a healthy antidote to this problem.

Another captivating insight from the literature on social psychology is that people appear to have a fairly strong sense of innate fairness (remember that this Article advocates cynicism only toward government actors, not toward private individuals). This sense of fairness, which makes some economists uncomfortable, sometimes manifests itself in redistributionist tendencies.

Social psychologists have used an interesting experiment called the “ultimatum game” to test these impulses.<sup>82</sup> One of the classic ways of structuring the ultimatum game is to have two people who do not know each other, and who are guaranteed that they will never come to know each other, play under conditions that maintain their anonymity. Both players are told that they will be able to split a sum of money (let us assume \$100) if they can “win” the game by cooperating with each other. One of the two players (“Player 1”) is then informed that she may either take the entire \$100 for herself, or take only a portion of it and share the rest with her partner (“Player 2”). Before Player 1 decides how much of the \$100 she will take for herself, she is told that Player 2 will be offered the balance of the \$100 that Player 1 decides to share. If Player 2 is unhappy with the sharing arrangement proposed by the first player, he may reject his share, in which case Player 1 will also receive nothing. In other words, Player 2 can “punish” Player 1 if she does not make a fair split by preventing Player 1 from receiving anything. Of course, when this happens, Player 2 is also punishing himself, because by rejecting Player 1’s split, he too receives nothing.<sup>83</sup>

The surprising thing about the ultimatum game is that while economic theory predicts that the second party should accept any amount offered by the first party that is greater than zero, the second party generally will reject offers that might be described as insultingly low, such as offers below about \$20, or twenty percent of the total

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<sup>79</sup> See *Sturge v. Smouha (In re Smouha)*, 136 B.R. 921, 926 (Bankr. S.D.N.Y. 1992); Macey, *supra* note 53, at 419.

<sup>80</sup> 12 U.S.C. § 3104 (1994). For a detailed account of the events leading up to the passage of the FBSEA, see Macey, *supra* note 53, at 420.

<sup>81</sup> Macey, *supra* note 53, at 420.

<sup>82</sup> See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1489–90 (1998).

<sup>83</sup> *Id.*

available amount.<sup>84</sup> Even more interesting is the fact that Player 1 often anticipates this result and generally makes a rather generous offer in order to protect her claim to at least some of the money.<sup>85</sup>

The implications of the ultimatum game are interesting and subtle. First and foremost, it seems plausible that people not only have a strong sense of fairness, but are also willing to punish others (and themselves) to vindicate that sense. Importantly, however, the ultimatum game is played with “found money.” Neither player can be said to have “earned” the money, neither is more deserving than the other, and neither can claim a greater share. By contrast, money that the government distributes is earned by somebody and then taken from him through taxation.

It seems clear that impulses similar to those at work in the ultimatum game are at work in government. If redistributionist tendencies are observable in the ultimatum game, where such tendencies impose real costs on the party seeking to send the message that failure to redistribute adequately is immoral, such tendencies are likely to be magnified in the context of governmental wealth transfer programs when the costs of redistribution to the bureaucrat or politician engaging in the distribution are effectively zero. Put differently, the redistributionist impulses that are laudable in the context of the ultimatum game are dangerous when exhibited in the context of governmental programs. Again, cynicism about the motives and effects of government can serve as a healthy antidote to unfettered, unchecked redistributionist impulses. These impulses are likely to be made worse by the fact that legislators and bureaucrats may infer unfairness whenever they witness undesirable outcomes. Due to hindsight biases, legislators and bureaucrats may infer erroneously that such outcomes are the result of systemic unfairness or the unwillingness of the rich to share with the less deserving.

Another important psychological phenomenon, the tendency to believe convenient fictions, may then come into play. Specifically, those in a position to help the least advantaged may convince themselves that it is unnecessary to take responsibility for underprivileged members of society because of the convenient fiction that the government will help those people. We are then left with the worst of all worlds—a private citizenry that will not and a government that cannot help the least advantaged.

Another cognitive bias that politicians appear to have exploited is the “endowment effect.” Endowment effects have been tested through social science experiments that compare human subjects’

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<sup>84</sup> *Id.* at 1490.

<sup>85</sup> See Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281, 1283–84 (1993).

willingness to pay for certain goods with their willingness to accept payment for those same goods.<sup>86</sup> A rational economic actor should not demand a higher price when selling a possession than he would be willing to pay to purchase that item. In fact, however, we see that people are generally unwilling to part with an item in their possession without receiving a premium above what they would pay for the item when it is in the possession of others. The gap between this relatively low amount that people are willing to pay and the relatively high amount that people demand for goods in their possession is referred to as the endowment effect.<sup>87</sup>

As Daniel Kahneman, Jack Knetsch, and Richard Thaler have observed, “[o]ne implication [of the endowment effect] is that individuals have a strong tendency to remain at the status quo, because the disadvantages of leaving it loom larger than advantages.”<sup>88</sup> One can infer from this that economists are wrong to assume that we can tell how satisfied people are merely by tabulating their wealth. Instead, satisfaction should be calculated by examining changes in a person’s condition relative to a neutral reference point. Similarly, we can infer that people fear changes in condition that make them worse off more than they value improvements or gains of a corresponding magnitude.<sup>89</sup>

When viewed from the perspective of government, the endowment effect paves the way for an expansion of governmental power. First, government represents itself as the guardian of people’s rights and possessions. By preying on people’s exaggerated fears about the risks of having their rights or possessions removed, government can increase the demand for its own services. Welfare is a particularly egregious example of this practice. The endowment effect contributes to the problem of welfare dependency because people view the costs of removing themselves from welfare to be significant while they simultaneously undervalue the benefits of moving into private-sector employment. Thus, while it is easy for people to support welfare transfer payments that target the neediest members of society, the endowment effect demonstrates that welfare can become a trap as people irrationally become averse to surrendering those payments, even when they have concrete opportunities to improve their condition. Of course, cynicism about government ameliorates this problem to the extent that potential welfare recipients develop a healthy skepticism about the government’s ability to solve their problems.

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<sup>86</sup> See Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193, 194.

<sup>87</sup> The phenomenon has also been dubbed “status quo bias” or simply “loss aversion.”  
*See id.*

<sup>88</sup> *Id.* at 197–98.

<sup>89</sup> *See id.* at 199.



Another way that the endowment effect can produce bad results is attributable to the "framing effect." The framing effect leads people to treat out-of-pocket costs more seriously than they treat opportunity costs, while a rational economic actor should treat both costs as equal.<sup>90</sup> This phenomenon has important implications for people's views about fairness and justice.<sup>91</sup> For example, Kahneman, Knetsch, and Thaler conducted a survey of Toronto and Vancouver residents to test the interaction of the framing effect and people's views of fairness. Subjects were told that a shortage of cars had developed and were then asked whether particular responses to that shortage were "fair" or not. One group was told that there was a shortage for a popular model of automobile, and that the shortage was causing a two-month delay in delivery. This group was further told that in response to the shortage, a dealer had raised his price to \$200 above the manufacturer's suggested retail price (list price) for the automobile. Seventy-one percent of respondents thought that this action was unfair, while only twenty-nine percent of respondents thought it was acceptable.<sup>92</sup>

By contrast, another group was told the same story about the shortage of cars, but then was told that the dealer that had previously sold cars at \$200 *below* list price was now selling cars at list price. Their conclusions about the fairness of the car dealer's actions change dramatically. Despite the fact that the economic event (a price increase of \$200) was the same, fifty-eight percent of respondents now said that the dealer was behaving acceptably, while only forty-two percent thought that the dealer was behaving unfairly in this situation.<sup>93</sup>

The point is that absent cynicism, government can dramatically affect the popular acceptance or rejection of its policies simply by taking full advantage of its power to frame the issues as it prefers.

One might argue that private companies' capacity to take advantage of the framing effect is also substantial, and that this type of cognitive bias can be effective in advertising. For example, Thaler has shown that businesses can take advantage of the framing effect when they establish pricing policies. For example, when there is a disparity between the prices charged to credit card customers and to cash customers, retailers never frame the credit card price as a "surcharge," but instead refer to the cash price as a "discount."<sup>94</sup>

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<sup>90</sup> See *id.* at 203.

<sup>91</sup> See *id.*

<sup>92</sup> *Id.*; Daniel Kahneman, Jack L. Knetsch, & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 723, 732 (1986).

<sup>93</sup> Kahneman, Knetsch, & Thaler, *supra* note 86, at 203; Kahneman, Knetsch, & Thaler, *supra* note 92, at 732.

<sup>94</sup> Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 45 (1980).

However, the government's ability to achieve its intended results by exploiting the framing effect is substantially greater than that of private firms. Private-sector framing effects like the one described above are not harmful or even misleading. These framing effects merely put the best possible "spin" on a particular consumer choice. Moreover, in the private-sector context, people internalize the entire cost of their failure to overcome cognitive biases. Finally, there are statutory and common law remedies against fraudulent and misleading commercial practices in the private sector that do not exist in lawsuits against the government.<sup>95</sup>

By contrast, the government's ability to take advantage of framing effects is significantly greater than that of the private sector because the government can establish entitlement programs that provoke people's status quo bias and loss aversion. Government can also trigger framing effects through monetary policy. Imagine that the economy is heading into decline. Business profits are declining, unemployment is already high, and firms will have to cut wages in order to avoid further layoffs. Studies testing the framing effect show that the vast majority of people find cutting wages to be unfair.<sup>96</sup> By contrast, if the government utilizes its control over monetary policy to cause substantial inflation, the company can accomplish its goal of reducing workers' salaries more palatably by simply failing to increase wages at the rate of inflation.<sup>97</sup>

The framing effect also provides an additional reason for why sensible constitutional structures establish independent central banks and then place control over monetary policy in the hands of those banks.<sup>98</sup> When central banks are not independent of the political process, there are other inexorable pressures on politicians to inflate their countries' currencies. Inflation is a form of taxation that politicians can impose outside of the normal legislative process. The government can print money at no cost and then use the newly printed money to buy goods and services at an initially low set of prices. Prices then rise as people begin to re-spend the newly minted money. These subsequent purchases cause inflation, which reduces the purchasing power of the money that people hold. But the government has ac-

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<sup>95</sup> For example, lawsuits against private parties for consumer fraud or securities fraud are common while such suits against the government are unheard of.

<sup>96</sup> See Kahneman, Knetsch, & Thaler, *supra* note 86, at 204.

<sup>97</sup> For example, Kahneman, Knetsch, and Thaler found that 63% of respondents thought decreasing wages and salaries by 7% to be unfair in an economy experiencing a recession but no inflation. However, in an economy with an inflation rate of 12%, only 22% of respondents found increasing salaries by 5% to be unfair, even though this amounts to a 7% decrease once the rate of inflation is taken into account. *Id.*

<sup>98</sup> Cf. Stanley Fischer, *Central-Bank Independence Revisited*, AM. ECON. REV., May 1995, at 201, 202 ("The central bank has to be independent to ensure that its preferences rather than those of society determine monetary policy.").

quired real resources from the private sector through its initial purchases, as if through a tax, with a tax rate proportional to the rate of inflation.<sup>99</sup> Consequently, the framing effect may partially explain why politicians seek to gain control over monetary policy and then pursue inflationary policies.

### C. Contestability

One explanation for the poor performance of government agencies and public enterprises relative to their private-sector counterparts is that the managers of public-sector enterprises "lack the high-powered incentives that are believed to prevail in private firms."<sup>100</sup> These public-sector managers differ from private-sector managers in three important ways. First, there is often no clear way to measure the performance of public-sector actors because their goals are relatively amorphous. In other words, while it is easy to determine whether a private-sector firm is achieving its goal (making a profit), it is difficult to discern the goals of a public-sector agency. Determining whether those goals are being met may be impossible.

Second, while private-sector firms generally will have either a single owner or multiple owners (shareholders) with identical incentives (profit maximization), public-sector firms have many principals.<sup>101</sup> For example, in the United States, a single agency may be answerable not only to the executive branch or Congress and the courts, but also indirectly to the media, organized lobbyists, professional associations, watchdog groups, and taxpayers.

Finally, government agencies often provide services to constituents that are particularly ill-suited to either monitor the agencies' performance or take steps to remedy bad performance.<sup>102</sup> These constituents include poor people, minority groups, the sick, and the elderly. Moreover, rational ignorance and other collective action problems make it difficult for even well-educated citizens to effectively monitor the performance of government.<sup>103</sup>

One way to combat these problems is to make government contestable. Presumably, all politicians are concerned about is losing elections. All else being equal, politicians who are perceived as corrupt or incompetent are more likely to lose elections than those who are perceived as honest and competent. Similarly, politicians who

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<sup>99</sup> Owen F. Humpage, *Central Bank Independence*, ECON. COMMENT. (Fed. Reserve Bank of Cleveland), Apr. 1, 1994, at 1.

<sup>100</sup> Avinash Dixit, *Power of Incentives in Private Versus Public Organizations*, 87 AM. ECON. REV. 378, 378 (1997).

<sup>101</sup> See *id.* at 379-81.

<sup>102</sup> See *id.* at 378.

<sup>103</sup> See *supra* note 30 and accompanying text.

produce economic growth or are credited with producing economic growth are more likely to be successful than politicians who either cannot or do not produce such growth.

Two important insights emerge from these observations. First, political freedom serves the important function of improving the internal market for political leadership by lowering the information costs of monitoring performance and displacing existing rulers.<sup>104</sup> As the costs of monitoring and responding to government decline, pressure on governmental actors to perform well increase. When a government denies civil liberties, political leaders can “successfully consolidate their hold on power by keeping their countries poor and depriving citizens of the means to organize opposition.”<sup>105</sup>

Second, this analysis of the relationship between civil liberties and prosperity depends upon leadership being contestable. In other words, civil liberties matter only if citizens live in a functioning democracy in which the transaction costs of displacing an existing ruling coalition are low. Where this is the case, elections operate in the political realm precisely the same way that the market for corporate control operates in the realm of corporate governance. Elections, like takeovers, provide the means by which citizens use voting power to displace inefficient or corrupt incumbent management.

This analysis of the roles of civil liberties and contestability of government deepens our understanding of cynicism’s role in improving the operation of government. After all, if we assume that government is comprised of decent, honorable, competent people adequately policing both themselves and the public, there is no need for public monitoring or investigation. To the extent that governmental actors are honest and competent, they certainly will not be *harmed* by civil liberties and democratic contestability. However, for us cynics, public monitoring and investigation are essential to a functioning democracy.

#### CONCLUSION

This Article attempts to demonstrate that cynicism about government is healthy. Cynicism is good public policy because it improves the quality of the laws and regulations produced by government. There should be no doubt, however, that there are real costs associated with cynicism about governmental behavior. However, in politics, as in all fields of human endeavor, first-best solutions simply cannot be achieved, and we must accept the fact that compromise is inevitable. Cynicism about government provides a tremendous bene-

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<sup>104</sup> Colombatto & Macey, *supra* note 13, at 618.

<sup>105</sup> *Id.* at 619–20.

fit by slowing down the production of laws and regulations. Admittedly, some of the laws and regulations that are eliminated through cynicism would have resulted in net improvements for society. However, the benefits of stopping bad laws and forcing the government to fully articulate cogent justifications for the rules it does pass will substantially outweigh these costs.

The Framers well understood the need for cynicism to provide some check on the arbitrary exercise of power. Indeed, the genius of the Constitution is that it assumed a cynical view of human nature and designed a system of checks and balances to confront this reality. Since then, a host of insights about human nature from economics, public choice, and social psychology have strengthened the sound position articulated by the Framers.

In addition to its system of checks and balances, the Constitution reflects cynicism about the outcomes generated by government during "ordinary" times in a number of other ways. Democracy attempts to force politicians to work hard to produce high-quality policies by making their jobs contestable. Basic civil liberties, such as freedom of assembly, freedom of speech, and freedom of the press all can be defended on the grounds that they lower the transaction costs associated with monitoring government and communicating political wrongdoing.

Unfortunately, even with a secure system of checks and balances and strong support for civil liberties, governmental corruption and ineptitude remain serious problems. For this reason, it seems clear that the quality of government will be improved dramatically if people retain a high level of cynicism about government. Even more importantly, maintaining cynicism about government can help to avoid future calamities, like those that have occurred during awful moments in history when citizens suspend their cynicism and embrace the myth that government can solve all of society's problems. Nazi Germany, Soviet Russia, and Pol Pot's Cambodia are vivid examples of the horrors that can occur when cynicism disappears and people trust the government to create a utopia.

To bolster the constitutional system of checks and balances and other efforts to reflect cynicism about government, I have proposed Macey's razor, a variant of Occam's razor, as the best perspective for lawyers and social scientists to adopt when analyzing public policy issues. Macey's razor counsels social scientists to adopt the most cynical explanation of data when confronted with multiple explanations for the same governmental action. Abundant use of Macey's razor will improve the quality of government by shifting the burden of persuasion to governmental actors and forcing them to justify proposed regulations.