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Public Choice, Public Interest, and the Soft Drink Interbrand Competition Act: Time to Derail the "Root Beer Express"?

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SUMMARY: ... Are Congressional representatives the rent-seeking egoists upon whom the public choice model depends, or the selfless pursuers of public good upon whom the public interest analysis rests? They are, of course, neither -- a fact well recognized when one gets past the caricatures of the public choice debate. ... For these reasons -- the use of refillable bottles, the development of a vertically segregated distribution system, the need to create potentially higher rates of return in order to encourage investment in bottling enterprises, and the need to protect each bottler's float of refillable glass -- the trademarked soft drink industry historically has consisted of a large number of independent bottlers holding appointments for a national brand in an exclusive geographic territory. ... The public choice model correctly predicts the situation in which the soft drink industry proposed the Soft Drink Act. ... Using such a definition, and notwithstanding the good fit of the Soft Drink Act and the public choice model, a reasonable public interest rationale exists for the legislation. ... The refillable bottle required territorial exclusivity; as the soft drink industry abandoned the refillable bottle, it also abandoned the justification for the Soft Drink Act. ... The change in the composition of the bottler community alters the calculation of both benefits and costs and the proponent group's ability to act. ...

TEXT:

[*337] I. INTRODUCTION

Are Congressional representatives the rent-seeking egoists upon whom the public choice model depends, [1] or the selfless pursuers of public good upon whom the public interest analysis rests? [2] They are, of course, neither -- a fact well recognized when one gets past the caricatures of the public choice debate. [3] In truth, everyone [*338] knows that the world is neither black nor white, and legislator behavior is more complex than either the public choice or public interest model, in its simplest form, can accommodate. Congress, it turns out, is comprised of individuals, each of whom is in part a shameless rent seeker, in part an estimable defender of the public interest, and occasionally both at the same time.

The public choice debate has been long on broad theory and remarkably short on the reality testing of case examinations. [4] This Article is a preliminary discussion of one piece of legislation, the Soft Drink Interbrand Competition Act [5] (Soft Drink Act), a piece of antitrust legislation narrowly targeted but of immense importance within its range of coverage. This discussion is not an attempt to prove or disprove the public choice model; although I [*339] strongly disagree with many of the policy conclusions that public choice theorists have drawn, I find immersion in "the icy water of egotistical calculation" [6] interesting and helpful -- to a point. Rather, this discussion focuses on the Soft Drink Act and uses the public choice and public interest analytical models to help understand how the statute was enacted and whether it should now be repealed.

Because one cannot profitably study legislation of this type without having a basic understanding of the industry involved, this Article starts with a capsule history of the soft drink industry. The discussion then asks a preliminary question: how well do the public choice and public interest analyses square with passage of the statute? I conclude that either a public choice or a public interest model can plausibly explain the Soft Drink Act, but the explanation sounding in public choice is the more convincing of the two. Having concluded that both models are of some value as explanatory vehicles, the discussion proceeds to ask, using each approach, what should be the future of the statute.

The Article ends with some more general conclusions about the usefulness of the public choice model and the soundness of some policy conclusions taken from the constitutionalist public choice position.

II. THE SOFT DRINK ACT

The story of the soft drink industry begins with the unpretentious refillable glass bottle, for that container is the key to the historical organization of the industry. Understanding the industry's organization permits one to see how legal and economic forces converged in the 1970s to make the Soft Drink Act of critical importance to the industry, and why developments in the industry over the last decade ought to call into question the future of the Soft Drink Act.

A. Structural and Antitrust History of the Soft Drink Industry

Three central points put the organization of the soft drink industry into perspective for our purposes. First, the industry grew [*340] using refillable containers, which require relatively dense production facilities. [7] Second, the soft drink industry historically has been vertically segregated, with the national parent company producing the proprietary syrup base and independent bottlers at the local level producing the finished soft drink product. [8] Third, the use of refillable containers and independent bottlers in turn required the creation of exclusive marketing territories. [9]

The pharmacist who originally formulated Coca-Cola marketed the soft drink at the soda fountain in his drug store and later sold his proprietary syrup to other druggists for in-store consumption. [10] Not until the development of the machine-blown bottle and the invention of the crown cap in the last decade of the nineteenth century was the stage set for the modern soft drink bottling business. [11] Because the bottler had to deliver the product and pick up the empty used bottles for refilling, and because the cost of transporting the finished product over long distances would have been prohibitive, production efficiencies demanded that the soft drink distribution system be rather dense, with a large number of bottling plants located relatively close to their respective markets. [12] One account of early operations set the boundaries of each individual territory at the distance a horse and driver could cover conveniently in one day; those territories later increased somewhat in size to account for the use of motor vehicles. [14]

Even though efficiencies of production and distribution using refillable bottles demanded dense production facilities, the syrup manufacturers lacked both the will [15] and the resources [16] to establish vertically integrated production and distribution systems. [17] Thus was born the franchised bottler, who bought syrup from the manufacturer and bottled the product for the local market pursuant to an exclusive, perpetual appointment. [18]

There are two reasons the use of refillable containers in a vertically segregated organization required exclusive geographic marketing territories. First, for the early bottlers the venture was quite risky, as it would be for contemporary bottlers in an environment of intense intrabrand competition, and territorial exclusivity was the only way to attract participants. [19] Second, the refillable bottling [*342] process itself requires exclusivity. A bottler using refillable bottles will always have a huge number of bottles in circulation, either on the shelves of retailers or in the hands of customers. [20] This supply of bottles out of the bottler's direct control is the "float." [21] Refillable bottles cost more than the deposit that is charged for their return, thus the bottler essentially finances the float. [22] If the bottler is not assured of recapturing this float, the refillable operation cannot continue. [23] Exclusive territories were the only practical means of assuring that individual bottlers would recapture their float. [24]

For these reasons -- the use of refillable bottles, the development of a vertically segregated distribution system, the need to create potentially higher rates of return in order to encourage investment in bottling enterprises, and the need to protect each bottler's float of refillable glass -- the trademarked soft drink industry historically has consisted of a large number of independent bottlers holding appointments for a national brand in an exclusive geographic territory. [25]

Courts have upheld the legality of the exclusive territories despite early antitrust challenges. [26] In 1967, however, the challenge [*343] to territorial exclusivity became more troublesome in the wake of United States v. Arnold, Schwinn & Co. [27] Following Schwinn, the Federal Trade Commission (FTC) began an investigation of territorial exclusivity in the soft drink industry and, in 1971, issued complaints against PepsiCo, the Coca-Cola Company, and others, seeking to have the exclusive territories declared illegal under section five of the Federal

Trade Commission Act. [28] On the basis of a voluminous record developed over the course of four years, the administrative law judge determined that the territorial restrictions were vertical in nature, [29] which therefore distinguished the case from Schwinn. [30] The judge applied a "rule of reason" analysis [32] Despite the 1977 reversal of Schwinn, [33] in 1978 the FTC, by a vote of two to one, overruled the administrative law judge, [34] rejecting both the horizontal [35] and vertical [36] per se illegality analyses. Analyzing the situation under a rule-of-reason approach, [37] the Commission found that the use of exclusive territories violated the law except insofar as the territories were used with respect to refillable bottles. [38]

B. Passage of the Soft Drink Act

At the same time the soft drink industry appealed the FTC's decision to the courts, it also lobbied Congress for legislation to insulate the exclusive territories from antitrust attack. The lobbying [*344] effort was successful in 1980 with passage of the Soft Drink Act, [39] which in turn resulted in dismissal of the FTC action. [40]

The Soft Drink Act passed both Houses of Congress by substantial margins [41] and was signed into law by President Carter. [42] The [*345] initial question is how the Soft Drink Act passed over the opposition of the Justice Department, [43] the National Association of Attorneys General, [44] food-service trade groups, [45] and consumer groups. [46] It is to this question that we now turn, using first a public choice model and then a public interest approach.

C. The Public Choice Analysis of Passage

The [National Soft Drink Association is] . . . using economic, translatable into political, muscle to buy a profit to which they are not entitled by virtue of any investment of capital or labor or creativity or enterprise or entrepreneurship that will be paid for out of the pockets of the consumers.

So that in effect there can be really no reason to pass this bill except for us to admit we've been bought off by the bottlers and their lobbyists . . . . [47]

The public choice model starts with the economic theory of legislation, which "asserts that legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare, whether 'welfare' is defined as wealth, utility, or some other version of equity or justice." [48] Efficiency assumptions provide "that a group forms into an effective political coalition [*346] when the benefits from achieving wealth transfers from the legislature outweigh the costs of organizing." [49]

Although public choice theory does not necessarily exclude the possibility of motivations that are not narrowly economic, [50] public choice models either exclude such factors, [51] stretch the definition of self-interest to make the proposition nonfalsifiable and tautological, [53] Judge Mikva's commentary is particularly helpful on this point: "The politicians and other people I have known in public life just do not fit the 'rent-seeking' egoist model that the public choice theorists offer." [54]

Let us assume a public choice model on the terms most favorable to its proponents, with political decisionmakers predominantly motivated by a desire to maximize their narrowly defined self-interest, while admitting to the existence of ideological motivations. [55] What types of results should such a system generate? There are two dimensions to the answer: the first involves the substance of the legislation produced, and the second involves the process by which such legislation is enacted.

As to substance, one would expect to find rent-seeking statutes, legislation by which one group uses the power of government to gain a transfer of wealth from another group. Public choice theorists are careful to leave open the possibility that such rent-seeking legislation can serve a legitimate end apart from the redistributive calculus of the legislation's proponents. [56] The public choice analysis, however, sees the range of permissible transfers as extraordinarily [*348] limited. [57] Basic public choice doctrine favors private transactions over public transactions because the welfare implications of the former are positive while the latter are indeterminate:

It is axiomatic that voluntary transactions in the private sector provide all parties to such trades with a net welfare gain. . . . The occurrence of such transactions also provides a net gain to the public at large as entrepreneurs are forced by competitive pressures to provide high-quality goods and services at low prices.

By contrast, the welfare implications of transactions that occur because the legislature mandates them are indeterminate. Some may provide net improvements in the social welfare; others clearly do not. Often such transactions merely reflect the triumph of raw political power over the disorganized public at large. [58]

Therefore, because "it is extremely difficult to distinguish between those governmental activities that involve 'amorally redistributive' rent seeking . . . and those that represent wealth-increasing 'public interest' governmental activities," [59] the public choice model essentially [*349] ignores the possibility of the latter and disfavors virtually all rent-seeking legislation.

An expected result under the public choice model is that "the legislature will produce too few laws that serve truly public ends, and too many laws that serve private ends." [60] Assuming away the problem of rent-seeking statutes that advance the social welfare, the redistributive function of rent-seeking is criticized both because of the immediate concern that rent-seeking legislation imposes costs on one group to the advantage of another [61] and because of the longer term concern that such legislation diminishes competition [62] and hobbles society's ability to respond to changing economic conditions. [63]

The process dimension of the public choice model involves the flow of value to the legislators who helped enact the statute. [64] These values can be represented in money or votes and may be cast in terms of the acknowledgment of leadership or ideological fulfillment. [65] In addition, the public choice model predicts some conditions under which rent-seeking will be more likely to occur. [*350] Among these are an asymmetry of costs and benefits, [66] an ability to control the free-rider problem, [67] the availability of interest tieins or preexisting groups upon which to build an organization, [68] a position which is -- or at least appears to be -- efficiency creating, [69] and a willingness to concentrate on the details of implementation in lieu of the general thrust of the policy. [71] In the long term, one would expect to find that the rent-seeking statute diminishes competition, perhaps by curtailing entry, and diminishes the society's [*351] ability to respond to changing economic conditions and to new technology. In enacting the Soft Drink Act and allowing the soft drink companies to enforce territorial restrictions, Congress condoned a restriction on intrabrand competition [72] and erected a barrier to the realization of scale economies from changing economic conditions and new technologies. [73]

Some members of Congress recognized the Soft Drink Act for what it was: "special interest legislation, pure and simple, and in its worst form." [74] Indeed, during the floor debate in the House, Representative Stark characterized the bill in terms that a public choice academic might have chosen:

[W]e are faced here with a group of people, most [of] whom own their businesses for the second or third generation, and all of which are highly profitable. It would take a genius to run a bottling company today with an exclusive territory and lose money. Now they are asking for a perpetual built-in profit for the rest of their lives and their family's lives.

The [National Soft Drink Association is] . . . using economic, translatable into political, muscle to buy a profit to which they are not entitled by virtue of any investment of capital or labor or creativity or enterprise or entrepreneurship that will be paid for out of the pockets of the consumers.

So that in effect there can be really no reason to pass this bill except for us to admit we've been bought off by the bottlers and their lobbyists, and there are 300 and some odd of my colleagues who have testified to that by cosponsoring the bill which would protect the exclusive territories.

[*352] On the other hand, being a political realist, and being able to count beyond 20 with my shoes and socks on, it's likely that the bottlers are going to win. [75]

Turning to the process dimension of the public choice model, again the Soft Drink Act is a nearly perfect example of rent-seeking in operation. Under the model, one would expect to find an exchange between the proponents of the legislation and the legislators, in campaign contributions, the promise of votes, and the like. Of course, the exchange can be a negative one; if the legislator does not support the rent-seeking legislation, the proponent will support the legislator's opponent.

Once again, the Soft Drink Act fits the model. The Washington Post described the "lobby effort that Congressional sources called almost unprecedented for its audacious effervescence," and reported that "[p]ressure became so heavy and the industry's clout so imposing in recent weeks that several key legislators . . . reported campaign threats and demands by the bottlers that no amendments be accepted." [76] Senator Metzenbaum stated on the Senate floor that the bill had "been subjected to one of the finest lobbying efforts I have encountered since I have been in the Senate, and I find no fault about that." [77] An "angry" Senator Metzenbaum was less neutral off the floor, saying the "industry's highly charged lobby campaign" was "'just a sad commentary.'" [78]

Indeed, the soft drink industry's lobbying effort was so successful that the bill had over seventy cosponsors in the Senate [79] and 309 cosponsors in the House. [80] The strong support in the Senate allowed proponents easily to defeat a series of amendments offered by Senator Metzenbaum, leading to the Senator's observation in the floor debate that "the picture is clear now; it is unequivocally clear. This bill is supposed to be for those little guys, those small businessmen. The fact is that it is for the big boys. It is for the [*353] conglomerates, and it is for the syrup manufacturers." [82]

The public choice model correctly predicts the situation in which the soft drink industry proposed the Soft Drink Act. There was an asymmetry between the benefits granted by the Soft Drink Act and the costs imposed. Because of the narrow focus of the bill and the small size of the proponent group, the free-rider problem was minimal. In addition, the existing franchise network and bottler associations facilitated organization of the proponents. The proponents even made an efficiency argument, [83] and they sought to coopt the potential opposition by associating their cause with two others having broad political support: environmental protection [84] and small-business preservation. [85] Finally, the proponents showed a marked willingness to concentrate on the details of implementation in lieu of the general thrust of the policy with respect to at least one of the larger policy issues with which they associated. [86]

[*354] The public choice model fails with respect to the Soft Drink Act in only one area. Professor Eskridge observes that the group pushing rent-seeking legislation "usually squanders virtually all of its benefit on efforts to obtain the rent-seeking legislation, thus leaving society with a complete deadweight loss." [87] Although figures are unavailable as to what the Soft Drink Act cost the soft drink industry, and the value of territorial exclusivity cannot be estimated with any reliability, it is certain that the Act gave the industry a transfer of wealth from the consuming public that makes the cost of the legislation pale to insignificance. At least it was not a complete deadweight loss.

D. The Public Interest Analysis of Passage

Congress cannot responsibly grant the soft drink industry an antitrust exemption without a purpose. [88]

Although the Soft Drink Act fits the public choice model, it is also possible to explain passage of the Soft Drink Act by looking at the public policy motivation of the public interest model. For our purposes, I suggest a public interest model under which concern for the public interest, however defined, [89] is a substantial but not exclusive motivation for legislative behavior. [90] Using such a definition, and notwithstanding the good fit of the Soft Drink Act and the public choice model, a reasonable public interest rationale exists [*355] for the legislation. [91] The soft drink industry advanced four basic reasons for the Soft Drink Act in the congressional debate: [92] protection of the environment through the use of refillable bottles, [93] preservation of small business, [94] maintenance of bottler investment, [95] and clarification of the antitrust laws. [96] Of the rationales [*356] offered, I find only the first two to be valid on public interest grounds. [97]

The proponents of the Soft Drink Act advanced the environmental-protection rationale in the House of Representatives [98] and the Senate. [99] Although they encountered opposition, [100] the proponents won handily. [101] It is important to note that the environmental-protection rationale for the Act depends upon the use of refillable bottles, [*357] because it is the dense production facilities and float requirements associated with refillable bottle use that require the favorable antitrust treatment of exclusive territories. [102]

Congressional supporters of the legislation also argued the small-business rationale in both the House of Representatives [103] and the Senate. [104] Although opponents of the legislation challenged the small-business rationale in both the House [105] and the Senate, [106] the proponents cast their arguments in terms of a certainty, rather than a mere possibility, that the small-business goal would be achieved [107] and the proponents carried the vote handily. [108]

The proponents framed the small-business rationale for the Act in several ways. They argued, for example, that the demise of the small, local bottlers would hurt directly the bottlers' employees and the communities in which the operations were located. [109] They [*358] found a less direct harm from the rejection of territorial exclusivity, claiming that other small businesses in the community would feel the demise of the local bottler; the claim was that distant bottlers competing for business would focus on the more profitable chain-store accounts, with the result that the small businesses in the community either would not be served or would be disadvantaged as to price. [110] This concern is consistent with the record developed in the FTC proceeding. The administrative law judge found that franchised bottlers, in their exclusive territories, would service unprofitable accounts simply to increase market penetration. [111] If exclusive territories were eliminated, chain retailers would receive competitive bids for warehouse delivery, [112] taking high-margin accounts from the small bottlers and either forcing them completely out of business [113] or forcing them to cut back on service or raise prices to lower margin accounts. [115] Others argue for a more pragmatic and flexible approach. [116] Although collective legislative intent is always to some extent indeterminate, [*359] in some cases a collective intent certainly is ascertainable. [117] One factor in identifying collective legislative intent is the statutory history available. Although some would greatly discount such materials as committee reports, [118] it does appear that in some cases, when the materials are undisputed and reflect a reasonable picture of the legislative equilibrium, statutory materials provide a reasonable indication of collective legislative intent. [119]

The Soft Drink Act presents a case that may support the argument that a legislative intent can be ascertained fairly. First, a reasonable public interest justification for the legislation is identifiable in the statements of the participants. [120] Second, there is a fair degree of unanimity in the statements of both the industry and congressional participants. [122] The outlines of a bargain between the soft drink industry and the public are ascertainable.

We are presented with two competing explanations for passage of the Soft Drink Act. Which is more plausible, the public choice version of rent-seeking, or the public interest version of deliberative government? Was the small-business argument the basis for passage, thus supporting the public interest model; or was the economic [*360] argument merely a cover for giving in to the powerful soft drink lobby, as the public choice model would predict? On balance, a careful reading of the record suggests to me that the public choice model offers a better explanation, but I cannot prove the conclusion. The only tangible proof is that although Congress embraced the rhetoric of the small-business rationale, it overwhelmingly rejected the amendments offered by Senator Metzenbaum that would have limited the benefits of the Soft Drink Act exclusively to small business. [123] I reach the same conclusion with respect to the environmental argument, supported in part by the overwhelming rejection of the alternative offered by Representatives Stark and Weiss, which would have mandated the use of refillable bottles. [125]

Professor Eskridge suggests an appropriate public choice judicial response. He argues that when dealing with statutes having concentrated benefits and distributed costs, the courts should "[i]nterpret narrowly and refuse to provide special benefits unless clearly required by statute." [126] In the case of the Soft Drink Act, such a narrow reading would first address the question of whether the Act confers blanket antitrust immunity on territorial exclusivity, and, if not, what standard of review the court should use.

The language of the Act is reasonably clear as to whether the statute confers blanket antitrust immunity on agreements for exclusive territories:

Nothing contained in any antitrust law shall render unlawful the inclusion and enforcement . . . of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell [trademarked soft drink] product in a defined geographic area . . . Provided, That such product is in substantial and effective competition with other products of the same general class in the relevant market or markets. [127]

This is not the language of an unqualified exemption; by its terms the Act imposes a "substantial and effective competition" test. [128] However, and notwithstanding the plain language of the Act, some courts applying the Soft Drink Act have acted as though it confers [*362] unqualified immunity from the antitrust laws. [129] These readings of the statute are simply wrong.

If one concedes, as the plain language requires, that the Act imposes a substantial and effective competition test, the problem remains how such a test should be interpreted and applied. One possibility is to treat the standard embodied in the Act as being the same as a rule-of-reason analysis. The legislative history is rather clear that Congress did not intend the Act to immunize territorial exclusivity in the soft drink industry from review under the antitrust laws, and that Congress intended for courts to conduct that review using a rule-of-reason standard. [130] Because the plain language of the Act is not a mere restatement of the Sylvania rule-of-reason, however, this reading is troublesome.

A second possibility is to treat the Act as a "positive restatement" of the rule-of-reason test, arguing that "[a]lthough its approach is significantly different, the result of its application is the same." [131] But the outcome of the application of the substantial and effective competition test surely need not be the same as the outcome [*363] of a rule-of-reason analysis. The rule-of-reason approach articulated in Sylvania is based upon a review of "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." [132] The substantial and effective competition qualification in the Act is a less rigorous test than the rule-of-reason test under Sylvania and its progeny. [133] This analysis, however, is also troublesome.

The best reading is to recognize the substantial and effective competition test as different from the rule-of-reason analysis and to recognize that the Act contemplates a two-step analysis: first, is there substantial and effective competition, and second, if such competition is not found, is the restraint legal under the rule-of-reason test. [134] Such a reading would be consistent with the public choice directive to read rent-seeking statutes narrowly.

B. The Outstanding Public Interest Question

The public interest analysis of the Soft Drink Act after a dozen years have passed is somewhat more complicated than the public choice appraisal. A reasonable point of departure is to recognize [*364] that this statute is not a public statute, with general application to the populace, but is rather a private statute designed to confer benefits on a narrow range of parties in return for widely dispersed public welfare gains. Because the Act, viewed under a public interest analysis, is a bargain between the public and the private recipients of benefits, it is appropriate to identify the bargained-for public welfare gains and determine whether the public has realized such results.

In the case of the Soft Drink Act, a considerable social cost certainly has been paid -- the industry has realized substantial benefits from passage of the Act and maintenance of territorial exclusivity. [135] The reciprocal social welfare gains were to have occurred in the areas of environmental protection -- through the increased use of refillable containers -- and small business preservation -- through the continued operation of small, independent bottlers. [136]

The story of the soft drink industry in the 1980s is not a success story in either the environmental or the small-business dimension. The Soft Drink Act has failed to achieve either goal, and its failures have been dramatic. The use of refillable bottles has dropped by about three-quarters since 1980, [138] The appropriate questions are: why were the public welfare gains unrealized, and what effect should this failure have on the future of the Soft Drink Act?

[*365] 1. The Environmental Rationale

The environmental rationale for the Soft Drink Act rests on the use of refillable bottles. Refillable bottles provide an environmentally sound way to extend the life of soft drink containers, multiplying the use from a single container by a factor of up to twenty before it is recycled for further use. [139] There is also a case for refillable bottles based on consumer economics. Refillable glass bottles historically have provided the consumer with soft drinks at the lowest cost per ounce, in some cases less than half the cost of nonrefillable containers. [140]

With these advantages one might expect that refillable glass bottles would dominate the soft drink market. The facts are exactly the opposite. The use of refillable bottles was already in decline in 1980: refillable glass bottles had gone from a virtual 100% market share in 1958 to 80% in 1966, 42% in 1976, and 38% in 1980. [141]

Against this history of decline, Congress was told in 1980 that "[the Soft Drink Act] will halt trends that might otherwise lead to the . . . disappearance of the refillable bottle." [142] The trend away from refillables continued after passage of the Soft Drink Act, and today refillable glass bottles account for less than ten percent of the market. [143] Nor is the future promising for refillables: "It's no [*366] secret that refillable soft drink sales are going downhill," observed one trade publication, "[f]ast." [144]

Why have refillable glass bottles suffered such a great decline? Should we rethink the Soft Drink Act linkage between refillable bottles and environmental protection? Industry representatives often point to consumer choice to explain the decline of the refillable bottle -- an increased emphasis on "convenience and active lifestyles" is to blame. [145] To these industry spokespeople, the customer in the market is sovereign, and if refillables do not sell, the industry should not market them. [146]

It is a nice story, especially to those who believe in the myth of the omniscient invisible hand of the free market, but the reality is somewhat different. The easiest explanation for the decline of refillable bottles is that they simply have not been available in many major markets. [147] There is substantial evidence that some bottlers and retailers refuse to produce or stock refillable bottles. For example, a senator has cited one government study for the proposition that "much of the pressure to switch from returnable to nonreturnable containers comes from the intermediate customers' stores and distributors, rather than the ultimate consumer . . . [and] that the consumer may have had little effect on the choice of container type." [148] Another manifestation of the hostility of some bottlers and chain stores is the disparate treatment of refillable [*367] and nonrefillable containers in advertising. As the old retail trade adage goes, "We promote what we sell and we sell what we promote." [149]

Why the hostility to refillable bottles among some retailers and bottlers? From the retailers' standpoint, there are three primary reasons. First, there is a perception that the logistical requirements of bottle redemption, sorting, and storage place a substantial burden on the retailer who sells refillable bottles. [150] Second, because the use of refillable bottles requires a means of getting the used bottles back to the vendor, as a practical matter such a system requires a store-door delivery system rather than a warehouse delivery system. [151] Chain retailers would prefer a unified warehouse delivery system even to the point of sacrificing the traditionally higher profits on refillable bottles. [152] Third, national brands in refillable bottles are price competitive with the retailers' private label soft drinks, and the retail chains want to limit the competition for the price-sensitive segment of the consumer market. [153]

[*368] The antipathy of some bottlers toward refillable bottles arises because the efficiencies of transportation and return of the used bottles require a much smaller territory for a refillable bottle operation than for a nonrefillable-based operation. [154] Some bottlers have moved from refillable bottles to cans and nonrefillable bottles in order to replace the dense production organization demanded for refillable bottles with fewer, larger, centralized production facilities and satellite warehouses, leaving no local production facilities to serve local markets. [155] The antipathy of such bottlers toward refillables is predictable.

One might be tempted to enforce the bargain struck in 1980 and require the use of refillable glass bottles. Certainly nothing in the sales history of refillable bottles, or the history of antipathy on the part of some retailers and bottlers, would either call into question the 1980 congressional judgment in support of refillables or justify the abandonment of this environmentally prudent alternative in the future. It is true that revolutionary changes in packaging have occurred with regularity in the industry ever since the introduction of alternatives to refillable bottles over thirty years ago. [156] The problem, discussed in the following section, is that since the passage of the Soft Drink Act in 1980, the soft drink industry has gone through a wave of facility consolidations, [157] a fundamental shift in organization that makes a return to the refillable glass bottle much more than a mere change in packaging. The industry may have changed in such a basic way that Congress no longer can enforce the agreement embodied in the Soft Drink Act.

The soft drink industry might argue that, notwithstanding the demise of the refillable soft drink container, it has met the underlying environmental goal of the Soft Drink Act. Certainly the soft drink industry is working to make itself appear environmentally [*369] responsible, [158] and there are signs of environmental progress. For example, both Coca-Cola and Pepsi-Cola announced that by the end of 1991 they would have only packaging types that can be [*370] made with recycled materials. [159] The soft drink industry is also a forceful advocate of comprehensive curbside recycling programs, in which municipalities use their refuse removal systems to collect and recycle a broad array of household materials. [160]

Ultimately, however, a substituted-performance argument would be a mere artifice, because whether one accepts or rejects such an argument is irrelevant to the future of the Soft Drink Act. [161] The simple fact is that such laudatory programs as the production and recycling of nonrefillable soft drink containers does not depend on the existence of exclusive distribution territories. The refillable bottle required territorial exclusivity; as the soft drink industry abandoned the refillable bottle, it also abandoned the justification for the Soft Drink Act. Although the soft drink industry perhaps [*371] should be applauded for its environmental commitment, [162] the industry does not merit unnecessary special antitrust treatment under the Soft Drink Act.

2. The Small-Business Rationale

The small-business rationale for the Act was that it would protect the network of independent, local bottlers. On this dimension, as on the environmental dimension, the dozen years since the passage of the Soft Drink Act have been a period of failure, not success.

The concentration of economic power within the soft drink industry had begun well before 1980. In 1900, after an initial decade of phenomenal growth, there were approximately 2,700 soft drink [*372] bottlers in the United States. [163] The high point in terms of the number of bottlers occurred in the 1950s, when there were some 6,000 bottlers in the United States. [165] By 1970, the number of bottlers was back to early twentieth-century levels of approximately 3,000. [166] By 1980, only one decade later, the number was down to 1,900 bottlers. [167] The trend toward concentration of the units of production continued after passage of the Soft Drink Act; in 1988 there were fewer than 1,100 bottlers, [168] and the end of the implosion is not in sight. [169]

The concentration goes beyond the elimination of local facilities; ownership patterns are also changing. Large conglomerates have bought into the bottling community, eroding the local, small-business character of the industry. [170] More significantly, both Coca-Cola [*373] and Pepsi-Cola have integrated forward to bring formerly independent bottling operations under the control of the parent companies. [171] Pepsi-Cola and Coca-Cola now have an equity interest in bottlers accounting for two-thirds of their respective national markets. [172]

This integration represents a dramatic change in policy; [173] indeed, the legislative history of the Soft Drink Act can be read fairly to contain representations by both parent companies that such consolidations were not contemplated. "We owned a few bottling plants for a long number of years," testified the former president of the Coca-Cola Company, J. Lucian Smith. [174] "We purchased the Atlanta Coca-Cola Bottling Co.," he continued, with reference to the firm's sole recent acquisition, "which is our hometown, because it was put on the market by the owners, not because we sought it, and we felt it had many advantages that we should own a plant in our hometown." [175] This representative of the Coca-Cola Company characterized his company's ownership as "de minimis" and, when pressed, represented that "[t]here has not been a policy change at all . . . . Policywise, we have not changed our policy . . . . Our policy is not to own." [176] Asked again about the parent company buying up local bottlers, Smith responded as follows:

Mr. Volkmer. [W]ould you as Coca-Cola come in and buy up bottlers?

Mr. Smith. Oh, no, sir.

Mr. Volkmer. You wouldn't do that?

Mr. Smith. Well, I mean if you calculate it, I've already said that the bottlers have $2 billion invested. I can't imagine that [*374] we'd undertake to do that. We don't believe in it, in the first place. [178] who found that the Coca-Cola Company had a policy of limiting the number of bottling operations it owned [180]

Coca-Cola apparently started planning the forward integration of the bottling network before the ink on the Soft Drink Act was dry. [181] The integration through direct purchases and equity investments [182] [*375] proceeded apace through the 1980s. [183] In a two-week period in 1986, Coca-Cola invested $2.4 billion in bottling operations. [186] Coca-Cola does now admit the obvious, that the forward integration has changed the ground rules of the industry: "[Coca-Cola Enterprises] is an 800-pound gorilla as far as the system is concerned, and since they are our next door neighbors, we have more regular contact. In many ways it is a very close operating arrangement." [187]

Pepsi-Cola followed a parallel integration path. [188] At the time of the hearings on the Soft Drink Act, Pepsi-Cola controlled five percent [*376] of its bottlers and was responsible for some twenty percent of bottlers' sales by volume. [189] At the Soft Drink Act hearings a PepsiCo, Inc. spokesperson promised that independent bottlers were not at risk from the company: "Bottlers are not threatened by company-owned plants at the present time. They would not be threatened if the Congress, in its wisdom, passed [the Soft Drink Act]. Nor would they be threatened in the future if these territories are preserved." [190] Through the 1980s PepsiCo bought a number of bottlers, [191] spending over $2.2 billion on two 1988 transactions alone. [192] By 1989, Pepsi-Cola's wholly owned bottling operations directly controlled over forty-nine percent of its domestic [*377] volume. [193] In addition, Pepsi has had minority interests in a number of "independent" Pepsi franchisees. [194] A 1991 study revealed that a sixty-five percent share of the market is served by bottlers in which PepsiCo has an equity interest. [195]

As stark as the numbers are, the underlying reality is even worse. Historically, the value of dispersed economic power in smaller, local units of production was truly realized in the soft drink industry. In many small and medium-sized towns, especially in the South, the local Coca-Cola and Pepsi-Cola bottlers were significant participants in the local economy and substantial employers. [196] The concentration of the soft drink industry, through forward integration and the entry of conglomerates, has ended that [*378] phenomenon in many places and has changed the basic relationship between the business and the community. [197]

Why did the industry undertake forward integration? It should first be noted that in integrating forward the soft drink industry has conformed to the pattern established in the marketing of other foods. [198] In the soft drink industry, changes in operations, specifically the introduction of high-speed, high-capacity production lines, have fueled the impetus towards consolidation. [199] At the same time, there has been a proliferation of products offered, both in terms of product lines and container varieties, putting pressure on small bottlers. [200] The forward integration of territories permits consolidation of production facilities and realization of scale economies in production. [201] The reported savings from such consolidations are quite large. [202]

[*379] Given the operational economies, it is not surprising that "[t]he large majority of bottler consolidations have included the closing of small, relatively inefficient bottling operations and the consolidation of operations into larger, more efficient firms." [203] There are, however, some powerful justifications for consolidation beyond the direct production considerations, such as potential efficiencies in terms of the internal operation of the system. [204] For example, consolidation offers efficiencies in dealing with large customers with operations across franchise territory boundaries [205] and in coordinating advertising and promotional activities in multifranchise markets. [206] Consolidation also allows the national brands to "get rid of the deadwood" among the bottlers. [207] The forward integration of the national brands may even have a defensive element. Faced with the increasing concentration of bottling activities from a system of atomized small independents into a handful of large independents with substantial bargaining power, Coca-Cola and [*380] Pepsi may have found it increasingly difficult to control the system, thus opting for forward integration in response. [208]

Not all of the efficiencies require the consolidation of ownership in the parent companies. Some of the production efficiencies can be achieved through cooperative or joint venture production facilities owned in common by a group of independent bottlers, by the merger of franchise territories while retaining independent ownership, or by the parent company's investment of equity in independent bottlers to permit modernization. [209] There is also a fairness argument against forward integration; the independent bottlers made the national brands successful by virtue of their investment of capital at critical junctures [210] and by virtue of the hard work of the individuals associated with the independents. As one independent bottler put it, "[W]e brought them to the dance and now they want to go home with someone else." [211] Given the high (and increasing) concentration at other levels of the soft drink industry, however, a consolidation of bottler operations may have been inevitable. [212]

[*381] As with the environmental goal, the soft drink industry may argue that it has met the economic goal of the Soft Drink Act, albeit in a way not contemplated in 1980. Such an argument would require a rather disingenuous recharacterization of the economic rationale before Congress in 1980, from a small-business preservation goal, to a goal of economic efficiency. At best, the industry can make a plausible argument that the reorganization of the soft drink industry has been efficiency creating. One study indicated that a major acquisition by PepsiCo "was at worst competitively neutral and in many instances was procompetitive." [213] Furthermore, the industry heavily promotes and discounts soft drinks, [214] and the wholesale price has declined significantly over time. [215] The problem with the substituted-performance argument is that the efficiency of the industry presumably would be enhanced by repeal of the Soft Drink Act, which would allow the same sort of robust competition on the intrabrand dimension that has characterized the interbrand dimension.

Regardless of whether such an efficiency argument would have merit, a fair reading of the 1980 debates surely indicates that the goal was not efficiency; it was the preservation of the small businesses represented by the independent bottlers. [216] If the soft drink industry wants to come before Congress to argue that the continuation of exclusive territories -- in the present industry configuration with intense concentration in large conglomerates and the parent companies -- justifies the extension of the Soft Drink Act, let them come. Stripped of the small-business cloak, the nature of the congressional debate -- and the outcome -- could be rather different this time around.

Is the legislative history of the Soft Drink Act sufficient to demonstrate that the soft drink industry and Congress struck a [*382] bargain for refillable bottles and small-business preservation? In the end it does not matter. If the industry and Congress struck such a bargain, the promised benefits have not been realized and the legislation should be repealed. If they did not strike such a bargain, and the industry can suggest no other cognizable social benefits, repeal is also justified.

IV. CONCLUSIONS

A. The Soft Drink Act

In the case of the Soft Drink Act, the public choice and public interest analyses converge on the question of what should be done. Either because it should not have been passed in the first place, under the public choice analysis, or because it has not gained the public benefits bargained for, under the public interest analysis, the Soft Drink Act should be repealed. Presumably within the debate on repeal, the soft drink industry would have a chance to present an alternative public policy defense of the Soft Drink Act, appropriate under the public interest analysis, but not likely persuasive within the public choice discussion. The justifications used at the time of passage -- environmental protection through the use of refillable bottles and small-business preservation through the protection of the independent bottler community -- effectively have been eliminated by developments in the industry over the last dozen years.

The public choice and public interest analyses may diverge, however, in predicting what will be done with the Soft Drink Act. If there are no social welfare gains from the Soft Drink Act to counterbalance its costs, the public interest analysis calls for repeal of the statute and posits that at some level the right result eventually will obtain. [217] The public choice model is less sanguine. [218] In general, one of six factors must change for the public choice analysis to predict a change in the statutory equilibrium. As to the proponents, the aggregate benefit of the rent-seeking statute may decline, [*383] the aggregate cost of maintaining the statute may increase, or the composition of the benefitted group may change in such a way as to introduce free-rider or other organizational problems; on the other side, as to the opponents, the aggregate detriment of the statute may increase, the aggregate cost of repeal may decrease, or the composition of the burdened group may change in such a way as to diminish organizational problems. [219]

The past twelve years have witnessed substantial changes in some of these six factors relating to the Soft Drink Act. The primary change has been a shift in the composition of the proponent group. The parent companies, who were not substantial players at the bottler level in 1980, are central on that level today. [220] The conglomerates, who were a factor in 1980, remain strong. [221] The independent, local bottler community has been decimated. [222] The change in the composition of the bottler community alters the calculation of both benefits and costs and the proponent group's ability to act.

As to the calculation of benefits, a significant shift may have occurred in the position of the parent companies. A plausible argument can be made that, whereas in 1980 the parent companies may have feared robust intrabrand competition at the local level, over which they could have exercised little control, [223] in the present situation the parent companies are well positioned to gain in a "walls down" world. At the time the Soft Drink Act passed, some argued, based in part on a calculation of the benefit to the parent companies from an open market, that the parent companies were not [*384] fully supportive of the Act. [224] The situation of the parent companies has shifted significantly, making it more likely that they would now favor, or at least not strenuously oppose, repeal. [225]

As to the calculation of costs, the political backing that made the Soft Drink Act irresistible in 1980 has been weakened significantly. By all accounts, the pressure from the nationwide network of local bottlers was significant in 1980; [226] there are hundreds fewer of such small, local, independent bottlers today. [227] Thus, even if sufficient funds were available to promote retention of the Soft Drink Act, [*385] the proponents would face a tougher situation because of a diminution of local voting support for the legislation. [228]

As to the shifting ability of the proponent group to act, there may also have been a change. One clear advantage the soft drink industry had in 1980 was preexisting organization. [229] If one believes that the parent companies, and perhaps the large conglomerates, have a diminished interest in territorial exclusivity, then the ability of the Act's proponents to use the National Soft Drink Association may be curtailed. A loss of this preexisting organizational base could impede the proponents substantially. At the same time, changes in the composition of the likely opponent coalition may have strengthened the possibilities for coordinated opposition. To the extent business ownership generally has been concentrated since 1980, one would expect to see greater coordination among the Act's likely opponents. Interestingly, some opponents from 1980 have not forgotten the issue. [230]

In fairness, an alternative public choice scenario is equally plausible. Faced with the possible repeal of the Act and the loss of territorial exclusivity, the parent companies and independent conglomerates might conclude that the uncertainties of robust local intrabrand competition are large enough, and the territories remaining in the hands of vulnerable small bottlers are marginal enough, that the parents and conglomerates would prefer a modus vivendi under which they would support retention of the Act. The remaining small, independent bottlers certainly would gain from such an arrangement; the consuming public certainly would lose.

B. The Public Choice Debate

The Soft Drink Act suggests both weaknesses and strengths of the public choice model and indicates how the public choice analysis can be used best. The public choice model is initially flawed in its description of human behavior. The model is correctly challenged [*386] as a gross oversimplification of an extremely complicated reality; the motivations of political decisionmakers are far too mixed and complicated to be profitably reduced to a one-dimensional representation. [231] Public choice proponents concede that their model does not reflect reality accurately; [232] they claim, however, that the model is close enough to the complex reality of decisionmaking to be useful. [233] But when proponents of public choice announce that they "seek a set of rules that will work well independently of the behavioral postulates introduced," [234] they are really announcing that they model government without considering its essence: the behavior of the people who control, support, and are served by the enterprise. It is hardly surprising that such a model is not very powerful.

This weakness of the public choice model is highlighted by the scientistic illusion of the presentation. [235] The public choice model must be judged a failure on its own scientistic terms, because the model's value as a predictive device has not been subjected to rigorous review. [236] This is in part because some public choice proponents do not wish to spend time refining or verifying the theory; [237] [*387] rather they are interested in exploring incentive structures and proposing constitutional changes. [238]

The public choice analysis is equally flawed in its evaluative function, beginning with the assumption that the world divides into private and public transactions, a distinction Professor Kelman correctly argues is hopelessly ambiguous. [239] Building upon this error, the public choice proponents admit that there are examples of good public ordering -- "wealth increasing governmental activities." [240] But even on their own terms, the public choice proponents are unable to identify this class fully. [241] While proponents acknowledge that there are positive social welfare implications of some legislative transfers, [242] their narrow definition of social welfare -- the increase in total wealth -- coupled with their inability to identify such transactions, means as a practical matter that all public transactions are subordinated to all private transactions in the public choice calculus. [243]

Because economically and politically marginalized groups within society have a rather small stake in the maintenance of enforcement [*388] mechanisms for privately negotiated contracts, the expenditure of public funds to maintain such structures is not neutral and is, in itself, redistributive. [244] This is not to say that such "wealth-increasing public interest governmental activity" is inappropriate. Rather, it is an observation that political analysis that condemns a cash payment to a mother to buy food for a baby as "amorally redistributive," while approving as wealth increasing governmental expenditures to resolve disputes between wealthy investors, is at the very least highly suspect.

Which brings us to the broader point: the constitutional public choice analysis is unconvincing by virtue of its failure to differentiate on moral grounds between nonwealth-increasing governmental activities. The public choice assumption that the only appropriate governmental activities are those that increase overall wealth offends the popular notion of why government exists. We do not undertake as a society to feed the hungry, educate those who cannot read, and house the homeless -- even to the inadequate extent we presently do these things -- because it is efficient or wealth maximizing to do so. We do these things because collectively we believe society ought to. To the extent the public choice model is manipulated to cast such activities as wealth maximizing, it is facile but empty. If the model is true to its assumptions and leads to the conclusion that government ought not undertake these activities, it is so far removed from the reality of this society as to be silly and irrelevant.

This is not to say that the public choice analysis is wholly without merit, or that there are not important lessons to be learned from it. The issue is how to use public choice analysis. The history of the Soft Drink Act indicates that the public choice suspicion of and hostility to the use of public power for private ends is sometimes justified. If the complete hostility toward public ordering of the public choice advocates is inappropriate, the sometimes too trusting nature of some public interest proponents is equally unavailing. [*389] The case of the Soft Drink Act also indicates that the public choice analysis is correct when it tells us, once again, that structure and procedure matter. If the flat incentive structure of the public choice world is not in itself enough to explain behavior, we are well advised to remember that the incentives to which the public choice analysis points -- economic return, votes, and power -- are important in the decisionmaking calculus of public officials.

In the end, public choice analysis should be integrated into our evaluation -- if indeed it was ever really missing. As Professors Frickey and Farber suggest, a "less grandiose version of the economic theory" would be useful to the extent "the model could be used to identify tendencies within the political system, but not to explain all of politics." [245]

But, if one accepts the possibility of a public interest motivation behind legislative action, the fatal flaw in the Soft Drink Act was something that the public choice critique does not address. The flaw in the Soft Drink Act from the environmental standpoint was timidity. The survival of territorial exclusivity was one necessary precondition for the survival of the refillable container, to be sure, but it alone did not necessarily lead to the continued use of such containers. [246] Congress failed to require that the industry follow through and provide the public good, and in the absence of a requirement, the industry largely abandoned the refillable bottle. [248] Again, Congress failed to require that the industry follow through and provide the public good, and in the absence of a requirement, the industry moved sharply away from its independent, small-business heritage. [249]

There are lessons in the Soft Drink Act from both the public interest and public choice analyses. From the public interest side comes the lesson that we cannot be timid in our pursuit of social gain. From the public choice side comes the warning that if we are timid in our actions, the very mechanisms we establish to advance social ends likely will be subverted toward ends that harm society.

Professors Brennan and Buchanan identify the essential issue, although they miss the answer. Those who reject the constitutional public choice alternative, Brennan and Buchanan argue, "must either model political man as he is and live with Schumpeterian despair, or model man as he 'should be' and seek to make their dreams come true." [250] To the "hardheaded, realistic, indeed cynical" [251] advocates of constitutional public choice, the answer is clear: public ordering should be minimized, and what government remains should be structured to restrain egotistic maneuvering to use government for private advantage. Because they fear the unpredictability [*391] of human behavior and the inefficiency of moral decisionmaking, the public choice proponents construct a sterile and powerless system which cannot possibly improve the human condition.

The constitutional public choice model, built as it is without regard for the full range of human behavior and morality, surely ought not become the dominant paradigm by which the proper sphere of social activity is defined. [253]

FOOTNOTES:

[1] See Geoffrey Brennan & James M. Buchanan, Is Public Choice Immoral? The Case for the "Nobel" Lie, 74 VA. L. REV. 179, 180 (1988).

[2] See Jonathan R. Macey, Transaction Costs and the Normative Elements of the Public Choice Model, 74 VA. L. REV. 471, 472 n.8 (1988) (briefly describing public interest analysis). Professor Macey actually criticizes public interest analysis for its "naive view of legislators as public-regarding guardian angels who meet periodically to right the wrongs of society." Id. at 476.

[3] Public choice theorists often caricature the public interest argument and exaggerate the extent to which public choice considerations, as distinct from the ends to which the analysis is put, are novel. For example, Professors Brennan and Buchanan do not claim that the private interest of legislators is the sole motivation for their actions: "[A]lthough we do not believe that narrow self-interest is the sole motive of political agents, or that it is necessarily as relevant a motive in political as in market settings, we certainly believe it to be a significant motive." Brennan & Buchanan, supra note 1, at 181. They argue that it is the public interest analysis that is flawed, by a presumption that pursuit of the "public interest" is adequate to model legislative behavior:

This [acceptance of narrow self-interest as a significant motive] differentiates our approach from the alternative model, implicit in conventional welfare economics and widespread in conventional political science, that political agents can be satisfactorily modeled as motivated solely to promote the "public interest," somehow conceived. That model we, along with all our public choice colleagues, categorically reject.

Id. Of course, in making their point, Professors Brennan and Buchanan shift the focus from what is descriptively accurate to what is useful in establishing a model. If it is true that the public interest model is built on the flawed assumption that legislator behavior is motivated solely by the public interest, then it is also true that the Brennan and Buchanan public choice model is equally flawed, because in moving from an empirical description to the creation of a model, Brennan and Buchanan discard the complication of a multimotivation universe in favor of the simplicity of a one-dimensional legislator. The resulting model is analytically more manageable, but it is not descriptively accurate. "We model man as a wealth maximizer, not because this model is necessarily the most descriptive empirically, but because we seek a set of rules that will work well independently of the behavioral postulates introduced." Id. at 188. Thus, the two questions, what is descriptively accurate and what is a useful model, are not squarely joined.

Those who challenge public choice theory seem somewhat less inclined to collapse the distinction between reality and a model of reality and deal in easily dismissed caricature. See, e.g., Mark Kelman, On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement, 74 VA. L. REV. 199, 223 (1988).

[4] The case studies that have been done have been criticized. See Kelman, supra note 3, at 204-05. Professor Kelman has complained that public choice scholars frequently support their preconception with empirical studies that are so off the point and unpersuasive that a reasonably skeptical outsider must ultimately feel that she is dealing with a cult, a group that reassures itself with ritual incantation of familiar homilies that appear to be utter mumbo jumbo to nonbelievers.

Id.; see also Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 TEX. L. REV. 873, 895-96 (1987) (criticizing generally the factual and causation analyses offered in support of economic theory of legislation). There are examples, however, of creative and exploratory public choice analyses that look at the moderate level of explanatory power provided by public choice analysis. See, e.g., Jeffrey N. Gordon, Corporations, Markets and Courts, 91 COLUM. L. REV. 1931, 1957-91 (1991) (presenting an alternative public choice explanation for the Delaware Supreme Court's decision in Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989)).

[5] 15 U.S.C. " 3501-3503 (1988).

[6] KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 62 (Washington Square Press 1968) (1848).

[7] See infra notes 12-14 and accompanying text.

[8] See infra notes 15-18 and accompanying text.

[9] See infra notes 19-25 and accompanying text.

[10] PAT WATTERS, COCA-COLA: AN ILLUSTRATED HISTORY 5-8 (1978).

[11] STEPHEN N. TCHUDI, SODA POPPERY: THE HISTORY OF SOFT DRINKS IN AMERICA 19 (1986). The use of returnable bottles dates from the mid-1890s. BEVERAGE WORLD, COKE'S FIRST 100 YEARS 124-26 (1986) [hereinafter COKE'S FIRST 100 YEARS].

[12] "[Asa Candler, the sole owner of Coca-Cola in 1887,] felt it would be too expensive to bottle Coca-Cola in Atlanta, then ship it all over the country. Soft drinks are mostly water, and water is both heavy and expensive to ship." TCHUDI, supra note 11, at 29.

[13] Coca-Cola Co., 91 F.T.C. 517, 585 (1975) (initial decision) (noting the "vehicle-round-trip-in-one-day measurement" used by the Coca-Cola Company in setting its territorial boundaries), rev'd, 91 F.T.C. 517, 607 (1978) (final decision), rev'd, 642 F.2d 1387 (D.C. Cir. 1981); Deposition of Walter S. Mack, former President of the Pepsi-Cola Company at 14, PepsiCo, Inc., 91 F.T.C. 680 (1978), rev'd sub nom. Coca-Cola Co. v. Federal Trade Comm'n, 642 F.2d 1387 (D.C. Cir. 1981) [hereinafter Mack Deposition].

[14] See, e.g., Soft Drink Interbrand Competition Act: Hearings on H.R. 3567 and H.R. 3573 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 96th Cong., 1st & 2d Sess. 61 (1979-1980) [hereinafter House Judiciary Hearings] (testimony of Richard W. Caudill, Vice President, Central Investment Corp.).

[15] As to the Coca-Cola system, management lacked faith in the idea of bottled soft drinks. See THOMAS OLIVER, THE REAL COKE -- THE REAL STORY 14 (1986). In 1899, the exclusive bottling rights for Coca-Cola in the whole of the United States, except New England, Mississippi, and Texas, were sold for $1.00 to two lawyers. Id. At the contract signing Asa Candler, the President of Coca-Cola, reportedly said: "If you boys fail in the undertaking, don't come back to cry on my shoulder, because I have very little confidence in this bottling business." WATTERS, supra note 10, at 57. In the case of Pepsi-Cola, the growth of the distribution system took place in the 1930s, after Coca-Cola had long since proved the viability of the bottling concept. Mack Deposition, supra note 13, at 14. Nevertheless, Pepsi-Cola chose to franchise. Id.

[16] See WATTERS, supra note 10, at 66; Mack Deposition, supra note 13, at 14.

[17] There is also some evidence that the syrup manufacturers feared governmental scrutiny of an integrated production-and-distribution network. "[A Coca-Cola] archive source speculates that [Coca-Cola owner and President from 1887 through 1915 Asa] Candler may have had the vision to foresee that if a gigantic Coca-Cola controlled both ends of the market, it might one day be a prime target of government trust busters." COKE'S FIRST 100 YEARS, supra note 11, at 50.

[18] Coca-Cola Co., 91 F.T.C. 517, 540-41 (1975) (initial decision), rev'd, 91 F.T.C. 517, 607 (1978) (final decision), rev'd, 642 F.2d 1387 (D.C. Cir. 1981); Mack Deposition, supra note 13, at 16-18, 29-30.

[19] House Judiciary Hearings, supra note 14, at 31 (testimony of Sidney P. Mudd, Chairman, National Soft Drink Association Special Franchise Committee).

The practice of licensing local bottlers to manufacture, distribute, and sell soft drinks under a particular trademark in a defined territory began more than 75 years ago. The territorial exclusivity of the license agreement is critical to the soft drink franchise system. Because of the substantial capital investment required to manufacture and distribute soft drinks, it was and is necessary to grant the bottlers exclusivity in order to persuade them to make such investments.
Id.

[20] Id. at 52-53 (statement of Richard W. Caudill, Vice President, Central Investment Corp.) (estimating four billion refillable soft drink bottles in circulation).

[21] Id. at 52.

[22] Coca-Cola, 91 F.T.C. at 555-56 (initial decision).

[23] "Returnable bottle usage would also decline because bottlers would be reluctant to invest in returnable bottles when they had no assurance that they would be able to recapture their large investment in returnable bottles for reuse." Id. at 559 (initial decision).

In assessing the impact of the order proposed by complaint counsel, it is pertinent in the context of respondents' bottler network that the use of refillable bottles makes economic and competitive sense only if each bottler is able steadily to recapture from the market an adequate, predictable supply of used bottles to service his production requirements.
Id. at 648 (final decision).

[24] House Judiciary Hearings, supra note 14, at 48 (testimony of Richard W. Caudill).

[25] Coca-Cola, 91 F.T.C. at 532 (initial decision).

[26] See, e.g., Brosious v. Pepsi-Cola Co., 155 F.2d 99, 101-02 (3d Cir. 1946) (holding that maintaining exclusive territories is not a Sherman Act violation); Coca-Cola Co. v. J.G. Butler & Sons, 229 F. 224 (E.D. Ark. 1916).

[27] 388 U.S. 365 (1967) (holding that a manufacturer may not restrict or confine the resale of its product after it parts with dominion over the product), overruled by Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[28] PepsiCo, Inc., 91 F.T.C. 680, 680 (1971) (complaint); Coca-Cola, 91 F.T.C. at 518 (1971) (complaint).

[29] Coca-Cola, 91 F.T.C. at 580 (initial decision).

[30] Id. at 580-82 (initial decision).

[31] Id. at 579-80, 582-85 (initial decision).

[32] PepsiCo, Inc., 91 F.T.C. 680 (1975), rev'd sub nom. Coca-Cola Co. v. Federal Trade Comm'n, 642 F.2d 1387 (D.C. Cir. 1981); Coca-Cola, 91 F.T.C. at 585-86 (initial decision).

[33] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).
[34] Coca-Cola, 91 F.T.C. at 609-10 (final decision).

[35] Id. at 611-14 (final decision).

[36] Id. at 615 (final decision).

[37] Id. at 616 (final decision).

[38] Id. at 609 (final decision).

[39] Soft Drink Interbrand Competition Act, Pub. L. No. 96-308, 94 Stat. 939 (1980) (codified at 15 U.S.C. " 3501-3503 (1988)). The Act provides:

SECTION 1. This Act may be cited as the "Soft Drink Interbrand Competition Act."

SEC. 2. Nothing contained in any antitrust law shall render unlawful the inclusion and enforcement in any trademark licensing contract or agreement, pursuant to which the licensee engages in the manufacture (including manufacture by a sublicensee, agent, or subcontractor), distribution, and sale of a trademarked soft drink product, of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area or limiting the licensee, directly or indirectly, to the manufacture, distribution, and sale of such product only for ultimate resale to consumers within a defined geographic area: Provided, That such product is in substantial and effective competition with other products of the same general class in the relevant market or markets.

SEC. 3. Nothing in this Act shall be construed to legalize the enforcement of provisions described in section 2 of this Act in trademark licensing contracts or agreements described in that section by means of price fixing agreements, horizontal restraints of trade, or group boycotts, if such agreements, restraints, or boycotts would otherwise be unlawful.

SEC. 4. In the case of any proceeding instituted by the United States described in subsection i of section 5 of the Clayton Act (relating to suspension of the statute of limitations on the institution of proceedings by the United States) (15 U.S.C. 16(i)) which is pending on the date of the enactment of this Act, that subsection shall not apply with respect to any right of action referred to in that subsection based in whole or in part on any matter complained of in that proceeding consisting of the existence or enforcement of any provision described in section 2 of this Act in any trademark licensing contract or agreement described in that section.

SEC. 5. As used in this Act, the term "antitrust law" means the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), and the Federal Trade Commission Act (15 U.S.C. 41 et seq.)
Id.

[40] Coca-Cola Co. v. Federal Trade Comm'n, 642 F.2d 1387, 1390 (D.C. Cir. 1981) (remanding cases to the FTC for dismissal without prejudice). The court of appeals expressly denied petitioners' request that a finding be entered declaring territorial exclusivity to be lawful under the Soft Drink Act, basing its decision instead on the FTC's stipulation that its action had been taken on the basis of legal standards other than those imposed by the Act. Id.

[41] The margins on final passage were 89 to 3 in the Senate, and 377 to 34 in the House of Representatives. 126 CONG. REC. 11,359, 16,582-88, 17,713 (1980).

[42] See Statement on Signing S.598 Into Law, 16 WEEKLY COMP. PRES. DOC. 1334 (July 10, 1980).

[43] See House Judiciary Hearings, supra note 14, at 13-17 (testimony of Richard J. Favretto, Deputy Assistant Attorney General, Antitrust Division, Department of Justice) (voicing the strong opposition of the Justice Department to the Soft Drink Act).

[44] See NAAG Gives Preliminary Approval to Car Rental Enforcement Guidelines, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1395, at 1001 (Dec. 15, 1988) (noting the National Association of Attorneys General's opposition to the Soft Drink Act at the time of its passage).

[45] See Ken Rankin, On the Heels of Soda Industry, Others Take Antitrust Laws to Task, NATION'S

RESTAURANT NEWS, June 20, 1983, at 6, 6 (recounting the opposition of food-service trade groups to the Soft Drink Act at the time of its passage).

[46] See House Judiciary Hearings, supra note 14, at 308-11 (prepared statement of Mark Silbergeld, Director, Consumers Union, Washington Office) (stating that the Consumers Union and Consumer Federation of America strongly opposed the Soft Drink Act).

[47] Id. at 262 (testimony of Rep. Stark).

[48] Richard A. Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. CHI. L. REV. 263, 265 (1982) (explaining the "interest group theory" of legislation), quoted in part in Macey, supra note 2, at 474 (summarizing the "modern economic theory of legislation").

[49] Macey, supra note 2, at 475.

[50] See Brennan & Buchanan, supra note 1, at 181 (noting that narrow self-interest is not the sole motive, but is "a significant motive"); Dwight R. Lee, Politics, Ideology, and the Power of Public Choice, 74 VA. L. REV. 191 (1988) ("[I]ndividuals . . . are motivated primarily by private interests rather than the public interest.").

[51] See supra note 3. The public choice model is subject to attack for this simplification, which can be seen as the product of mere analytical expedience. "We model man as a wealth maximizer, not because this model is necessarily the most descriptive empirically, but because we seek a set of rules that will work well independently of the behavioral postulates introduced." Brennan & Buchanan, supra note 1, at 188. Thus, Professor Kelman has attacked the public choice model, arguing that "there is no reason to adopt the economists' flattened motivational explanation, which has frequently been shown wanting, simply because it offers the most readily testable hypothesis." Kelman, supra note 3, at 220. Even the analytical expedience argument for the one-dimensional model is wanting, because Professors Brennan and Buchanan devise their model not for "the descriptive exercise of providing predictions as to the likely outcomes of political interactions," but rather for "the normative exercise of investigating the incentive structures embodied in various institutional forms." Brennan & Buchanan, supra note 1, at 180.

[52] Just how narrowly to model the self-interest of political decisionmakers is a significant problem for the public choice theorists. "The general public choice notion that public leaders (whether elected or appointed) seek to maximize anything resembling a narrowly specified wealth function is likewise hard to defend unless put in nonfalsifiable form (i.e., incorporating all ideological and desire-for-service variables within the selfish utility function)." Kelman, supra note 3, at 217-18. Some public choice theorists struggle mightily, but not convincingly, with this problem:

Of course, any activity can be reconciled with private interest by inserting it into the decisionmakers' utility function as a positively valued variable. The obvious criticism of this reconciliation is that the theory that explains everything explains nothing . . . .

This criticism notwithstanding, it is obvious that people place positive value on a multitude of things, including participation and expression, and public choice theory is not rendered less useful by acknowledging this fact. Public choice assumes, as does economic theory in general, that, no matter what their objectives, people pursue them rationally. They will allocate their limited resources over alternative activities in order to maximize their personal satisfaction. This assumption moves the analysis beyond the level of a meaningless tautology that says nothing more than "people do those things that they want to do."
Lee, supra note 50, at 193-94.

This criticism of the public choice model retains a great deal of power, however, especially if the goal of the model is the normative one of proposing constitutional changes, and not merely the testable one of predicting behavior.

[53] Lee, supra note 50, at 195.

The expectation of affecting the outcome has little to do with an individual's motivation to vote.

. . . [P]eople receive satisfaction from participating in processes they feel are important, from supporting things they believe are good, and from opposing things they believe are bad. . . . There is no more difficulty reconciling voting with private interest than there is with reconciling attendance at sporting events with private interest.
Id. at 193.

[54] Abner J. Mikva, Foreword to Symposium on the Theory of Public Choice, 74 VA. L. REV. 167, 167 (1988).

[55] But for the epithetical language, Professor Kelman presents the proper formulation:

The standard public choice models posit that politics can best be understood as a market in which officials, seeking to maximize their own fortunes, "sell" what is seen as the government's unique service, the capacity to steal from less politically potent citizens, to voters motivated by the desire to steal. Obviously, at base, such a claim is grounded in the idea that wealth-maximizing motives best account for both voter and official behavior.
Kelman, supra note 3, at 205.

[56] See Macey, supra note 2, at 508.

[57] Professor Macey, for example, acknowledges that not all governmental activities should be prohibited:

The most important normative implication [of the economic theory of legislation] is that the use of governmental regulation to achieve wealth transfers imposes significant costs on society by impeding the process through which market forces create wealth. Unfortunately, however, it is extremely difficult to distinguish between those governmental activities that involve "amorally redistributive" rent-seeking (and therefore should be prohibited) and those that represent wealth-increasing "public interest" governmental activities (and therefore should be encouraged).
Id. at 472-73. Lest the reader think Professor Macey is contemplating social welfare programs, however, it is instructive to note that the only examples of "wealth-increasing 'public interest' governmental activities" provided by Professor Macey are

providing public goods (e.g. national defense); overcoming free-rider problems that prevent private parties from reaching mutually advantageous agreements; . . . and providing a responsible yet coercive enforcement mechanism for privately negotiated contracts. . . . In economic terms, the public interest functions of government are to intervene in the market economy to correct market failures or distributional shortcomings.
Id. at 472 n.8.

[58] Id. at 515-16.

[59] Id. at 472. Professor Macey has been greatly criticized for this aspect of his model. For example, Professor Jack Beermann believes that "Macey's analysis often turns out to be quite extreme, largely because Macey does not make an effort to distinguish desirable from undesirable government action. This raises the suspicion that lurking behind Macey's theory is a highly antiregulatory political agenda." Jack M. Beermann, Interest Group Politics and Judicial Behavior: Macey's Public Choice, 67 NOTRE DAME L. REV. 183, 198 (1992). The criticism is not limited to Professor Macey's work. Professor Kelman observes that "the most significant evaluative term that reactionary legal economists apply in extolling the private ordering that goes on against a backdrop of common law rules -- that such activity is 'efficient' or 'wealth-maximizing' -- is hopelessly ambiguous." Kelman, supra note 3, at 203. The imprecision on the public-ordering side of the dichotomy is matched by what many would consider a fundamental error on the private-ordering side. In structuring the dichotomy between public and private ordering, Professor Macey contrasts the net welfare effects on "all parties to such trades" in private transactions with the "social welfare" implications of public transactions. Macey, supra note 2, at 515-16. Such a construction effectively concedes the larger point, that the social welfare implications of private transactions are equally indeterminate.

[60] William N. Eskridge, Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 VA. L. REV. 275, 277 (1988).

[61] Professor Eskridge argues that the advantaged group often wastes the benefits, "leaving society with a

complete deadweight loss." Id. at 294-95.

[62] The Soft Drink Act is of course an example of legislation that diminishes competition. See, e.g., 15 U.S.C. ' 3502 (1988) (altering antitrust treatment of soft drink trademark licensing agreements).

[63] Macey, supra note 2, at 479 (citing MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 74 (1982)).

[64] See Eskridge, supra note 60, at 287-88.

[65] See id. at 288.

[66] Professor Eskridge's typology, which discusses the four combinations of distributed and concentrated costs and benefits, is interesting in this regard. He characterizes a statute with concentrated benefits and distributed costs as "[c]lassic rent-seeking legislation." Id. at 290.

[67] One possibility in meeting the free-rider problem is to seek legislation that is so narrowly focused as not to be a public good in any real sense. Beermann, supra note 59, at 194-95. A second possibility for reducing the free-rider problem is to work in a small group, because "different groups display varying degrees of efficiency in exerting legislative influence. Relatively small groups and those otherwise able to control the free-riding behavior of members can obtain legislation at a lower average cost than other groups." Macey, supra note 2, at 494.

[68] The ability to tie in an existing economic relationship with the projected group lobbying is of obvious importance. Beermann, supra note 59, at 195-96; Robert D. Tollison, Public Choice and Legislation, 74 VA. L. REV. 339, 342 (1988) (discussing the "by-product theory of group collective action").

[69] The justification for this factor is that an efficiency-creating policy will be less likely to create substantial opposition than an efficiency-reducing policy. Macey, supra note 2, at 476 n.16 (citing Gary Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. ECON. 371, 384-85 (1983)). Of course, in the real world, the perceptions of other actors, not the underlying reality, control the strength of the opposition.

[70] Lee, supra note 50, at 196.

[71] See 15 U.S.C. ' 3502 (1988) (altering antitrust treatment of soft drink trademark licensing agreements).

[72] By allowing the continuation of exclusive territories, see id., the Soft Drink Act permits the elimination of intrabrand competition as to given products within each territory. Of course the Soft Drink Act does not permit agreements limiting interbrand competition. See id. ("Provided, That such product is in substantial and effective competition with other products of the same general class in the relevant market or markets."). Thus, for example, a Pepsi bottler would face no competition with regard to the bottler's Pepsi products within the territory, although the Pepsi-Coke competition on essentially fungible products would continue.

[73] See infra note 83.

[74] 126 CONG. REC. 16,571 (1980) (statement of Rep. Conyers); see also Ward Sinclair, Soda Firms Push Bill to Take Fizz Out of Antitrust Laws, WASH. POST, June 18, 1980, at A4 ("Under intense pressure from soda pop makers, Congress is about to grant the highly profitable industry the most sweeping exemption from antitrust laws in 30 years.").

[75] House Judiciary Hearings, supra note 14, at 262 (testimony of Rep. Stark).

[76] Sinclair, supra note 74, at A4.

[77] 126 CONG. REC. 10,968 (statement of Sen. Metzenbaum).

[78] Sinclair, supra note 74, at A4 (quoting Sen. Metzenbaum).

[79] 126 CONG. REC. 10,946 (statement of Sen. Cochran).

[80] House Judiciary Hearings, supra note 14, at 12 (testimony of Rep. Hall) (reflecting statistics as of the opening day of testimony).

[81] 126 CONG. REC. 11,341 (statement of Sen. Metzenbaum). Senator Metzenbaum was addressing Amendment No. 1761, which would have made the Soft Drink Act applicable only to "any licensee whose sales do not exceed $100,000,000 and whose assets do not exceed $50,000,000," and which failed on a vote of 89 to 4. Id. at 11,340.

[82] Sinclair, supra note 74, at A4. It was this heavy-handed move that prompted the observation that "[t]he root beer express went sloshing through the House Judiciary Committee yesterday, assuring that the heavily lobbied exemption will soon reach the floor, where passage is regarded as certain." Id.

[83] Proponents made the claim, based primarily on anecdotal evidence, that small bottlers were as efficient as large bottlers. See, e.g., House Judiciary Hearings, supra note 14, at 493-95 (written statement of Dwight C. Reed, National Soft Drink Association). The clear weight of the academic analyses was that substantial economies of scale make the small bottlers' operations less efficient. See, e.g., id. at 78-79 (written statement of Dr. Louis W. Stern, Northwestern University). Subsequent academic analysis is in accord. See, e.g., ROBERT D. TOLLISON ET AL., COMPETITION AND CONCENTRATION: THE ECONOMICS OF THE CARBONATED SOFT DRINK INDUSTRY 107 (1991) (noting little debate on the fact that bottler consolidations have reduced production and other related costs).

[84] See infra notes 139-62 and accompanying text.

[85] See infra notes 163-215 and accompanying text.

[86] The soft drink industry has shown a clear propensity to use the environmental card to avoid regulation. See infra notes 98-99, 162.

[87] Eskridge, supra note 60, at 294.

[88] 126 CONG. REC. 16,575 (1980) (statement of Rep. Jeffords).

[89] One should exclude the purely egoistic conception of the public interest under which a given legislator defines the nation's best interest exclusively in terms of his or her reelection and maintenance.

[90] Farber & Frickey, supra note 4, at 876 (identifying the "deliberative view" that "legislators can operate somewhat autonomously"); Kelman, supra note 3, at 223 (declaring groundless the claim of 16 public choice theorists that financial selfishness is the sole motivating factor of those who seek public office). By allowing for "economic" considerations within an essentially public interest model, this formulation roughly corresponds to Professors Farber and Frickey's "less grandiose version of the economic theory" and seems to be a good fit with the political science scholarship they explore. Farber & Frickey, supra note 4, at 900. This formulation is also compatible with Judge Mikva's conclusion that "[t]he basic direction of political decisions is fashioned by people (whether voters or politicians) who are thinking of the public interest (as they see it). A legislator who caters only to the rent-seekers because he himself is only a rent-seeker will soon be an ex-legislator." Mikva, supra note 54, at 173.

[91] Public choice theorists do not reject the possibility that a piece of rent-seeking legislation can have incidental public interest consequences, although they seem at a loss as to how such combinations should be identified, much less handled. See supra notes 50-54 and accompanying text.

[92] Others characterized the reasons differently, but the former president of Coca-Cola and a contemporaneous academic commentator included the small-business and refillable-bottle rationales in their short lists. House Judiciary Hearings, supra note 14, at 564 (written statement of J. Lucian Smith, Director and former President, Coca-

Cola Co.); Leonard R. Stein, Note, The Soft Drink Interbrand Competition Act of 1980: Antitrust Loses its Fizz, 18 HARV. J. ON LEGIS. 91, 124-32 (1981) (arguing that vertical restraints protect bottlers' expectations, preserve small business, promote interbrand competition, and protect the returnable bottle).

[93] See House Judiciary Hearings, supra note 14, at 231 (testimony of Cartha DeLoach, Vice President for Corporate Affairs, PepsiCo, Inc.); id. at 47 (testimony of Richard W. Caudill, Vice President, Central Investment Corp.). Some industry spokespeople did attempt to disassociate their support of the Soft Drink Act from the refillable container question. See, e.g., id. at 473 (written statement of Charles B. Ruttenberg, Special Counsel for the National Soft Drink Association).

[94] See id. at 233 (testimony of Cartha DeLoach); id. at 34-35 (testimony of Sidney P. Mudd, Chairman, National Soft Drink Association Special Franchise Committee); 126 CONG. REC. 10,947 (1980) (statement of Sen. Cochran).

Industry representatives were somewhat disingenuous about the small business preservation rationale. "[W]ith the passage of [the Soft Drink Act] . . . the industry will continue to have the local, unconcentrated structure which for so long has typified this national small business industry." House Judiciary Hearings, supra note 14, at 37 (testimony of Sidney P. Mudd). "This legislation was not 'designed to help small business'; neither do any proponents of the legislation, known to me, 'insist that it is designed' to accomplish that." Id. at 468 (supplementary written statement of Sidney P. Mudd).

[95] House Judiciary Hearings, supra note 14, at 226 (testimony of J. Lucian Smith).

There is a sense of fairness, and I would not like that to go unnoticed. These bottlers have invested huge amounts of money and time and effort in building the equities they have in these businesses. If the Federal Trade Commission's present order is allowed to stand, many, many, many bottlers will lose all of that equity.

. . . [W]e don't know who will survive and who will demise, but many will lose their equities without any chance of recovery, as we view it.
Id.

Soft drink bottlers require "extraordinary treatment" quite simply because the effect on the soft drink industry from the FTC's decision, if that decision is allowed to stand, would be extraordinary. . . . This attempt by the FTC to restructure an entire industry overnight, thereby destroying 80 years of investment, justifies and indeed requires extraordinary treatment by the Congress.
Id. at 521-22 (written statement of Cartha DeLoach).

[96] See id. at 558 (written statement of J. Lucian Smith).

[97] Of course, some of the small business preservation arguments advanced by industry participants were simply classic "bad competition" arguments, often with no pretense of social purpose; the kind of statements that public choice advocates hope for, but rarely find, in public debates. See, e.g., id. at 46 (testimony of Charles L. Sandahl, Jr., President, Pepsi-Cola Bottling Co., Austin, Tex.) ("The FTC says there should be intra-brand competition to bring down prices. Let me say, quite frankly, that I have all the competition I can stand, and the prices we charge could not be lowered without going in the red.")

The protection of bottler investment is not a legitimate public policy goal for two reasons. First, industry representatives made it sound as though bottler investment would be wiped out immediately by an adverse ruling on the FTC litigation. E.g., id. at 226 (testimony of J. Lucian Smith). However, hard investment in plant and equipment would have had substantial residual value, and at least some bottlers had no substantial investment basis in the franchise rights. Id. at 42-43 (testimony of Charles L. Sandahl, Jr.) ("[T]he [Pepsi] franchise cost us nothing [in 1950]."). More important from the public policy perspective is the argument that Congress has no business enhancing the value of a business that is dependent on a history of operation now seen as illegal under the antitrust laws.

Clarification of antitrust law is a questionable justification for the Act, because a most immediate and definitive clarification of the law would have come had the FTC litigation been allowed to run its course. This very conclusion was reached by Chairman Rodino, id. at 1-2, the Justice Department, id. at 13, 16 (testimony of Richard J. Favretto, Deputy Assistant Attorney General, Antitrust Division, Department of Justice), and Senator Metzenbaum, 126 CONG. REC. 10,968 (statement of Sen. Metzenbaum). What was apparently really at issue in the clarification argument was a feeling that the matter had taken too long and that the expenditure of resources in pursuit of clarification was too great. See House Judiciary Hearings, supra note 14, at 282 (statement of Rep. Synar).

[98] See, e.g., H.R. REP. NO. 1118, 96th Cong., 2d Sess. 3 (1980) [hereinafter HOUSE REPORT NO. 1118], reprinted in 1980 U.S.C.C.A.N. 2373, 2374.

[99] See, e.g., 126 CONG. REC. 10,959 (statement of Sen. Bayh); id. at 10,947 (statement of Sen. Cochran).

[100] See, e.g., id. at 16,577 (statement of Rep. Pease); id. at 16,569 (statement of Rep. Edwards) ("[T]he argument that the bill will save the returnable bottles does not stand up."). Representative Rodino, who expressed skepticism as to the environmental rationale, House Judiciary Hearings, supra note 14, at 247-48 (written statement of Rep. Rodino), later supported passage of the Act on the basis of changes made with reference to the antitrust exemption point, not the environmental dimension. 126 CONG. REC. 16,568-69 (statement of Rep. Rodino).

[101] The margins on final passage were 89 to 3 in the Senate, and 377 to 34 in the House of Representatives. 126 CONG. REC. 11,359, 16,582-83, 17,713.

[102] See supra note 12-14 and accompanying text.

[103] See, e.g., House Judiciary Hearings, supra note 14, at 249-50 (testimony of Rep. AuCoin); id. at 12 (testimony of Rep. Hall); 126 CONG. REC. 16,574 (statement of Rep. Luken); id. at 16,572 (statement of Rep. Hammerschmidt); id. at 16,571-72 (statement of Rep. Pickle).

[104] See, e.g., 126 CONG. REC. 11,355 (statement of Sen. Percy); id. at 10,947 (statement of Sen. Cochran); id. at 10,922 (statement of Sen. Bayh).

[105] See House Judiciary Hearings, supra note 14, at 279 (testimony of Rep. Weiss); 126 CONG. REC. 16,577 (statement of Rep. Pease).

[106] 126 CONG. REC. 11,340-41 (statement of Sen. Metzenbaum) (addressing Amendment No. 1761, which would have made the Act applicable only to "any licensee whose sales do not exceed $100,000,000 and whose assets do not exceed $50,000,000"). The amendment failed on a vote of 89 to 4. Id. at 11,340-41.

[107] The House of Representatives was told that "[the Soft Drink Act] will halt trends that might otherwise lead to the demise of small bottling firms." HOUSE REPORT NO. 1118, supra note 98, at 3. Similarly, the Senate was told that "the Soft Drink Interbrand Competition Act will preserve a unique system of enterprise, which for the past 75 years has encouraged initiative, promoted competition, and established one of the most successful examples of small business development in this country." 126 CONG. REC. 11,334 (statement of Sen. Hatch).

[108] See supra note 101. The FTC had already rejected this economic argument in its ruling, which served as the primary impetus for congressional action:

The Commission has also given careful consideration to the arguments of respondents and the bottler intervenors advocating geographic market segmentation as a legitimate method of protecting "small" bottlers from intrabrand competition. We have reviewed, in-depth, the evidence and the precedents cited in support of this contention, and have concluded that this argument is without merit.

Coca-Cola Co., 91 F.T.C. 517, 609-10 (1978) (final decision), rev'd, 642 F.2d 1387 (D.C. Cir. 1981).

[109] E.g., House Judiciary Hearings, supra note 14, at 12 (testimony of Rep. Hall).

[110] Id. at 45 (testimony of Charles L. Sandahl, Jr., President, Pepsi-Cola Bottling Co., Austin, Tex.).

[111] Coca-Cola Co., 91 F.T.C. 517, 546 (1975) (initial decision), rev'd, 91 F.T.C. 517, 607 (1978) (final decision), rev'd, 642 F.2d 1387 (D.C. Cir. 1981).

[112] There are two basic systems of product delivery in the soft drink industry: "storedoor delivery," in which the bottler delivers soft drink products to the individual stores, and "warehouse delivery," in which the vendor delivers product to a centralized warehouse for redelivery to the individual stores by the chain or independent broker's transport system. Id. at 623-24 (final decision). "If territorial exclusivity were eliminated, the chain stores would request bids for warehouse delivery from bottlers with the equipment and capacity to service their needs, thus resulting in short-term wholesale price competition for warehouse delivery business." Id. at 572 (initial decision).

[113] Id. at 575-76 (initial decision).

[114] Id. at 574 (initial decision) ("Bottlers of Coca-Cola charge the same price to all their customers; but if bottlers lost chain store outlets which are the high volume and high profit accounts to warehouse delivery, they would be obliged to cut back service to small accounts or to raise prices, either of which would reduce volume.").

[115] For example, Judge Easterbrook argued that a coherent collective legislative design may be impossible to identify:

Because legislatures comprise many members, they do not have "intents" or "designs," hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes. . . .

. . . Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.
Frank H. Easterbrook, Statutes' Domains, 50 U. CHI. L. REV. 533, 547 (1983).

[116] See, e.g., Daniel A. Farber & Philip P. Frickey, Legislative Intent and Public Choice, 74 VA. L. REV. 423, 424 (1988).

[117] As my colleague Professor Gwen Handelman reminds us in a slightly different context, legislative intent is often identifiable if one approaches the exercise reasonably. "Often, legislative intent will not be ascertainable, but I posit that, realistically defined, legislative intent is not a myth; and, more often than is generally acknowledged, sufficient probative evidence is available for legislative intent to be reliably identified." Gwen T. Handelman, Zen and the Art of Statutory Construction: A Tax Lawyer's Account of Enlightenment, 40 DEPAUL L. REV. 611, 615 (1991).

[118] Compare Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 7-8 & n.1 (D.C. Cir. 1985) (Scalia, J., concurring) (finding analytical error in using a committee report to gauge the intent of legislators) with Farber & Frickey, supra note 116, at 425 (characterizing as "excessive" Justice Scalia's "cynicism" on the judicial use of legislative history in interpreting statutes).

[119] Farber & Frickey, supra note 116, at 450.

[120] See supra notes 91-97 and accompanying text.

[121] Compare supra notes 92-96 and accompanying text (discussing industry arguments) with supra notes 98-104 and accompanying text (discussing congressional arguments).

[122] See supra note 101.

[123] For example, Senator Metzenbaum's Amendment No. 1761, which would have made the Act applicable only to "any licensee whose sales do not exceed $100,000,000 and whose assets do not exceed $50,000,000," failed on a vote of 89 to 4. 126 CONG. REC. 11,340-41 (1980).

[124] Representative AuCoin, who authored House Bill 2812, national deposit legislation, properly framed the issue.

The choice facing this committee is by passing legislation that provides for protection for the small bottler, you create then a possibility for the continuation of the returnable bottle. That's a possibility. A possibility.

What we need to do is make it a likelihood and a certainty, and the certainty comes by adding language, it seems to me, to the legislation that puts percentage targets and percentage requirements in the legislation, so that this isn't just rhetoric used to justify an exemption from antitrust . . . .
House Judiciary Hearings, supra note 14, at 258 (testimony of Rep. AuCoin). Environmental proponents in the House attempted without success to gather support for bills that would have required the use of refillable bottles in lieu of a sliding percentage of nonrefillable containers. Id. Other environmental proponents attempted without success to pass a complete ban on nonrefillable bottles. Id. at 262 (testimony of Rep. Stark).
[125] It is theoretically possible, but extraordinarily unlikely, that one could identify social welfare benefits of the Soft Drink Act sufficient to redeem it in the eyes of the public choice analyst. This remote possibility is merged into the public interest discussion presented in the following section.

[126] Eskridge, supra note 60, at 299.

[127] 15 U.S.C. ' 3501 (1988) (emphasis added).

[128] The contemporaneous academic discussions are in accord. See Anna B. Parker, Note, The Soft Drink Act: Soft on Vertical Restraints?, 2 PACE L. REV. 249, 270-71 (1982); Stein, supra note 92, at 137.

[129] One court found that "[t]he legislative history of the Act confirms the purpose of Section 3501 is to exempt from the antitrust laws agreements which essentially forbid transshipping of soft drink products by resellers." O'Neill v. Coca-Cola Co., 669 F. Supp. 217, 225 (N.D. Ill. 1987). Another court held that "the Soft Drink Act was enacted to remove certain soft drink industry practices from the reach of the antitrust laws." Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 175 (3d Cir. 1988).

[130] The committee has produced an amended bill that does not grant antitrust immunity to the soft drink industry. Instead, it provides a restatement of existing antitrust law applicable to exclusive territorial franchises, as set forth in the Supreme Court's 1977 GTE Sylvania decision. That decision, and this legislation, insure that the rule of reason will apply to territorial restrictions imposed by a syrup manufacturer on his bottling franchises.

. . . .

. . . [I]t is the committee's intent that the rule of reason be applied fully and fairly to authorize exclusive territories only when they operate consistently with the competitive principles of our antitrust laws.
126 CONG. REC. 16,568-69 (1980) (statement of Rep. Rodino); see id. at 16,569 (statement of Rep. Seiberling). The House Report was consistent with the interpretation that the legislation did not offer a complete exemption: "This legislation restates the rule of reason approach followed by the Supreme Court in Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). The clarification eliminates uncertainty in the law that has plagued the industry, particularly small bottlers, during the last decade. It does not grant antitrust immunities." HOUSE REPORT NO. 1118, supra note 98, at 2 (citation omitted); see also id. at 2374-76.

[131] Parker, supra note 128, at 271.

[132] Sylvania, 433 U.S. at 49.

[133] Compare Parker, supra note 128, at 269-70 ("[T]erritorial exclusivity provisions . . . are likely to survive the application of the Soft Drink Act standard.") with Louis W. Stern et. al., An Application of a Rule of Reason Model to Coca-Cola's Use of Territorial Restrictions in Distribution, printed in House Judiciary Hearings, supra note 14, at 85 (arguing that territorial exclusivity would not survive a rule-of-reason analysis).

[134] See Stein, supra note 92, at 138 ("[R]ule of reason analysis will be applied only where the court has already found that the relevant market is not competitive."). Another author goes beyond the record, however, in claiming judicial approval of this approach. Discussing the remand order of the FTC decision in Coca-Cola Co. v. Federal Trade Comm'n, 642 F.2d 1387 (D.C. Cir. 1981), that author asserts that:

[T]he Court of Appeals for the District of Columbia set aside [the FTC] orders, holding that they were "based upon legal standards which differ from those in the . . . Soft Drink Act." The court of appeals reasoned that, rather than codifying the rule of reason standard, the Soft Drink Act introduced a new standard into the analysis of vertical restraints.

Parker, supra note 128, at 253. This is a misreading of the court of appeals order. In fact, the court noted that the parties agreed that the Soft Drink Act controlled, Coca-Cola, 642 F.2d at 1389, that the FTC stipulated that the standards used by the Commission varied from those in the Act, id. at 1389, and found that the FTC's admission required the dismissal, id. at 1390. The court made no independent finding that the Act failed to codify the rule-of-reason standard.

[135] The administrative law judge in the FTC proceedings, for example, found that the elimination of territorial exclusivity would, among other effects, substantially curtail or eliminate effective merchandising by local bottlers, Coca-Cola Co., 91 F.T.C. 517, 573 (initial decision), rev'd, 91 F.T.C. 517, 607 (final decision), rev'd, 642 F.2d 1387 (D.C. Cir. 1981), limit service and raise prices to small accounts, id. at 574 (initial decision), eliminate some brands and flavors, id. at 574 (initial decision), and put hundreds of bottlers out of business. Id. at 574-75 (initial decision). In addition, the bottlers secured some relief from antitrust claims based on prior claims. Soft Drink Interbrand Competition Act, Pub. L. No. 96-308, ' 4, 94 Stat. 939, 939 (1980).

[136] See supra notes 93-94, 98-99, 103-04 and accompanying text.

[137] See infra note 141 and accompanying text.

[138] See infra notes 163-69 and accompanying text.

[139] See House Judiciary Hearings, supra note 14, at 47 (testimony of Richard W. Caudill, Vice President, Central Investment Corp.); Mack Deposition, supra note 13, at 25.

[140] See Coca-Cola Co., 91 F.T.C. 517, 646-47 (1978) (final decision), rev'd, 642 F.2d 1387 (D.C. Cir. 1981); Coca-Cola Co., 91 F.T.C. 517, 555-57 (initial decision), rev'd, 91 F.T.C. 517, 607 (1978) (final decision), rev'd, 642 F.2d 1387 (D.C. Cir. 1981); House Judiciary Hearings, supra note 14, at 542 (written statement of J. Lucian Smith, Director and former President, Coca-Cola Co.); id. at 481-82 (written statement of Richard W. Caudill); Tracey Tyler, Pop Firms to Start Anti-Cans Drive, TORONTO STAR, Oct. 16, 1990, at A8 (noting that refillables are about 30% less expensive than cans).

[141] See Coca-Cola, 91 F.T.C. at 557 (initial decision); House Judiciary Hearings, supra note 14, at 252 (testimony of Rep. AuCoin) (citing National Soft Drink Association figures). The National Soft Drink Association's figures for 1988 showed an overall mix of metal cans (44%), nonreturnable glass (14%), returnable glass (10%), and plastic (32%), representing a change from 1973 when the corresponding figures were metal cans (29%), nonreturnable glass (17%), returnable glass (54%), and plastic (0%). Eric Benmour, Coke Decides Returnable Bottles Not the Real Thing, BUS. FIRST-LOUISVILLE, May 28, 1990, ' 1, at 9, 9.

[142] HOUSE REPORT NO. 1118, supra note 98, at 3.

[143] Benmour, supra note 141, ' 1, at 9; Two New Contour-Pak Sizes Now Available, BEVERAGE WORLD, Mar. 1989, at 1, 1 (reporting that 1988 sales of refillable soft drinks were less than seven percent) [hereinafter Two New Sizes].

[144] Two New Sizes, supra note 143, at 1.

[145] See R. Blair Murphy, Aluminum Containers in the Beverage Industry, in Effective Beverage Marketing

Through Better Packaging, 118 AM. MGMT. ASS'N MGMT. BULL. 11, 12 (1968) (citing "the affluent consumer's desire for convenience") [hereinafter Effective Beverage Marketing]; Two New Sizes, supra note 143, at 1.

[146] See House Judiciary Hearings, supra note 14, at 243-44 (testimony of Cartha DeLoach, Vice President for Corporate Affairs, PepsiCo, Inc.).

[147] Id. at 247-48 (written statement of Rep. Rodino) ("In major metropolitan areas such as New York, Philadelphia, and Boston, the refillable bottle has almost totally disappeared. Pepsi-Cola has provided us with information that 34 of its franchised bottlers produce no or insignificant numbers of, soft drinks in refillable bottles.").

[148] Id. at 388 (written submission of Sen. Hatfield) (citing GENERAL ACCOUNTING OFFICE, POTENTIAL EFFECTS OF A NATIONAL MANDATORY DEPOSIT ON BEVERAGE CONTAINERS). There is ample evidence in the record that chain stores have discouraged bottlers from producing and stocking refillable glass bottles. Id. at 53 (written statement of Richard W. Caudill, Vice President, Central Investment Corp.). The phenomenon is not new. See, e.g., Milton E. Bergwall, Innovations in Carbonated Beverage Packaging, in Effective Beverage Marketing, supra note 145, at 6-7 (describing the history of 1960s retail chain efforts to replace returnables with nonreturnable glass bottles).

[149] Bruce Oman, A Clear Choice?, BEVERAGE WORLD, June 1990, at 78, 78. Of course, some bottlers promote refillable use through pricing and advertising. "The price of a canned Coke has been hiked five cents a can in Georgia by the Atlanta Coca-Cola Bottling Co. in a campaign to encourage consumers to purchase Coke in returnable bottles." Price Increases, WASH.POST, Jan. 4, 1979, at D10.

[150] See Mack Deposition, supra note 13, at 25; Nicholas J. D'Agostino, Jr., A Retailer's View of Merchandising in the Beverage Industry, in Effective Beverage Marketing, supra note 145, at 21, 22-23 (identifying retailers' handling costs from refillable containers).

[151] There is general agreement that warehouse delivery and refillable bottles are not compatible. See Coca-Cola Co., 91 F.T.C. 517, 543 (1975) (initial decision), rev'd, 91 F.T.C. 517, 607 (1978) (final decision), rev'd, 642 F.2d 1387 (D.C. Cir. 1981); House Judiciary Hearings, supra note 14, at 234 (testimony of Cartha DeLoach, Vice President for Corporate Affairs, PepsiCo, Inc.); id. at 45 (testimony of Charles L. Sandahl, Jr., President, Pepsi-Cola Bottling Co., Austin, Tex.); id. at 559-60 (written statement of J. Lucian Smith, Director and former President, Coca-Cola Co.).

The tension between refillables and warehouse delivery is not new. Pepsi-Cola first experimented with steel cans prior to 1951 but discontinued the experiment because of the transshipment problems that warehouse delivery caused. See Mack Deposition, supra note 13, at 24-28.

[152] House Judiciary Hearings, supra note 14, at 542 (written statement of J. Lucian Smith) ("[F]ood chains, as a matter of policy, take a higher profit on Coca-Cola in returnables than on Coca-Cola sold in disposable packages [and] often refuse to price-promote returnables even when wholesale price promotions are offered by the bottler."); see also id. at 53 (written statement of Richard W. Caudill).

[153] See Coca-Cola, 91 F.T.C. at 558 (initial decision).

[154] See House Judiciary Hearings, supra note 14, at 61 (testimony of Richard W. Caudill).

[155] See id. at 60 (testimony of Peter Chokola, President, Chokola Beverage Company, Wilkes-Barre, Pa.).

[156] See COKE'S FIRST 100 YEARS, supra note 11, at 50-52; id. at 124-35 (presenting a history of Coca-Cola packaging). One of the few packaging miscues led to Coke's withdrawal of the LOPAC plastic bottle in 1974, following a Food and Drug Administration (FDA) question as to carcinogens. See id. at 135.

[157] See infra notes 163-69 and accompanying text.

[158] The industry efforts include a predictable amount of empty posturing: "Think this industry isn't environmentally aware? Think again. . . . [T]he beverage world has Planet Earth on its mind." Greg Prince, Again and Again, BEVERAGE WORLD, Dec. 1990, at 62, 62. There is also some progress mixed in with the hype. For example, in the fourth quarter of 1990, amid great fanfare, both Pepsi and Coca-Cola announced the development of new technology to make polyethylene terephthalate (PET) plastic recyclable into soft drink bottles. Coca Cola, Pepsi Plan to Introduce Bottles Using Recycled Plastic, INTEGRATED WASTE MGMT., Dec. 12, 1990, at 3, 3 [hereinafter Recycled Plastic]. The announcement was greeted with skepticism. Plastics recycling industry insiders assessed the venture as "a public relations stunt that would prove too costly to pursue," Barnaby J. Feder, Profits, and Problems, for Recycler, N.Y. TIMES, Jan. 8, 1991, at D1 (quoting Thomas M. Duff, President, Wellman, Inc.), and predicted that "the program will probably not grow beyond a demonstration project." John Holusha, Coming Clean on Goods: Ecology Claims Faulted, N.Y. TIMES, Mar. 12, 1991, at D1. The skeptics, however, were wrong. The FDA has approved the use of recycled PET plastic for food-contact use, and the marketing of such containers is now underway. See, e.g., Label from a two-liter bottle of Diet Coke, purchased Mar. 19, 1992, Lexington, Va. (on file with the author, awaiting recycling) ("Bottle made with at least 25% recycled plastic").

The soft drink industry, however, seems constitutionally unable to be straightforward on these issues; both Coca-Cola and Pepsi-Cola have announced that they will not pass on to their customers the increased cost of the recycling program. The position of the Coca-Cola Company is firm, but inexplicably so: "'Of course, these costs won't be passed on to the consumer . . . .'" Recycled Plastic, supra, at 3. Pepsi-Cola's position is equally obtuse: "'It is not a question of economics; it's a question of doing the right thing . . . . Consumers want environmentally correct packages. . . . Besides, it's our nickel. . . . We are not going to pass on the added cost.'" Holusha, supra, at D1 (quoting Andrew Giangola, Pepsi-Cola spokesperson).

Apparently, "doing the right thing" in environmental terms is not always the policy. The soft drink industry has been reluctant to implement in this country environmentally desirable practices that it has adopted in foreign markets. For example, the technology has been developed to make PET plastic bottles refillable, not merely recyclable; both PepsiCo and the Coca-Cola Company have test-marketed refillable PET plastic bottles in Europe. Alan Wolf, Drinktec-Interbrau: Living the Dream, BEVERAGE WORLD, Dec. 1989, at 66, 70 (describing refillable PET bottles being tested by the Coca-Cola Company in West Germany and by PepsiCo in the Netherlands). Refillable PET plastic bottles were developed under pressure from European environmental authorities and only after nonrefillable PET plastic bottles were forced from the German market. See Sean Milmo, European Plastics on a Downward Track: Plastics '90 Special Report, CHEMICAL MARKETING REP., Feb. 12, 1990, at SR19, SR19.

The refillable PET plastic bottles are reported to have a 20-round-trip life cycle -- equivalent to that of a glass refillable. Wolf, supra, at 70. There are at present no plans to introduce the refillable PET plastic bottle into the domestic market. Interview with Coca-Cola Company spokesperson, who spoke on condition that she not be identified by name, in Atlanta, Ga. (July 10, 1991); Telephone Interview with Andrew Giangola, Pepsi-Cola spokesperson (July 11, 1991).

[159] Recycled Plastic, supra note 158, at 3.

[160] Pepsi-Cola Announces Environmental Breakthrough: Recycled Plastic PET Bottle, PR NEWSWIRE, Dec. 4, 1990, available in LEXIS, Nexis Library, PRNEWS File (quoting Paul Griswold, Director of Packaging Development and Procurement, Pepsi-Cola Company). "Pepsi-Cola strongly endorses and supports curbside recycling efforts, as the preferred method to recover the materials in soft drink containers. . . . 'Pepsi will continue to support a comprehensive program to manage solid waste.'" Id.

[161] There is ample justification for caution in accepting the substituted-performance argument. An administrative law judge in an FTC case conducted a comprehensive evaluation of the relative environmental costs of aluminum cans, steel cans, nonrefillable glass bottles, and refillable glass bottles, concluding that in realistic situations, the refillable glass bottle is the best container from an environmental standpoint:

From the standpoint of raw materials consumed in the manufacture of soft drink containers; the energy used in the processing of raw materials, the manufacture of containers, the filling of containers, and the transportation associated

therewith; water use; solid waste generation; air pollutants; water-borne wastes; and energy effluents, the returnable bottle is the preferred soft drink container even at trippage rates below ten. At approximately four trips, the returnable bottle has the same composite impact on the environment as the conventional steel can. A returnable bottle with trippage as low as two still has roughly the same impact as a non-returnable bottle. A returnable bottle with a trippage between four and five has the same composite environmental impact as does an aluminum can which is recycled at an 80 percent rate.
Coca-Cola Co., 91 F.T.C. 517, 571-72 (1975) (initial decision) (citations omitted), rev'd, 91 F.T.C. 517, 607 (1978) (final decision), rev'd, 642 F.2d 1387 (D.C. Cir. 1981). The matter needs to be reexamined in light of substantially changed circumstances since the 1975 comparison. Movement to a substantially less dense production infrastructure has worsened the environmental performance of refillables by increasing the distances over which such containers must be delivered and returned. The significant advances in recycling technology and community recycling efforts since 1975 need to be taken into account.

[162] Substantial, albeit anecdotal, evidence indicates that the soft drink industry supports some recycling programs primarily as a means of deflecting more intrusive environmental requirements. For example, some within the industry view curbside recycling as a means of deflecting government scrutiny from the soft drink industry:

There is only one proven way to avoid container deposit, redemption and packaging laws. The litter tax concept doesn't fly. Industry promises "to do a better job in recycling" aren't enough. The only option is to propose a comprehensive, multimaterial recycling program statewide or provincewide. This tactic commonly involves industry support of a comprehensive recycling law.
Jerry Powell, The Soft Drink Industry Gets Relief in Ontario, BEVERAGE WORLD, May 1990, at 90, 90. One industry advocate has advised that "the industry must position itself as a facilitator of comprehensive solid waste solutions if it is to avoid the stroke of the legislator's pen." Andrew Galvin, Solid Waste Challenge, BEVERAGE WORLD, June 1989, at 23, 23. In his view, curbside recycling is "the most potent weapon beverage packaging has to upgrade its image with legislators." Id. This is not to dismiss curbside recycling programs, for despite the self-serving advocacy of the soft drink industry, there is logic to the use of integrated recycling programs.

The bottom line is that post-consumer beverage containers are good for the bottom line. As more communities turn to curbside separation and recycling to cut down on the amount of trash headed for the landfill or the incinerator, it is in everybody's best interest to include beverage packaging in the plan. The resale value of these materials helps pay for the cost of collection, the householder can take care of all his recycling at curbside, and retailers, bottlers and wholesalers don't have to handle returned empties.
Id.

The critical point for this discussion is the last, that with curbside recycling the empty bottles are not returned through the store to the bottler. Because the empties are not returned to the bottler, the justification for exclusive territories -- to preserve each bottler's float -- disappears.

[163] See TCHUDI, supra note 11, at 21-52, 57. Consumption patterns were much different at the turn of the century as well; in 1900 the per-capita consumption of soft drinks was 12 bottles or glasses per year. Id. at 57.

[164] House Judiciary Hearings, supra note 14, at 224 (statement of Rep. Rodino) (quoting National Soft Drink Association figures).

[165] Id. (statement of J. Lucian Smith, Director and former President, Coca-Cola Co.).

[166] House Judiciary Hearings, supra note 14, at 224 (statement of Rep. Rodino) (quoting National Soft Drink Association figures); BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., STATISTICAL ABSTRACT OF THE UNITED STATES 778 (110th ed. 1990) [hereinafter CENSUS].

[167] CENSUS, supra note 166, at 778.

[168] Id.

[169] "Production-scale economies have motivated a substantial consolidation of U.S. soft drink production facilities. Roughly 6,600 plants were in production in 1950; only about 1,000 are producing today. Despite this drop, there may yet be substantial economies to be reached by further consolidations." TOLLISON ET AL., supra note 83, at 77; see also House Judiciary Hearings, supra note 14, at 279 (written statement of Rep. Weiss) (stating that the market concentration trend is irreversible); id. at 77-78 (written statement of Dr. Louis W. Stern, Northwestern University) (asserting that natural market forces compel industry concentration); id. at 224 (statement of Rep. Rodino) (quoting National Soft Drink Association figures).

[170] [M]any larger corporations, Fortune 500 companies, such as Beatrice Foods, IC Industries, General Cinema and Warner Communication -- all of these are major soft drink bottlers.

The Coca-Cola Bottling Co. of New York, a so-called independent bottling company, ranks in the Fortune 500 and owns bottling companies in Maine, Kentucky, Kansas, Nebraska, and Colorado, as well as in New York.

The Coca-Cola Co. and Pepsico, Inc. are themselves among the Nation's largest bottlers.
126 CONG. REC. 10,968-69 (1980) (statement of Sen. Metzenbaum).

[171] See OLIVER, supra note 15, at 191 (discussing the integration at Coca-Cola).

[172] TOLLISON ET AL., supra note 83, at 113 n.10. ("Coca-Cola, through Coca-Cola Enterprises and other equity interests, reportedly has an equity interest in bottlers that represent 70 percent of its U.S. volume. PepsiCo reportedly has an equity interest in bottles [sic] representing 65 percent of its U.S. volume.").

[173] OLIVER, supra note 15, at 191 ("Coca-Cola reversed a century-old policy of fostering an almost totally independent bottling system."); TOLLISON ET AL., supra note 83, at 1.

[174] House Judiciary Hearings, supra note 14, at 220 (testimony of J. Lucian Smith, Director and former President, Coca-Cola Co.).

[175] Id.

[176] Id.

[177] Id. at 222 (emphasis added).

[178] Coca-Cola Co., 91 F.T.C. 517 (1975) (initial decision), rev'd, 91 F.T.C. 517, 607 (1978) (final decision), rev'd, 642 F.2d 1378 (D.C. Cir. 1981).

[179] Id. at 527-28 (initial decision). Noting that in 1971, the Coca-Cola Company operated 27 bottling plants serving 14% of the population, Judge Joseph P. DuFresne stated:

Most of the subsidiary bottling plants were acquired years ago to assure the availability of Coca-Cola in territories when bottlers in those territories had to sell out or did not have the financial resources and independent firms with money and know-how were unavailable in those areas. The policy of the company for over a decade has been that such a subsidiary bottler is to be sold when the company acquires one so that the number of subsidiaries remains stable.
Id. at 528 (initial decision).

[180] Judge DuFresne noted that a Coca-Cola subsidiary had "constructed canning plants . . . in areas where there was inadequate canning capacity," but that as "independent bottlers in some areas desire to invest in them, the company has sold canning plants." Id.

[181] In a 1986 interview, Coca-Cola USA President Brian Dyson addressed the ownership question and indicated that the planning for the forward integration started as early as 1981.

I'd say [the purchase of JTL, the largest bottler in the world, by the Coca-Cola Company is] a natural evolution of the [bottler] system. We started this whole campaign back in 1981, and, in effect, it was setting up a system that some day would deal with situations such as a major Coca-Cola bottler, who for reasons that were sovereign and personal to that group of shareholders, decided that they wanted to restructure their ownership. . . . We applaud those critical members of our system, big, large or medium-sized, who, when they have a reason to change their ownership structure, do it in a way that is strengthening to the system and not just unilateral. And that is why I think that is such a fantastic example of all we have been working on over these five or six years. I would say it's probably one of the most outstanding, strategic thrusts that we have had, historically.

Coke's First 100 Years, supra note 11, at 218-19. At the same time Don Keough, President of the Coca-Cola Company, said, "We think we've got a potful of opportunities in the soft drink business to make sensible investments [in the 1980s]." Id. at 200.

[182] Not all of the forward integration has been achieved through majority ownership, or even ownership through the Coca-Cola Enterprises vehicle. In 1986, Roberto Goizueta, Chairman of the Coca-Cola Company, indicated interest in the acquisition of minority interests and the structuring of joint ventures as part of "our restructuring efforts." Id. at 200-02.

[183] Coca-Cola (either Coca-Cola USA or Coca-Cola Enterprises) acquired the following bottlers since passage of the Soft Drink Act: Associated Coca-Cola Bottling Co. (June 1982), Mid-Atlantic Bottling Co. (Aug. 1984), Wometco Bottling Co. (Oct. 1984), Louisiana Coca-Cola Bottling Co., Ltd. (Dec. 1984), Central States Coca-Cola Bottling Co. (Mar. 1985), Athens Coca-Cola Bottling Co. (Oct. 1985), Beatrice Company's Coca-Cola Bottling Operations (June 1986), JTL Corp. (July 1986), Coca-Cola Bottling Co. of New York (Nov. 1986), Coca-Cola Bottling Co. of South Florida, Inc. (Dec. 1986), Coca-Cola Bottling Co. of Miami (Feb. 1988), Coca-Cola Bottling Co. of Delaware (Feb. 1988), Coca-Cola Bottling Co. of Memphis, Tennessee (Feb. 1988), Coca-Cola Bottler in Jacksonville, Texas (Mar. 1988), and Coca-Cola Bottler in Wauchula, Florida (Mar. 1988). TOLLISON ET AL., supra note 83, at 191-93.

[184] In this period, Coca-Cola purchased its largest bottling franchise from the JTL Corporation for $1.4 billion and the bottling operations of Beatrice Companies for $1 billion. OLIVER, supra note 15, at 191. To give some perspective, in 1980 Coca-Cola's entire investment in company-owned bottling facilities was $2 billion. House Judiciary Hearings, supra note 14, at 217 (testimony of J. Lucian Smith, Director and former President, Coca-Cola Co.).

[185] See A Year in the Life, BEVERAGE WORLD, Oct. 1989, at 58, 61-62 (interview with Ira C. "Ike" Herbert, President, Coca-Cola USA).

[186] TOLLISON ET AL., supra note 83, at 113 n.10.

[187] A Year in the Life, supra note 185, at 58, 61 (interview with Ira C. "Ike" Herbert).

[188] An exception is the Pepsi-Cola Bottling Co. of New York Inc. PepsiCo, Inc. owned the local bottler for years until 1984, when it was sold to a private party. Thomas J. Maier, A Federal Case of Soda; Distributors Sue Bottler to Open Up Market, NEWSDAY, Jan. 28, 1991, at 29. The reason for the transaction, characterized as unusual by industry observers, apparently was that PepsiCo, Inc. ran into a force with which it did not want to deal: the Teamsters. Id.

[189] House Judiciary Hearings, supra note 14, at 238 (testimony of Cartha DeLoach, Vice President for Corporate Affairs, PepsiCo, Inc.). PepsiCo had initially owned bottling plants as a means of establishing a presence in important markets where an independent bottler presence was not available. PepsiCo, Inc., 91 F.T.C. 680, 688 (1975), rev'd sub nom. Coca-Cola Co. v. Federal Trade Comm'n, 642 F.2d 1387 (D.C. Cir. 1981). In 1975 PepsiCo operated approximately 20 such plants. Id.

[190] House Judiciary Hearings, supra note 14, at 239 (testimony of Cartha DeLoach).

[191] PepsiCo acquired the following bottlers since passage of the Soft Drink Act: Bryant Beverages (May 1982),

Surfside Beverage Corp. (June 1983), Allegheny Pepsi-Cola Bottling Co. (May 1985) (sold Sept. 1988), Franklin Bottling Co. (July 1985), Pepsi-Cola Bottling Company of Perry, Inc. (Feb. 1986), MEI Corp. (May 1986), Pepsi-Cola Bottling Company of Gallup (Mar. 1986), New Century Beverage Co. (Dec. 1986), TJF Beverages, Inc. (Dec. 1986), Pepsi-Cola Bottling Company of Bloomington, Inc. (Oct. 1987), Rogers Beverages (Nov. 1987), IC Industries, Inc. (Dec. 1987) (20% joint venture), Pepsi-Cola Bottling Company of Tampa (Feb. 1988), Pepsi-Cola Bottling Company of Annapolis, Inc. (July 1988), Grand Metropolitan P.L.C. (Aug. 1988), Atlantic Soft Drink Co. of South Carolina (Aug. 1988), Pepsi-Cola San Joaquin Bottling Co. (Aug. 1988), Pepsi-Cola Bottling Company of Denver (Aug. 1988), Pepsi-Cola Bottling Company of Greeley (Aug. 1988), Astro Canners, Inc. (Aug. 1988), Confair Bottling Co., Inc. (Sept. 1988), Laurel Group Limited (Oct. 1988), Erie Bottling Corporation (Oct. 1988), Unibev, Inc. (Oct. 1988), Wilchart, Ltd. (Oct. 1988), Pepsi-Cola Bottling Company of Wilmington, Inc. (Oct. 1988), Southwest Beverage Corp. (Feb. 1989), General Cinema Beverages Corp. (Mar. 1989), Pepsi-Cola Bottling of Reading (Apr. 1989), and Rice Bottling Enterprises, Inc. (May 1989). TOLLISON ET AL., supra note 83, at 191-93.

[192] Robert J. Cole, Pepsico to Acquire Big Bottler, N.Y. TIMES, Dec. 2, 1988, at D1. In one 1989 transaction, PepsiCo paid $1.5 billion and bought General Cinema's bottling operations, id., which at the time accounted for 8.3% of national Pepsi-Cola production, bringing PepsiCo's control to 49% of domestic Pepsi-Cola production. Id. at D3. Incidentally, the General Cinema purchase gave PepsiCo an additional 6.6% of national Dr. Pepper production and 3.2% of national 7-Up production. Id. Also in 1988, PepsiCo paid $705 million for the bottling operations of Grand Metropolitan P.L.C. Id. at D1.

[193] Bruce Oman, Whole Lotta Shakin', BEVERAGE WORLD, Oct. 1989, at 219, 219.

[194] Bill Richards, PepsiCo Inc., IC Industries Set Venture, WALL ST. J., Nov. 10, 1987, at 2. One example is the "joint venture" of PepsiCo and IC Industries, which grew out of an acrimonious dispute over the transfer of a Pepsi-Cola franchise. Id. That situation arose when GenCorp, an existing Pepsi-Cola franchisee, attempted to transfer a $395 million franchise to IC Industries without PepsiCo approval. Id. PepsiCo blocked the transfer and was sued by both parties to the putative sale, who claimed that PepsiCo was using its claimed approval right to force a sale of the franchise to PepsiCo. Id. In a surprise settlement of the case, PepsiCo and IC Industries agreed to joint ownership of a corporate entity, into which PepsiCo put $177 million and two franchises valued at $77 million, and into which IC Industries put two bottling operations. Id. The combined entity would have an estimated 12% of Pepsi-Cola's domestic sales, making it the second largest bottler in the Pepsi-Cola system. The largest, PepsiCo's wholly owned operation, then accounted for 33% of domestic Pepsi sales volume. Id.

[195] TOLLISON ET AL., supra note 83, at 113 n.10.

[196] [The local bottlers] are heirs not only to a happy tradition which has seen each succeeding generation more solidly entrenched in local business and civic leadership in the place of their franchise, but also to one of the most lucrative businesses in existence. In the 1920s and 1930s, the local Coca-Cola bottler in towns and cities of the nation was high among, if not the highest of, the power-and-wealth elite. This was particularly true in the South where World War I industry barely dented the region's economic desolation and where the depression of the early 1930s hit particularly hard. In southern towns, the Coca-Cola bottling plant was often the most splendid building in town, and the owner of it likely also to be involved in banking, real estate, and other matters of high finance -- a strong element in an otherwise weak economy. Even amidst today's affluence, bottlers are somebody special, and their relative power and financial standing is little diminished, because the trend in recent years has been toward consolidations, buying up other territories and building larger, fewer, faster plants.

WATTERS, supra note 10, at 59.

[197] Over 3,400 bottlers closed over a period of -- about a 10-year period. But 90 percent of the ones that closed were the independents like myself. The Coke bottlers, the small Coke bottlers and Pepsi bottlers are the ones that have been bought out for very handsome prices. The large bottlers are not buying a bottling operation. They take the bottling operation and close down the machinery and throw the men out of work. All they want to buy is the exclusive territory marketing rights. The right to that territory. . . . What happens, the Coke and Pepsi marketing effort in that area changes the characteristic from basically a returnable, reusable, hometown bottling operation to one that is serviced with throwaway bottles and cans.

House Judiciary Hearings, supra note 14, at 60 (testimony of Peter Chokola, President, Chokola Beverage Company, Wilkes-Barre, Pa., an independent bottler).

[198] TOLLISON ET AL., supra note 83, at 110. ("[C]hanges occurring now in the soft drink business have already taken place in the marketing of other food products. Soft drinks are virtually the last major food product distributed through franchised dealers. The soft drink industry is mimicking the natural economic development of the marketing of other food products.")

[199] House Judiciary Hearings, supra note 14, at 78 (written statement of Dr. Louis W. Stern, Northwestern University); Coke's First 100 Years, supra note 11, at 272; id. at 219-20.

[200] See House Judiciary Hearings, supra note 14, at 78-79 (written statement of Dr. Louis W. Stern); TOLLISON ET AL., supra note 83, at 107-08.

[201] TOLLISON ET AL., supra note 83, at 77. One provocative argument is that territorial exclusivity hurt the small, independent bottler by limiting the bottler's market area, thereby blocking the independent bottler's only path to expansion and realization of scale economies. House Judiciary Hearings, supra note 14, at 310 (testimony of Mark Silbergeld, Director, Consumers Union, Washington Office).

[202] TOLLISON ET AL., supra note 83, at 108 (citing Walecia Konrad, Bottling is Hardly a Classic for Coke, BUS. WEEK, Dec. 11, 1989 at 130, 130) ("Coca-Cola Enterprises reports savings of more than $100 million in manufacturing and raw material expenses associated with the consolidation of acquired bottlers.").

[203] Id. at 107.

[204] There are also potential economies from having one entity instead of two.

There are, of course, other cost savings associated with vertical integration [beyond production efficiencies]: lower transaction costs associated with the interaction between two independent organizations, more efficient coordination of regional and national marketing strategies, more efficient coordination between marketing programs and production plans, and more opportunities to introduce new products or marketing concepts, among others. The economic logic of these and other factors is that vertical integration solves problems arising from the interrelatedness of activities where independent decision making leads to potentially inefficient results. Arrangements such as vertical integration arise to maximize the joint value of successive activities.
Id. at 109-10.

[205] Id. at 108 (noting that efficiencies in bottler consolidation result from the need to coordinate with large retail chains).

[206] Id. at 77.

[207] In his book, Pepsi-Cola President Roger Enrico addresses the question of why the Coca-Cola system was integrated forward, giving some indication, one would assume, of why Pepsi-Cola followed a parallel path:

When he took over in 1981, Roberto Goizueta was determined to change the rules of the game and create a modernized Coca-Cola Company.

. . . First, he restructured the company to get rid of the deadwood -- mostly third-generation bottlers who were so wealthy you couldn't get them off the golf course.
ROGER ENRICO & JESSE KORNBLUTH, THE OTHER GUY BLINKED: HOW PEPSI WON THE COLA WARS 7-8 (1986).

[208] See TOLLISON ET AL., supra note 83, at 110 ("Why would PepsiCo or Coca-Cola wish to place their destiny in the hands of five or six large bottlers when they own the asset around which the business is built?").

[209] Scale economies are achieved through joint ventures, bottling co-ops, contract bottling, and acquisitions.

Coca-Cola and PepsiCo have been active in refranchising their bottler networks in recent years, in part to hasten the achievement of attainable scale economies. Refranchising encompasses a variety of activities on the part of the concentrate company: outright acquisition of bottlers, equity investments, and financial assistance to independent multifranchise operations to assist them in mergers and acquisitions.
Id. at 77; see also COKE'S FIRST 100 YEARS, supra note 11, at 237 (quoting Roger Williams, President, Keystone Coca-Cola Bottling Company, Pittston, Pa., who supports the consolidation of bottling franchises).

[210] ENRICO & KORNBLUTH, supra note 207, at 19-20 (noting significant Pepsi-Cola growth during the 1950s due to bottler investment).

[211] COKE'S FIRST 100 YEARS, supra note 11, at 226 (quoting Jack Bernabucci, Coca-Cola Bottling Company of Jamestown, N.D.). The fairness argument may have had particular appeal to bottlers who felt pressured to sell at a time when franchise values were rising at a rapid rate. See ENRICO & KORNBLUTH, supra note 207, at 66-67 ("By 1986, the value of a Pepsi franchise was increasing by more than 23 percent a year.").

[212] The soft drink industry had a Herfindahl-Hirshman Index (a measure of concentration within a market) of 2,184 in 1981, at a time when the four largest firms had 75.7% of total sales, and Coca-Cola and Pepsi together had 64.1% of sales. By 1988, the Herfindahl-Hirshman Index had risen to 2,713, the four largest firms had 85.1% of total sales, and Coca-Cola and Pepsi shared 71.3% of total sales. TOLLISON ET AL., supra note 83, at 1.

[213] Id. at 111 (discussing the MEI acquisition and the fact that, after the acquisition, the volume of all carbonated soft drinks, including non-PepsiCo brands, increased in MEI distribution areas).

[214] See id. at 87 ("A majority of soft drink volume at both retail and wholesale is sold on promotion.")

[215] The wholesale price of soft drinks has declined (when controlled for Consumer Price Index (CPI) increases) by over 30% in the 24 years from 1965 to 1988. When controlled for CPI increase and cost changes, the wholesale price has decreased by 45.3% over the period 1965 to 1986. Id. at 10.

[216] See supra notes 103-14 and accompanying text.

[217] It is acknowledged that "the public interest model . . . is as much a goal as it is an analysis." Mikva, supra note 54, at 169-70.

[218] Given the misty outlines of the public interest prediction, the criticism that explaining shifts in policy over time is particularly problematic for public choice analysis is perhaps overstated. See Kelman, supra note 3, at 220.

[219] Professor Kelman expresses a parallel thought in somewhat different terms:

[I]n the typical public choice story, at least one of two things must occur: gains to the cartel must diminish from continued regulation, and/or gains from deregulation must become concentrated enough in some other group to overcome free rider barriers to forming a countervailing self-interested pressure group. In short, shifts in available producer or consumer surplus will alter the vote-maximizing coalitions.
Id.

[220] See supra notes 163-69 and accompanying text for a discussion of the changes in the bottling industry since 1980.

[221] See supra notes 171-72 and accompanying text.

[222] See supra note 170 and accompanying text.

[223] See Coca-Cola Co., 91 F.T.C. 517, 572-79 (1975) (initial decision), rev'd, 91 F.T.C. 517, 607 (1978) (final decision), rev'd, 642 F.2d 1387 (D.C. Cir. 1981).

[224] One independent bottler was outspoken in his suspicion of the parent companies.

The fact is that the syrup manufacturers, although they were the only defendants in the FTC proceedings, have everything to gain and nothing to lose from the implementation of the Commission's decision. The bottlers' pervasive fear is that their segment of the industry will be rapidly swallowed up by the syrup manufacturers in an unstoppable rush to vertical integration and concentration; in a word, to oligopoly.
House Judiciary Hearings, supra note 14, at 50 (testimony of Richard W. Caudill, Vice President, Central Investment Corp.). Mr. Caudill charged that the parent companies were "tensely coiled . . . to spring to advantage in the post-FTC soft drink world," id. at 58, and that the parent companies "are poised to make the 30-year growth of oligopoly in the beer industry look glacial by comparison." Id. at 50.

[225] Although it would not factor into the public choice model, a potentially important point should be noted: during the FTC action and the passage of the Soft Drink Act, individuals who had come up within the soft drink industry held senior management positions at both Coca-Cola and Pepsi. See ENRICO & KORNBLUTH, supra note 207, at 6-7. An argument can be made that even in 1980, the smart business move for the syrup manufacturers would have been to roll over on the Soft Drink Act, and that their apparently strong support of the Act stemmed as much from the emotional reaction of these senior managers as it did from dispassionate business judgment.

Senior management positions at both companies are now firmly in the hands of individuals with substantial business backgrounds in areas other than the soft drink industry. Moreover, both holding companies are now diversified. The next time around, the parent companies may find it easier to yield. In this regard it is interesting to compare the remarks made by the leaders of the two parent companies, who fairly can be said to represent this generational change in management. The first is a sentiment attributed to former Coca-Cola President and Board Chairman Robert W. Woodruff, the patriarch of the genteel past: "[T]here could not be a conflict of interest between the bottlers and The Coca-Cola Company. If there appeared to be one, somebody had made a wrong decision. The company and the bottlers succeeded or failed mutually." WATTERS, supra note 10, at 133. The second is by new-generation Pepsi-Cola President Roger Enrico, who characterized as "deadwood" some of the "third-generation [Coca-Cola] bottlers who were so wealthy you couldn't get them off the golf course." ENRICO & KORNBLUTH, supra note 207, at 7-8.

[226] See supra notes 74-82 and accompanying text.

[227] See supra notes 166-69 and accompanying text.

[228] See supra note 197 (discussing the effects of consolidation on communities).

[229] See Tollison, supra note 68, at 342-43 ("[L]obbying for special legislation becomes a relatively low-cost by-product of being organized.").

[230] For example, the National Association of Attorneys General went on record in 1988 as favoring the repeal of the Soft Drink Act. Antitrust Resolutions Adopted at NAAG's Winter Meeting, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1395, at 1020, (Dec. 15, 1988).

[231] See Mikva, supra note 54, at 169.

[232] See, e.g., Brennan & Buchanan, supra note 1, at 188 (describing the model as not necessarily the "most descriptive empirically").

[233] The "close enough" determination also depends on the use to which the theory is to be put. Professors Farber and Frickey correctly identify the difference between using a reductionist explanation as an investigative tool and using such an explanation as a foundation for the creation of public policy. Farber & Frickey, supra note 4, at 905. The former is interesting, the latter is dangerous: "Although reductionism is sometimes a useful strategy for the theorist seeking to construct an illuminating model, it is a dangerous foundation for public policy." Id.

[234] Brennan & Buchanan, supra note 1, at 188.

[235] See Mikva, supra note 54, at 169-70.

[236] For example, Professor Beermann tellingly examines historical flaws in Professor Macey's public choice explanation of the Constitution. Beermann, supra note 59, at 210-11.

Macey's willingness to ignore the fact that large segments of society were disenfranchised at the framing of the Constitution, especially when his own theory requires that the likely "losers in future rent-seeking activities be included in the process of constitutional formation," casts serious doubt on the rigor of his economic analysis. Id. at 211 n.83.

[237] Professors Farber and Frickey, for example, criticize the public choice literature for using unpersuasive evidence that a particular law favors a given economic group, and for assuming that -- even if such a result is identified -- the law was passed due to the efforts of the benefitted group. Farber & Frickey, supra note 4, at 895-96. For example, the Soft Drink Act clearly benefits the bottlers; however, whether it was passed due to their efforts depends upon whether the reader believes that Congress was simply inept in pursuing its ideological goals of environmental protection and small-business preservation, or that Congress was pursuing a rent-seeking agenda.

[238] This predilection is evident in the work of Professors Brennan and Buchanan, among others: "The more appropriate use of the homo economicus construction is to further the normative exercise of investigating the incentive structures embodied in various institutional forms rather than the descriptive exercise of providing predictions as to the likely outcomes of political interactions." Brennan & Buchanan, supra note 1, at 180.

[239] "The traditional distinctions drawn between the public and private spheres in the mainstream political debates are quite unreal in the minds of Critics, both because the state is explicitly implicated in all supposedly private arrangements and because coercive sovereignty is frequently exercised by supposedly private actors." Kelman, supra note 3, at 202 n.12.

[240] See Macey, supra note 2, at 472.

[241] Some public choice advocates admit the evaluative difficulty, albeit indirectly. Professor Macey believes it unfortunate that "it is extremely difficult to distinguish between those governmental activities that involve 'amorally redistributive' rent-seeking (and therefore should be prohibited) and those that represent wealth-increasing 'public interest' governmental activities (and therefore should be encouraged)." Id. at 472-73.

[242] See id. at 515-16. Macey allows that "providing a responsible yet coercive enforcement mechanism for privately negotiated contracts" is often indistinguishable from a "wealth-increasing 'public interest' governmental [activity]." Id. at 472 & n.8.

[243] See Beermann, supra note 59, at 198 (complaining that "Macey does not make an effort to distinguish desirable from undesirable government action").

[244] One can easily imagine that, when given a choice, a homeless person would opt to spend $127 million on food and shelter for citizens similarly situated, rather than spend the same amount of money to fund the Securities and Exchange Commission for fiscal year 1993. See Act of Oct. 6, 1992, Pub. L. No. 102-395, 106 Stat. 1828 (appropriating the SEC's budget for fiscal year 1993). Not only can one imagine such a preference, the decision would be wholly rational from the standpoint of such a marginalized individual.

[245] Farber & Frickey, supra note 4, at 900. "Rather than supporting reductionism, public choice theory can provide some useful additions to the judicial tool box." Farber & Frickey, supra note 116, at 469.

[246] See supra notes 141-55 and accompanying text.

[247] This flaw in the Soft Drink Act was the subject of debate. The Justice Department noted the absence of a returnable bottle requirement in the legislation and suggested that the matter be "addressed directly in a piece of

legislation." House Judiciary Hearings, supra note 14, at 24-25 (testimony of Richard J. Favretto, Deputy Assistant Attorney General, Antitrust Division, Department of Justice). The House Judiciary Committee had several proposals before it to do exactly that. See id. at 249-62. Representatives Weiss and Stark proposed House Bill 7128 in an attempt to force the complete conversion to refillables. Id. at 262. Representatives Jeffords and AuCoin proposed a compromise that would have required a rising percentage of refillables. Id. at 249-50 (testimony of Rep. AuCoin) (proposing an amendment to require bottlers to maintain 10% in year one, 20% in year two, and 35% thereafter, to retain exclusivity). Neither proposal was seriously discussed, and because of the rule under which the bill was brought to the floor, no amendments were allowed.

[248] See supra notes 166-95 and accompanying text.

[249] The Senate had before it a proposal by Senator Metzenbaum to extend the provisions of the Soft Drink Act to only bottlers with annual sales of $100 million or less and assets of $50 million or less. 126 CONG. REC. 11,341 (1980) (statement of Sen. Metzenbaum).

[T]his is the amendment that will separate the men from the boys. This will separate the talkers from the actors. . . . This amendment really says, in so many words, that if honestly what you want to do is protect the small bottlers, then pass this amendment and let the big boys fend for themselves. If you are selling more than $100 million of soft drinks or other products, you ought to be able to compete in the free enterprise system.

Id. at 11,340 (addressing Amendment No. 1761). The amendment was defeated by a vote of 89 to 4. Id. at 11,340-41.

[250] Brennan & Buchanan, supra note 1, at 188-89.

[251] Id. at 187.

[252] The irony may be that the most valuable contribution of the public choice model is to make the public interest analysis more powerful. "Public choice would accomplish something important if it could help the legal system redirect the political system toward acting more in the public interest." Beermann, supra note 59, at 228.

[253] WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN 39 (1974).