EXHIBIT 1-B

A LEGAL AND STRUCTURAL ANALYSIS OF THE LEGITIMACY AND CONSEQUENCES OF THE GOVERNANCE REGIMES ESTABLISHED BY THE STATE OF FLORIDA'S 1967 REEDY CREEK IMPROVEMENT ACT AND ASSOCIATED LAWS

Expert Report to:
the Central Florida Tourism Oversight District (CFTOD)
from:

DONALD J. KOCHAN
Professor of Law
Executive Director, Law & Economics Center
George Mason University Antonin Scalia Law School

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I. INTRODUCTION AND SUMMARY OF FINDINGS

The Reedy Creek Improvement Act of 1967 [hereinafter "1967 Act"],[1] by all accounts is an extraordinary piece of legislation. However, not all that is extraordinary is good. The 1967 Act deviates from governance norms and creates a path for capture and control by a private interest group that threatens the public interest.[2]

Ordinary institutional design and limits, democratic accountability mechanisms, and constitutionally-grounded processes of good governance serve important purposes. They exist to ensure that government powers remain limited, democratic principles remain protected, citizens remain empowered, and powerful interest groups like Disney are thwarted from capturing the strong arm of the state to advance their private purposes.

Indeed, the preservation of these principles of limited government and the rule of law requires erecting and respecting hurdles to government intervention to (1) ensure that government interference in private affairs is limited to serving the public interest and to those actions truly necessary and requiring such public intervention; and (2) to maximize the space for private ordering and market competition free of special privileges so that economic freedom, competition, innovation, and growth may flourish. That means that governance is intentionally difficult and time consuming, with the opportunity for the kind of broad public participation and scrutiny that leads to optimal decisionmaking, including balancing competing interests and recognizing that the neutrality principle grounding good governance prohibits picking favorites.

Legislation that sets a framework risking the relaxation of these norms should be re-evaluated. Such re-evaluation is the focus of this Report— *A Legal and Structural Analysis of the Legitimacy and Consequences of the Governance Regimes Established by the State of Florida's 1967 Reedy Creek Improvement Act and Associated Laws* [hereinafter "Report"]. This Report concludes that the 1967 Act, the political environment surrounding its creation and the maintenance of authorities under the Act, and governance

[1] Act effective May 12, 1967, ch. 67-764, 1967 Fla. Laws 256 [hereinafter "1967 Act"].

[2] See, e.g., William W. Buzbee, *Accountability Conceptions and Federalism Tales: Disney's Wonderful World?*, 100 MICH. L. REV. 1290, 1290-91 (2002) ("To an extent perhaps unparalleled within the United States, Disney succeeded in controlling both market choices and governmental issues within its approximately forty square mile kingdom" with the passage of the 1967 Act); Kent Wetherell, *Florida Law Because of and According to Mickey: The "Top 5" Florida Cases and Statutes Involving Walt Disney World*, 4 FL. COASTAL L.J.1, 3-6 (2002) ("Potentially the most significant piece of legislation passed by the Florida legislature in the twentieth century was the special act, chapter 67-764 of the Laws of Florida ("chapter 67-764"), which created the Reedy Creek Improvement District.").

pursuant to the Act have all surely accomplished a dangerous relaxation of normal limits on governmental power and structures of democratic accountability.

To reach these conclusions, this Report brings expertise and scholarly insights to bear upon the inquiry from constitutional law, statutory interpretation, democratic governance and institutional analysis from law and political science, land use planning, local government law, urban planning, administrative law and regulatory policy, and the interdisciplinary work animating positive political theory (explaining how politics actually works rather than the idealistic ways we wished it worked)—including from key insights from "public choice theory" at the intersection of law and economics. There are irregularities and infirmities in the 1967 Act and the creation of the RCID; irregularities and infirmities in the operation of the RCID; irregularities and infirmities in the level of influence and power given to Disney; and irregularities in the acceptance of irregularity and infirmity for so many decades. Yet, there are some things not surprising—even though irregular and infirm—once positive political theory is used to examine the 1967 Act and the dynamics surrounding it.

As this Report details, much of the rationale driving the 1967 Act—from the lobbyists advocating for it and from the legislators supporting the new paradigm—was based in a sales pitch that told the tale of an escape to a magic world where the barriers to action normally imposed by democratic governance would disappear to "better" pave the way for a shiny new prospect for regional prosperity. Yet the benefits of accountability outweigh the gains from reducing costs of compliance. This bright, alluring new object of "innovative" governance was masked as necessary and appropriate to the desired ends. That distractive narrative, furthered by what were later revealed as false promises of consideration from Disney, allowed for the capture of governmental power by a private entity and the abandonment of key principles of good governance and democratic accountability. A robust appreciation for the valuable role these principles play to create purposeful barriers to governmental action was missing.[3]

[3] This Report will remain agnostic on the past constitutional and legal challenges to the 1967 Act, related statutes governing RCID authority, and the RCID's authority itself (facially or as exercised). Further analysis might or might not reveal reasons why the Florida Supreme Court should revisit some of their past decisions. The Report also makes no comment on ongoing litigation involving the RCID. For this Report's purposes, the prudential analysis of the wisdom and consistency with sound principles of democratic governance and limited government of the 1967 Act, the RCID's decisions, and Disney's influence, as well as the application of the insights on political decisionmaking from public choice economics, all stand independent of whether the acts or powers reviewed are themselves legal or constitutional.

In the 1967 Act, the RCID was given extraordinary powers not shared with other special districts in Florida. It created a jurisdiction that, unlike municipalities and counties in Florida, does not have the kind of diverse citizenry and voting public that generates a check on governmental abuse, largesse, or favoritism. The RCID has no residential or voter base of any significance given that the population consists of less than 100 residents district-wide, almost all of whom are picked by or arguably beholden or indebted to Disney. And, aside from the low numbers, these residents may vote for municipal officials, but the municipalities inside the RCID have few powers, to the point they are often called "paper cities." And, their residents generally are not landowners capable of voting for the RCID Board. All of this means that even the residents in the RCID cannot act as an active force to check abuses of power or transgressions of prudence. And, despite promises to populate the RCID and give new residents a futurist environment in which to live, Disney has regularly and repeatedly found ways to avoid new residents or landowners from counting within the RCID, often just carving them out through de-annexation to ensure they could not become effective checks on Disney's capture of RCID power.

The 1967 Act rather shockingly exempts the RCID from the application of later-passed land use regulation, zoning, or building codes, insulating it from the control of general changes in these areas of law from the State and its authorities, unless a law expressly removes the exemption. It is hard for the State to exercise continuing control over the RCID once such a path-dependent presumption of independence is set.

Much of the privilege that Disney obtained under the 1967 Act involved a bait and switch. Many of the projects and results it promised it could provide only if it received the "flexibility" it asked for and received in the 1967 Act have never been fulfilled, including the development of residential communities inside the RCID. And, as a consequence of the RCID's insulation from regular governance practices elsewhere in Florida, Disney has been able to gain a significant artificially-manufactured competitive advantage, as created by RCID privilege-granting legislation, and impose externalities upon surrounding communities without legal consequences. The pressure that Disney's growth has placed on the transportation systems, affordable housing, and social services in Orange County and Osceola County, in particular, have been borne by those counties with only partial contribution for these effects from Disney's tax obligations.

This Report also provides critical insights from positive political theory to explain why the pervasive and powerful interest group influence by Disney was entirely predictable from the inception of the RCID and because of the structure of the 1967 Act. To help understand this, the Report first

surveys and then applies the relevant research. As this Report will discuss in greater detail later, the prevailing paradigm for analyzing political decisionmaking in political science and related disciplines through the 1960s—including when the 1967 Act was enacted—presumed that legislation and other government decisions were crafted and taken "in the public interest." It presumed that legislatures and other political decisonmakers would act as gatekeepers, filtering so that the products of government decisions would be public-spirited rather than decisionmakers acting as the suppliers of products to private interests for private gain. This naïve view has been challenged and displaced.

Through the groundbreaking work of James M. Buchanan and others, including in his 1962 book *Calculus of Consent* co-authored with Gordon Tullock,[4] the world awakened to a more realistic view of political decisionmaking commonly known today as "public choice economics," so named in contrast to the "public interest" paradigm of the past. Public choice is now widely regarded as the dominant paradigm given it is a more accurate predicter and more useful analytical framework for understanding political processes and political decisionmaking.[5] The application of public choice insights is critical to understanding how and why an interest group like Disney can capture the power of the State of Florida and use it to profit at the expense of the public.

Nobel Prize winning economist James Buchanan was known for categorizing the public choice framework as "politics without romance."[6] Indeed, it is precisely for his groundbreaking work in this analysis of interest group influence that he won the Nobel Prize in Economic Studies in 1986.[7]

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[4] JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

[5] *See, e.g.*, Edward Rubin, *The Conceptual Explanation for Legislative Failure*, 30 LAW & SOC. INQUIRY 583, 584 (2005) ("The dominant theory of legislative failure at the present time is public choice, which ascribes this failure to the political process.").

[6] James Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, *in* THE THEORY OF PUBLIC CHOICE –II (James Buchanan & Gordon Tullock eds. 1984).

[7] *See* The Nobel Prize, *James M. Buchanan, Jr. Facts*, available at https://www.nobelprize.org/prizes/economic-sciences/1986/buchanan/facts/. As the Nobel Prize website explains:

> James Buchanan was awarded the Economic Sciences Prize for his contributions to the theory of political decision-making and public economics. Traditional economic theory explains in great detail how consumers make decisions regarding purchase of goods, choice of work, product investments etc. In a series of studies, Buchanan has developed a corresponding theory of decision-making in the public sector. His best-known work is Calculus of Consent (1962), written in collaboration with Gordon Tullock.

These insights—as applied to the 1967 Act, the RCID, and Disney for the first time in any substantial way as a matter of academic analysis of these entities and structures—form the heart of the final sections of this Report.

Public choice reveals that we cannot necessarily count on political decisonmakers to act in the public interest, and we should expect that private interest groups will expend substantial resources to influence politics so that they can gain special interest deals at a savings from what they would need to spend to get similar benefits in the open market, if they could get a substitute through the market at all. Interest groups have strong incentives to coopt the coercive power of the state. Disney very effectively adopted what the public choice literature reveals are common interest group techniques. Disney presented to the world "public interest"-seeming masks that attempt to hide its private interest gains. These include the seductive allures from the mask of economic growth (which was in part true but driven by the suppression of competition); the mask of futurism and a world of tomorrow (as a way of selling the need for the rejection of traditional and time-tested governance structures, believing progress could follow only if outmoded government barriers of today like democratic accountability give way); the mask of the so-called free enterprise foundations of the pitch for a specialized private governance unit (which behind the mask were pleas for corporate favoritism); the mask of the need for efficiency (and relief from accountability and the "inefficiencies" the pitch portrayed it brings); and the mask of claims of Disney's indispensability to the community. Each of these were used as part of the sales pitch that we expect to see launched when an interest group is seeking favorable treatment in political decisionmaking, attempting to convince the public and politicians that the interest group should get its way because that would be good for the community.

This Report also adds insights from the scholarly literature explaining why agencies with single-industry-enhancing purposes or a single- or primary-entity constituency, like the RCID, tend to be captured by the entities they govern. Empirical evidence shows this is true in other contexts and predicts precisely the kind of capture we see of the RCID by Disney over so many years in the absence of oversight and will to take corrective action.

As a general lesson, structural protections and procedural steps should be fortified in order to minimize these deals and prevent capture. But, as will be discussed in relation to the 1967 Act, the RCID, and Disney, adequate structural and procedural safeguards have been absent or lacked vigor in their form or application from the 1967 Act and from the history of RCID

Id.

operations, leaving an atmosphere within the RCID swirling with special interest characteristics.

Government actors have an obligation to correct flaws in governance regimes. Here, the governance problems and the inherent flaws creating high susceptibility to interest group influence in the 1967 Act and RCID structure demand legislative attention. In a system of constitutional government, legislative actors have a duty to take corrective action when they become aware that the public interest has been sold out to a private interest, especially when the system itself, as here, is set up to ensure that normal accountability mechanisms are missing, and no self-correcting checks or mechanisms will be capable of doing so.

Research also reveals that institutional safeguards raise the costs of decisionmaking in a purposeful and useful manner; they are most effective at curbing abuse and guarding against infiltration of the public system by private interests. In direct contrast, the 1967 Act attempts to instead smooth the way for interest group influence by making decisionmaking easier for the RCID by dismantling process checks regularly present in systems of democratic accountability, by reducing enumerated limits on power, and by eliminating space for other countervailing auxiliary measures to operate that might otherwise act as institutional or systematic checks. Thus, the legislature and the CFTOD Board are in a position to evaluate how to restore and create the kinds of checks that ensure better and more accountable governance and that make it more difficult for private interest groups like Disney to capture public power.

This Report proceeds with Part II providing a background of the 1967 Act and identifying some of the key features of the Act and of RCID authority of potential concern. Part III identifies some specific examples of good governance and democratic accountability concerns in the 1967 Act and in the RCID operation for deeper analysis. Part IV of this Report will describe public choice theory in more detail and apply the teachings of public choice specifically to the 1967 Act, the RCID, and Disney. It introduces public choice and explains the interest group bargain that was struck between Disney and the Florida Legislature, as well as the interest group dynamics present in the relationship between Disney and the RCID. It also explains the masking concept and explores the types of "masks" that Disney has used to obscure the private nature of the legislative deals it has profited from by attempting to clothe the 1967 Act and RCID authority in public interest-sounding frames. Finally, Part V will explain capture theory and the outsized role that repeat private players have in governance regimes that have a small number of constituencies and a narrow set of mandates, much like occurs with Disney and the RCID. When the right conditions obtain, political

players like Disney can capture governmental power and redirect it to serve their private interests. Part VI offers a very brief conclusion.

II. BACKGROUND AND KEY FEATURES OF THE 1967 ACT FORMING THE RCID

This Part gives a brief summary of some of the most consequential or unique, sometimes troubling, provisions and features of the 1967 Act.[8] This Part is not meant to be an exhaustive synopsis of the Act, and I expect that other portions of the CFTOD report to the Florida Legislature will give an even broader review of critical details. Later in this Report, we will also return to review some of the activities leading up to the 1967 Act as a way of understanding the private-regarding nature of some of the 1967 Act's provisions from a public choice perspective.

When Disney scoped out Central Florida as a potential site for Walt Disney World, it was unwilling to locate there unless it could fundamentally alter the legal regime within which it would be required to operate. The 1967 Act was the second special governance structure for the area including and surrounding what is today Walt Disney World. Prior to the 1967 Act, Disney was successful in creating the Reedy Creek Drainage District in May 1966, per statutory authorization of a court-based process for establishing drainage districts,[9] by petitioning and obtaining a court decree from a Florida Circuit Court.[10] This gave Disney expedited and relaxed authority so that it could

[8] Much of the history of the 1967 Act, events leading up to it, and evidence of Disney's motivations are documented in the book *Married to the Mouse*. RICHARD E. FOGLESONG, MARRIED TO THE MOUSE: WALT DISNEY WORLD AND ORLANDO (2001). The book is a valuable resource for those examining the history of this area and the potential problems associated with the choices made in the last 50-plus years of the RC*ID*. Among those impressed with the work, Georgetown Law School Professor William Buzzbee praised the Foglesong book, explaining that Foglesong "backs his critical views with compelling documentation." Buzbee, *supra* note 2, at 1294, 1290 (noting *Married to the Mouse* is an "uncommonly good read" and "the book presents a nuanced picture"). Coming to that same conclusion myself, I concur with Professor Buzzbee's conclusion that "*Married to the Mouse* offers an exemplary blend of historical research distilled to provide insights into the pervasively important question of how dominant businesses and government officials interact and bargain." *Id.* at 1311. Buzbee continues that, "Married to the Mouse offers numerous compelling examples of how politics, personalities and historical context influenced both legal developments and the evolving nature of government-business interactions." *Id.* at 1294..

[9] Fla. Stat. §§ 298.001-.78 (governing drainage district creation and identifying powers).

[10] Buzbee, *supra* note 2, at 1295 ("Such a district required mere approval of a circuit court rather than a legislative body, would be substantially immune from county government interference, and would be governed based not on numbers of residents, but on numbers of acres controlled."). For background, see FOGLESONG, *supra* note 8, at 55; Kent Wetherell,

begin dredging and filling the swamp lands that eventually would be used for the Walt Disney World site.[11]

But, for a variety of reasons, including the limits of authority granted to a drainage district, Disney wanted a governance structure overseeing its operations with even broader jurisdiction, discretion, and flexibility to approve projects. And, it wanted a governing authority that would be sufficiently aligned with Disney's interests so as to effectively give Disney control. Somewhat paradoxically, this meant creating jurisdiction with wider authority and independence yet less power over its principal developer. Notably, Foglesong documents statements from the Disney consultants who describe the motivation for seeking more authority as including to be "'freed from the impediments to change, such as rigid building codes, traditional property rights, and elected political officials.'"[12] The 1967 Act was the Florida legislature's response to that demand.

Special districts—as distinguished from traditional cities—invite many kinds of academic studies on their operations, utility, prudence, and impact on good governance.[13] There is substantial room to critique special districts—including the many that exist as authorized or authorizable forms under Florida law[14]—as a general matter from both a governance viewpoint and a public choice perspective. And, there may be reasons why such general critiques might counsel against recommending the use of any kind of special district for the governance structure that might replace the RCID and CFTOD in future plans of the Florida Legislature. Nonetheless, a detailed analysis of these general concerns is beyond the scope of this Report.

Florida Law Because of and According to Mickey: The "Top 5" Florida Cases and Statutes Involving Walt Disney World, 4 FL. COASTAL L.J.1, 3-6 (2002).

[11] Buzbee, *supra* note 2, at 1295 ("The swamp conversion required more than just control of Disney's swamps and creative engineers. Disney needed either a pliant and reliable local government or governmental control for itself. Adjacent bodies of land and water were linked. Based on its engineers' advice, the Disney company used existing state law to obtain recognition of The Reedy Creek Drainage District.)

[12] FOGLESONG, *supra* note 8, at 62, 230 nn.20-24 (quoting REPORT FROM ECONOMIC RESEARCH ASSOCIATES TO WALT DISNEY PRODUCTIONS, EXPERIMENTAL PROTOTYPE CITY OF TOMORROW: OUTLINE OF PRESENTATION TO DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 20-22 (Aug. 15, 1966) (on file with the Disney Archives)). *See also* Buzbee, *supra* note 2, at 1295-96 (quoting the same).

[13] For a good survey of some of these issues, see Nadav Shoked, *Quasi-Cities*, 93 B.U. L. REV. 1971 (2013).

[14] For a survey of special districts in Florida, see Chad D. Emerson, *Merging Public and Private Governance: How Disney's Reedy Creek Improvement District "Re-Imagined" the Traditional Division of Local Regulatory Powers*, 36 FLA. ST. U. L. REV. 177, 178-82, 191 (2009).

But it is useful to note that the RCID, despite using the word "district," is sui generis—i.e. it does not fit the mold of special districts and thus should not be compared to most other special districts so classified under Florida or other state laws. Normally, when we use the term, "special district," we are referring to a single- and specific-purpose or in some cases multi- but still limited-purposes jurisdiction—such as for fire protection, water supply, drainage, soil and water conservation, sewage, or housing and community development—that has authority limited to what is necessary to serve the limited purpose(s), including sometimes the ability to raise revenue for the specific purpose, and not generalized jurisdiction, planning, or lawmaking powers. As the U.S. Census Bureau describes them: "Special districts are independent government units created for a limited, specific purpose . . . They typically have a shorter lifespan and higher turnover than general purpose governments."[15] This is in contrast to "County, municipal and township governments [which are] are general-purpose governments."[16] Florida Law follows the general definition: "'Special district' means a unit of local government created for a special purpose, as opposed to a general purpose, which has jurisdiction to operate within a limited geographic boundary and is created by general law, special act, local ordinance, or by rule of the Governor and Cabinet."[17]

Almost all special districts are defined by their purpose which is determined by the type of service or public need that is being fulfilled by its creation. Entirely atypical is to create a special district motivated to create a mostly general-purpose governance structure to carve out a jurisdiction that will serve the needs of a particular constituent or designed to advance a particular industry or private purpose. Yet, arguably, this atypical design for a special district was what Disney drafted and proposed to the legislature leading to the 1967 Act; and getting its own private jurisdiction was the driving force behind Disney's lobbying efforts leading to the 1967 Act—again, in part because being a true special district, as a limited-purpose special district for drainage, was not enough.

The 1967 Act retains the powers of the Reedy Creek Drainage District and adds more. A Disney vice president characterized the Act as "'in essence, a composite of special assessment, improvement, and taxing districts already

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[15] U.S. Census Bureau, *From Municipalities to Special Districts, Official Count of Every Type of Local Government in 2017 Census of Governments*, Oct. 29, 2019, available at https://www.census.gov/content/dam/Census/library/visualizations/2019/econ/from_municipalities_to_special_districts_america_counts_october_2019.pdf.

[16] *Id.*

[17] 2015 Fla. Laws, Title XIII, sec. 189.012(6) (part of the "Uniform Special District Accountability Act"), available at https://www.flsenate.gov/Laws/Statutes/2015/Chapter189/All.

provided for under existing Florida laws,'"[18] just never having been actually previously implemented in Florida law as such a combination.[19] There is a reason that the Legislature did not pre-conceive combinations of special districts. Special districts are supposed to be created for special, limited purposes rather than being designed as pieces to be cobbled together to create a super-special, special district that pulls together the broadest powers from different special district categories and then adds on general powers typically held by counties or municipalities to create a special district with expansive authority, while such district concurrently has severely limited features of traditional democratic governance that are present in the default structure of municipalities and counties under Florida law.

The 1967 Act centralized control over Disney in a political jurisdiction over which Disney would have substantial control. Northwestern University Law Professor Nadav Shoked explains his view of the Reedy Creek transformation from a drainage district to a sui generous special district as follows:

> A more famous Floridian quasi-city to have been created by special act is the Reedy Creek Improvement District accommodating Disney World and covering thirty-nine square miles. Originally a Disney-controlled drainage district, it was transformed into its current form in 1967 by special act of the state legislature. While Florida's drainage districts enjoy limited powers, the Reedy Creek Improvement District, in its post-1967 form, has extensive powers, including the authority to operate nuclear power plants. It is exempt from county zoning and development rules, and relies instead on its own development and planning powers, which are identical to those of all other Florida municipalities.[20]

The RCID was given jurisdiction over functions typically given to municipalities like the issuance of bonds and the use of funds obtained from tax-free municipal bonds to aid Disney projects; land use and local environmental regulations; building regulations and construction permits; land reclamation; stormwater and sewage systems; water and flood control; waste collection and disposal; pest control; and fire protection, among others.[21] Some of this was facilitated by two companion acts creating two

[18] FOGLESONG, *supra* note 8, at 69.
[19] *Id.* at 72.
[20] Shoked, *supra* note 13, at 2004-2005.
[21] 1967 Act §§ 9, 23.

municipalities—the cities of Bay Lake[22] and Reedy Creek[23] (now known as Lake Buena Vista)—inside the RCID that are subject to RCID control and with extremely small populations largely controlled by Disney.[24] These "paper cities," however, have no significant population to speak of, with nominal residents—less than 30 residents in Buena Vista and less than 50 in Bay City, and all of whom arguably have loyalties to Disney manufactured by design by Disney to create allies and minimize resistance to Disney demands of the RCID and its cities.[25]

By placing the authority over key areas of governance within the independent RCID, often exclusively, "the legislation clearly gave the district immunity from state and county regulation of buildings, land use, airport and nuclear power plant construction, and even the distribution of sale alcoholic beverages, among other things."[26] This was the kind of control and insulation that Walt Disney desired from what was perceived by Disney as pesky generalized governmental oversight, particularly from county governments.[27]

Using vague and broad language which allows the RCID to expand its own authority through generous interpretations of the text, the 1967 Act gave the RCID the power to operate and maintain roads and transportation systems, including "whether now or hereafter invented or developed including without limitation novel and experimental facilities."[28] The RCID

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[22] 1967 Fla. Laws ch. 1104.

[23] 1967 Fla. Laws ch. 1965

[24] Emerson, *supra* note 14, at 196 (("What is atypical . . . is the fact that Disney essentially controlled the governance of both cities by limiting their populations to small groups of Disney employees and their families.").

[25] Casey Rockwell, Sarah Clements & Andy Terry, *It's A Small World Getting Smaller: The Potential Dissolution of the Reedy Creek Special Improvement District*, 51 REAL EST. L.J. 48, 52 (2022). The authors explain:

> According to the US Census Bureau, the District includes Bay Lake, which comprises 29 residents. Lake Buena Vista comprises of 24 residents. Lake Buena Vista includes three households; Bay Lake includes twenty households with a median income of $106,429. Reedy Creek Improvement District (RCID) is home to a total of 43 residents who are handpicked by Disney. The residents who live on the property own the mobile home and pay Disney $75 a month to rent the lot space. In return, the residents vote on issues like building codes, planning, and fire protection, allowing Disney to make all the decisions necessary for the park to flourish financially.

Id. at 51-52.

[26] FOGLESONG, *supra* note 8, at 71.

[27] Buzbee, *supra* note 2, at 1297 (from the beginning, Disney was able to operate "Unshackled from the constraints of a local government land use review process or building code").

[28] 1967 Act § 9(16).

also has the power to operate utilities and to develop "new and experimental sources of power and energy."[29] These provisions are each irregularly broad and vague, as the statutory language invites rather than cabins the exercise of governmental power.

In his 2001 book published by Yale University Press, *Married to the Mouse: Walt Disney World and Orlando*,[30] Professor Richard Foglesong, now the George and Harriet Cornell Professor of Political Science Emeritus at Rollins College, provides a thoroughly researched and detailed accounting of the history of the creation of Walt Disney World and the government structures surrounding it, including the 1967 Act and the RCID. As a political scientist, a historian, and an expert in urban planning and land use, Foglesong also effectively explains the operational history between and around these entities and structures. Foglesong has a useful passage in the book that very effectively captures some of the concerns with the special privileges Disney received and the sui generis structure of the RCID deviating away from governance norms. When Disney was able to convince the Florida Legislature to give the RCID extraordinary powers with little attention to preserving facets of democratic accountability and structural limitations,

> For Central Florida residents, there was no guarantee that Disney would perform—no guarantee that they would build the Epcot city, nor exercise their powers responsibly, nor offer economic benefits commensurate with their public service costs. If the roads around the theme park were clogged, if there was a shortage of affordable housing to serve their workforce, if law enforcement was overburdened with the influx of tourists—that was the communities problem. All the public had were vague promises, and implicit social contract perhaps, but no legal guarantee. Such was the deal struck in 1967, a testament to the power of Pixie dust and Disney mystique.[31]

Not surprisingly, this is a pretty accurate list of many of the problems that have arisen with Disney's operations and all ones for which Disney has not provided a solution, and yet for which it has not, and under existing systems cannot, effectively be held accountable. By applying the lessons of the public choice theory of political decisionmaking, as will be done in Part IV, many of these consequences and other infirmities in the RCID structure were predictable from the point the 1967 Act became law.

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[29] 1967 Act § 9(17).
[30] FOGLESONG, *supra* note 8.
[31] FOGLESONG, *supra* note 8, at 55.

Foglesong gives a rather pointed summary of what the 1967 Act accomplished for Disney and its operations, as well as what harm it brought for the neighboring communities:

> On the cost side, Disney World has generated traffic congestion, public facility deficits, affordable housing shortages, and a low wage economy. These problems frequently accompany urban growth, but there is a complicating factor in the Disney-Orlando case. For Disney Co. got something special in coming to Florida: their own private government, a sort of Vatican with Mouse ears, with powers and immunities that exceed nearby Orlando's. The entertainment titan was authorized, among other things, to regulate land use, provide police and fire services, build roads, lay sewer lines, license the manufacture and sale of alcoholic beverages, even to build an airport and nuclear power plant. (In fact, Disney never established the public police force, relying instead on over 800 private security guards; nor did they build an airport or nuclear power plant, though they retain authority in state law to do so.). To the envy of other developers, Disney also won immunity from building, zoning, and land-use regulations. Orange County officials cannot even send a building inspector to Disney property, and sheriff deputies are obliged to check in when they come on property and to avoid conspicuous display of their marked cars on such occasions.[32]

Even commentators who ultimately have little concern with the level of influence Disney wields in the RCID admit that the scope of the 1967 Act is massive.[33] Indeed, one of these commentators, Emerson, acknowledges that the 1967 legislation had a "goal of enabling the District to govern outside conventional norms."[34] Emerson cites Section 9(20) of the 1967 Act as an example:

> [I]n order to promote the development and utilization of new concepts, designs and ideas in the fields of recreation and community living, the District shall have the power and authority to examine into, develop and utilize new concepts, designs and ideas, and to own, acquire, construct, reconstruct, equip, operate, maintain, extend and improve such

[32] FOGLESONG, *supra* note 8, at 5.
[33] *See, e.g.*, Emerson, *supra* note 14, at 195.
[34] *Id.* at 196.

> experimental public facilities and services . . . as the Board may from time to time determine.

I agree that this provision is one of many good examples of novelty in the 1967 Act. I would go further to offer that word "novelty" as a criticism rather than as a praiseworthy notion. Section 9(20) of the 1967 Act includes a delegation of sweeping authority to the RCID to adopt new policies without needing to return to the Legislature for guidance and without any grounding in an intelligible principle to limit the delegation.[35] Emerson concludes, again endorsing the novelty, that "Clearly, both the Legislature and Disney conceived a project that, while in many respects operated as a conventional municipality, also possessed a broad scope of enabling authority to approach governance from a more novel perspective."[36]

Foglesong explains the power of the sweeping and "clever perpetuity clause" in Section 23(1) of the 1967 Act that "said that if the provisions of future law should conflict with the charter, the charter would 'prevail,' unless the new law repealed the relevant section of the charter."[37] The text of Section 23(1) follows:

> The jurisdiction and powers of the Board of Supervisors [of the Reedy Creek Improvement District] provided for herein shall be exclusive of any law *now or hereafter enacted* providing for land use regulation, zoning, or building codes, by the State of Florida or any agency or authority of the State and the provisions of any such law shall not be applicable within the territorial limits of the District."[38]

In later years, Disney would seek an advisory ruling from the Florida Attorney General on whether certain laws passed after 1967 applied to the EPCOT expansion. As Georgetown Law Professor William Buzbee reports, "Several state officials thought this expansion should be subjected to analysis as a 'development of regional impact,' as was now generally required under a 1972 state law intended to rationalize regional growth."[39] Disney "succeeded in May 1977 when Attorney General Robert Shevin ruled in their

[35] These are the kinds of broad delegations that, when done in the administrative agency context, risk running afoul of the "nondelegation doctrine" because the Legislature has given away too much authority and failed to create ex ante jurisdictional controls over agency actors who will thus be incentivized to maximize their authority at the expense of the public.
[36] Emerson, *supra* note 14, at 197.
[37] FOGLESONG, *supra* note 8, at 71.
[38] 1967 Act § 23(1) (emphasis added).
[39] Buzbee, *supra* note 2, at 1298.

favor," finding nothing objectionable about the perpetuity clause and explaining it should be enforceable on its plain terms.[40]

This provision exempting the RCID from changes in law is particularly troublesome because it locks in place the status quo rather than encouraging political adaptability to changed conditions as we would expect from most regulatory regimes. It also means that the 1967 Act gave Disney near-perpetual protection from future intrusions upon the RCID's independence and insulation from traditional accountability measures in these enumerated areas of authority.

Beyond the general troubling nature that Disney was able to embed in the 1967 Act a near perpetual exemption from the application of certain categories of future laws unless the Legislature expressly applies them to the RCID, this Attorney General ruling has had severe consequences for the communities surrounding the RCID. It means "Disney thus was able to expand without sharing regional planning burdens. As Disney expanded, many other surrounding attractions foundered, unable to compete successfully with Disney's subsidized and unfettered operations, as well as Disney's popularity, smooth running and attractive facilities."[41] It also meant that Disney had successfully lobbied for a substantial cost advantage over competitors who would need to comply with new statutes, including mitigation obligations to offset regional impacts, while Disney would not.[42]

In order to evaluate whether the 1967 Act was based on false premises and whether the legislative bargain it struck should be maintained, we must look at the statements made by Disney and the reliance held by the Legislature and the courts generated by those promissory statements. Both the Florida Legislature creating the powers in the 1967 Act and the Supreme Court of Florida finding them constitutional based their decisions on reliance in a belief that the RCID would eventually have inhabitants that would make its authority subject to the powerful checks provided by democratic accountability. The Preamble to the 1967 Act specifically noted that the broad powers being conferred on the RCID were "necessary for the convenience of the District and all its inhabitants and landowners."[43] Furthermore, the Florida Supreme Court premised its 1968 ruling in *State v. Reedy Creek Improvement District* on the expectation that "the contemplated benefits of the District will inure to numerous inhabitants of the District in

[40] *See* FOGLESONG, *supra* note 8, at 102.
[41] Buzbee, *supra* note 2, at 1298 (citing FOGLESONG, *supra* note 8, at 103-05).
[42] *Id.* at 1298 n. 15 ("The net effect was to burden competitors' major projects with obligations under this regional planning law, including mitigation obligations, while Disney was subjected to no such similar burdens and costs.").
[43] 1967 Fla. Laws ch. 764 pmbl.

addition to persons in the Disney complex," rather than serve almost exclusively the private interests of a private corporation.[44]

Because only a popularly elected government could regulate land use and building, Disney consistently promised in the days leading up the passage of the 1967 Act that it would build a "model city, a functioning community where 20,000 would live and work and play."[45] Foglesong convincingly documents that this was a bait without even a switch, as Disney never intended to follow through on this promise because it indeed had a disdain for voters.[46] From the earliest days of strategic planning for Disney World, Disney sought to avoid being controlled by voters.[47] But "for legal reasons . . . the Disney Co. needed to say they were building a city. Only a popularly elected government could exercise planning and zoning authority and gain exemption from land use laws."[48] Once the 1967 Act was passed, pretense slowly disappeared.[49] For example, Foglesong explains that, "Having won that authority, [Disney] felt free to redefine Epcot [to not include residents]—without renouncing the powers and exemptions derived from the original concept. Amazingly they were not called on it."[50] Today, the facts are clear that this social contract Disney entered into in 1967 has been broken; and one question for future legislatures is what that should mean for the continuation of the authority as granted in 1967.

In fact, Disney appears to regularly find ways to ensure a continued absence of voters. De-annexation has been a regular mechanism by which new communities can be established, but then populated only after a de-annexation process that places the residents of these communities outside the boundaries of the RCID. Disney's planned community "Celebration" is a good illustration of Disney's concentrated effort to avoid creating voting

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[44] 216 So. 2d 202 (Fla. 1968).

[45] FOGLESONG, *supra* note 8, at 75. *See also Id.* at 6-8.

[46] *Id.* at 63-69, 75.

[47] For example, during Disney's "Project Future Seminar" in June 1965, Disney officials gathered to discuss plans for Disney's prospective new Florida project. Even from these early stages, Disney was trying to find ways to avoid accountability. As Emerson reports, "While the idea of creating a municipality piqued the group's interest, at least one Disney official suggested that, if established, the cities should exclude residential properties as this could dilute the company's influence. Once again, Helliwell offered a possible legal solution: limit voting rights within the municipalities to landowners." Emerson, *supra* note 14, at 189 (citing Summary of Project Future Seminar 3 (June 16, 1965) (on file with the Special Collections and University Archives, University of Central Florida)).

[48] FOGLESONG, *supra* note 8, at 103.

[49] Buzbee, *supra* note 2 at 1305 (Disney and the RCID's "governmental powers, however, concededly involved a bizarre form of local governance that included self-regulation but lacked citizens for thirty years.")

[50] FOGLESONG, *supra* note 8, at 103.

residents of any significance within the RCID borders that might dilute its interests, inject competing interests that would require government decisionmakers to balance concerns to the potential detriment of Disney, or that could serve as skeptical eyes providing oversight and accountability for decisionmakers that might threaten the viability or durability of Disney-centric governance. Celebration was one of the first efforts by Disney to bring housing to the area purportedly consistent with Walt's promises in his original sales pitch (although the nature of the high-scale development makes its unaffordable to most Disney employees meaning its consistency with the original plan is questionable—a subject beyond the scope of this Report). Because of the fear of voting residents as a threat, Disney arranged for the area where Celebration was to be built to be "de-annexed,"[51] ensuring that the residents could not be agents of democratic accountability in the RCID.[52] For the development of Celebration, Disney feared less the application of state and county laws to the new development—ones to which inclusion in the RCID often exempted them and that they lobbied hard to get in the 1967 Act, yet shields now lost upon de-annexation—than they feared the existence of voters.[53]

The 1967 Act created an unenforceable legislative bargain. Despite the promises made by Disney to create housing and populate the RCID with citizens and voters—promises made to induce the legislature to grant Disney special privileges that Disney claimed were necessary to effectively accomplish their grand plan, including housing—there are no built-in ways to hold Disney accountable for the failure to fulfill their promises. In other words, legislative action was induced by Disney's promises and the legislature performed, but it has not been able to get the full benefit of the bargain. And, this kind of bargain does not come with the normal rules we might apply under the law of contracts. For example, there may not be any way to use a theory of promissory estoppel to seek damages claiming that the Florida Legislature took action induced by and in reliance on the promise never fulfilled, as could happen between two private contracting parties.

Disney took advantage of the dreamland it sold to the public to make substantial demands to get the government it "needed," which Foglesong

[51] *See id.* at 158.

[52] Buzbee, *supra* note 2, at 1299-1300. Buzbee claims that "Foglesong wisely focuses on the Celebration project as another locus of Disney-government negotiation and strategic behavior." *Id.* He continues that, "Here too, a familiar pattern is found. Disney structured the creation and nature of Celebration so this first infusion of potentially independent actual voting citizens would not imperil Disney World's governance by corporate control." *Id.*

[53] *Id.* ("Disney "de-annexed Celebration from Reedy Creek, accepting as the price of this decision subjecting Celebration to new state growth management legislation."

reports "centered on taxes, roads, and—of particular interest—an autonomous political district."[54] Foglesong continues that:

> In its autonomous political district, Disney sought protection from county government—from county regulations such as building and land-use controls and from inadequate county services such as police, fire, water, and waste treatment. The approval of Disney's private government, rather than their obtaining tax concessions and road funding, is the remarkable part of this story. More than anything else, it set the stage for the economic development marriage that followed.[55]

Disney and their consultants were seeking to overcome a "governance problem."[56] The answer from Disney's consultants "was to limit the scope of democracy. 'New community developers should be exempted from processing their plans and development across through local governing bodies,' they said. To keep their community 'in a state of becoming,' they should be 'freed from the impediments to change, *such as rigid building codes, traditional property rights, and elected political officials*."[57] The ask was for the near absence of anticipated traditional government control by creating a government district that Disney effectively controlled.

Shoked explains that the structure sacrifices the typical value of self-determination that citizens in cities receive. He writes that:

> The quasi-city cannot promote self-determination in the traditional, populist, sense of the term when the power to control the quasi-city's governing body is not vested in the quasi-city's residents. In these instances, the quasi-city clearly fails to provide the level of self-determination offered by the city. Some of the quasi-cities surveyed fall into this category. Florida's community development districts, for example, limit the franchise to landowners, while in other Floridian quasi-cities—for example, Ave Maria Stewardship Community District and Reedy Creek Improvement District—*the original legislative act ensures that the developing corporation retains control over local affairs*.[58]

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[54] *Id.* at 57.
[55] *Id.* at 55.
[56] *Id.* at 61.
[57] *Id.* at 62 (emphasis added)
[58] Shoked, *supra* note 13, at 2006 (emphasis added). *See also id.* at 2006 n. 171 (noting that in the RCID "Disney is the only landowner of Reedy Creek. Disney also picks the few dozen

The absence of the existence, or cares for the concerns, of citizens in the 1967 Act, as well as the way the Act assists Disney in offloading externalities to nearby communities, have also been criticized by Professor Buzbee, who asserts that:

> The Disney World story . . . is far less consistent with optimistic expectations about state and local government sensitivity to citizens' desires and needs. Citizens are all but missing from state, local government, or Disney considerations and activities. With malleable and acquiescent state and local officials rolling out the carpet, Disney instead repeatedly sought and obtained authority to bypass citizen control or even modest democratic accountability, avoid its fair share of growth burdens, and shift to others many societal discomforts associated with its kingdom.[59]

The insulation of the RCID and lack of obligation to offset regional impacts has meant that Disney is not required to internalize the negative effects of its operations yet is able to fully internalize its profits. That is what is meant by uncompensated externalities—the harmed individuals must bear the costs of the actions of another who is not responsible for paying the complete costs of the harms they impose. As a consequence of its structure under the 1967 Act authorities, Disney and the RCID "could impose the costs of development on the surrounding community—the cost of building roads and schools and sewer lines; The cost of social services for a massive low wage workforce; The cost of synchronizing public facilities and services with their private development."[60]

Oddly, these costs seem unobserved by some with decisionmaking authority. My research and interviews revealed a narrative that has been repeated among employees of the RCID that centers on a mantra that decisions made by the RCID only have impacts inside the RCID, because there is a mandate not to ask for outside funding or impose direct costs on taxpayers outside the RCID. In other words, I heard it more than a few times stated that doing things that "the taxpayer" or "the landowner" requests are inherently cost-neutral because the taxpayer/landowner is simultaneously the beneficiary and the principal payer of costs for the action requested. Once,

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'permanent residents' in the two 'cities' in the district, thus providing Disney control over any representative government.").

[59] Buzbee, *supra* note 2, at 1302.

[60] FOGLESONG, *supra* note 8, at 98. *See also* Buzbee, *supra* note 2, at 1294 ("Later in the book [Foglesong] begins to focus on how rapid growth and an overwhelmingly low wage economy created harmful externalized costs for both citizens and local and state governments.")

when hearing a response, it was insinuated that wasteful or unwise decisions are not that consequential because they do not harm anyone. This narrative was very much aligned with the mistaken idea that what is good for Disney is necessarily within the mandate of the RCID, rather than the RCID acting like a normal government that must first decide if something is a wise, prudent, and public-regarding idea capable of being accomplished within the limits of the governmental entity's authority, with the consideration of how the public decision indirectly advances private interests only then operating as a secondary, not primary, metric. Furthermore, this idea that any bad decision is costless showed a failure to understand the dynamic interjurisdictional effects of intra-jurisdictional decisions. Even when direct costs of an action are internalized, incidental costs (like the strain on roads, transportation, housing, schools, social services, and the like) may very well be externalized. Those concerns must be a part of the decisionmaking process ex ante.

Over the decades since the 1967 Act, the Florida State Legislature has consistently sustained the RCID's special status.[61] The statutory authority given to the RCID and sustained is unusual and deviates from traditional limits on governing authority. But, as upcoming sections of this Report will detail, it was predictable that the state legislature and local authorities could be drawn in to give Disney special perks through Disney's promise of economic growth and other claimed benefits. The political science research on how local governments attract industry and the history of local government behavior, along with the lessons of interest group politics revealed in positive political theories like public choice, all anticipate what we have seen happen in the RCID.[62]

[61] Emerson, *supra* note 14, at 212 ("The reality is that, when confronted with subsequent opportunities to reduce or expand the scope of the District's governance authority, the State Legislature opted for the latter.").

[62] Buzbee, *supra* note 2, at 1301 ("The Disney World story presents elements both consistent and inconsistent with scholarly expectations. As predicted in Paul Peterson's foundational City Limits, state and local governments fell all over themselves for Disney and explicitly sought growth and conditions suitable for new investment with its attendant employment, real estate and tax benefits.") (citing PAUL E. PETERSON, CITY LIMITS (1981)).

III. SOME ADDITIONAL THOUGHTS ON GOOD GOVERNANCE AND DEMOCRATIC ACCOUNTABILITY DEFICITS IN THE 1967 ACT

The previous Part certainly introduces some concerns regarding democratic accountability and good governance alongside its summary of the 1967 Act's key provisions. This Part continues that critical lens to underscore some of those key concerns and further evaluate others.

A democracy deficit exists whenever a powerful special interest drafts the legislation that ultimately defines how that private entity will be regulated, as Disney did with the 1967 Act, with little to no resistance in getting their preferred package passed by the legislature. While Disney accepted certain limits on its authority after some objections from Orange County, there were otherwise few changes from what Disney proposed and what the Florida Legislature swiftly passed.[63] Indeed, despite the dramatic power shift at issue in the legislation, it was swept up in popular appeal—the consequence of a successful lobbying campaign. As Foglesong reports:

> Governor Kirk had promised at the park West theatre that the legislature would act swiftly. It did, moving the complicated and far reaching legislation through committee and onto the floor of both chambers, where it passed unanimously and without debate in the Senate, and with only one dissenting vote in the House—all in 12 days.[64]

There were no attempts to bind Disney to any of the promises it made to induce passage by the Legislature. The Florida Supreme Court later blessed the 1967 Act with a seemingly implied reliance on the promise of eventual inhabitants of the RCID that would add democratic legitimacy. Foglesong opines that "In retrospect, the legislature and Supreme Court appear naïve in taking Disney at their word," but he also explains it as a consequence of the fog of lobbying. He notes, for example, that Orlando-area Senator John Drucker exclaimed that "'You have no idea what kind of fervor there was in favor of Disney.'"[65] As Part IV of this Report explains, such fervor often propels interest group legislation and wealth transfers favoring profit-seeking private interests.

The absence of a voting public is one of the most striking deficits in the jurisdiction that is now governed by the 1967 Act.[66] To Disney, the lack

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[63] FOGLESONG, *supra* note 8, at 55.
[64] *Id.* at 73.
[65] *Id.* at 76.
[66] Buzbee, *supra* note 2, at 1305 ("A government without citizen vote, voice or opportunity to exit, may be doomed to ignore citizen social concerns and harms in favor of purely

of voters was a design feature, not a bug. To democracy and limited government, it is a deadly bug, not a feature. Disney hid its intentions to circumvent this fundamental vehicle for democratic control—an independent, voting population. Yet, as noted several times already, the avoidance of voters received constant attention at every stage of Disney's strategic design.[67]

The desire to avoid popular scrutiny appears to continue among some employees at the RCID/CFTOD today. In one of the interviews that I conducted as part of this study, one high level administrator who has been with the RCID for decades—and who, like many others with decisionmaking authority and in positions of power within the RCID, started as a Disney employee before coming to the RCID—gave a revealing and troubling answer to a question. They told me that operations were smoother before the recent change to, and shakeup from the creation of, the CFTOD, including because they seldom had to deal with people coming to Board meetings; yet now they come. In response, I asked: "Don't you think that decisions might have been made differently if there were greater scrutiny of that kind?" The response was, "Maybe, but why would we want that?" The implication was clearly that the scrutiny and need to reply to it would make the job harder and take more time, without a corresponding appreciation for the purposefulness of those consequences or that the process (albeit taking time and requiring work) might make the decisions better, make policies sounder, and make actions more likely within the bounds of authority.

That response revealed a failure to appreciate the good governance lessons described above—that the decisionmaking might be improved with more robust outside review and challenge. Public participation is like crowdsourcing for new ideas, enhancing decisionmaking. It may mean decisions take longer, but the hope is that they are also better. And if the "public" participation is from only one highly-interested party like Disney, then the decisonmakers hear only one voice in the crowd; meaning there is an absence of a marketplace of ideas. Furthermore, public scrutiny can help decisonmakers identify their own internal biases or blind spots, even those of which they were never aware and never intended to be determinative. As it is often said, sunlight is the best disinfectant of biases or abuses.

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monetary reward."); *Id.* at 1311 ("Disney remained consistently successful in avoiding the unpredictable presence of citizen power and voice.")

[67] Emerson, *supra* note 14, at 192 ("[E]arly on, Disney officials realized that private housing within the Florida project could dilute their control over the overall development. If Disney wanted to maintain quality control, the company would have to find a way to limit the voting power of the private residents.") (citing STEVE MANNHEIM, WALT DISNEY AND THE QUEST FOR COMMUNITY 68 (2002); FOGLESONG, *supra* note 8, at 61-63).

Buzbee calls the 1967 Act a "capitulation" by state authorities by giving Disney so much power with direct accountability to nearly no one for the harms it causes in the RCID or externalities to nearby communities.[68] Buzbee explains:

> The state capitulated to Disney's desires, giving Disney many of the powers of government, but with no explicit requirement that the company answer to resident citizens. The merger in Disney World of private and governmental control over an over forty square mile district shows both the benefits of internalization of all private and public functions, but also the likely inevitability of efforts to shift costs to others. The breadth of the Disney World Reedy charter district did not render Disney immune from running roughshod over public concerns when they conflicted with the profit motive.[69]

Consequently, Buzbee concludes that, "As an experiment in the merger of private and public powers, Disney World constitutes a mostly cautionary tale."[70]

In a damning indictment of the deal struck in the 1967 Act, Buzbee finds little evidence of service to the public good in it:

> Disney's broad private and governmental powers produced little evidence in Disney officials of civic engagement or expanded social conscience. Author Foglesong at times appears to expect such social engagement, but the reasons for such an expectation are hard to find.[33] Disney, like most powerful private or public actors, preferred to avoid public accountability and expenditures of money. Despite its assumption of broad public powers, Disney remained in the

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[68] Buzbee, *supra* note 2, at 1302. Buzbee explains:

> Disney's employment of a massive low-wage workforce created vast housing and social service needs, yet Disney played the political system to avoid paying its share for local burdens. Despite new state laws requiring growth proponents to pay impact fees for growth burdens, Disney resisted such a burden with its earlier Reedy Creek Charter immunity from new legal constraints. Disney similarly managed to avoid paying for most road improvements needed to service Disney World and killed with its opposition proposals for adding passenger rail service to the Orlando area. Disney's success in exporting to others the costs associated with its complex continued even after local disenchantment with Disney became evident.

Id. at 1304.

[69] *Id.*

[70] *Id.*

> end a for-profit corporation. After initially resisting involvement with community projects, it eventually invested modest sums in local philanthropy, engendering good will within the community. Disney was invested with broad government powers, but those grants of government power were subject to no citizen check within the Disney World kingdom, and surrounding local and state officials repeatedly showed little stomach for taking on "the Mouse." Foglesong soundly questions the desirability of giving an entity like Disney the ability to be "selectively public."[71]

So much of the narrative surrounding Disney World as combined with the creation of the RCID has been that this 1967 Act should be regarded as a bold, innovative, and successful model of local governance and urban planning. Yet, when pulling back the curtain and the analysis above, the evidence seems to support the opposite conclusion.[72]

Furthermore, even if it were conceded, which I do not do here, that granting the RCID broad powers in order to attract Disney to Central Florida made sense, it is hard to believe the privileged treatment would be necessary to get them to stay. And, continuing to prop up Disney and grant special exemptions from normal order for their operations, at the expense of the public interest, makes little sense once their operations have been firmly established and in light of the evidence gathered about the negative effects of the special access to power and privilege.[73]

These deficits in good governance norms and democratic control counsel Shoked to advise abandoning these kinds of public-private partnerships inside special districts entirely:

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[71] *Id.* at 1304-05.

[72] *Id.* at 1308 ("In reality, Florida officials quickly capitulated to Disney requests in handing over accountable government authority, largely eliminating citizen voice, and in only minimally burdening Disney with a fraction of the regional growth costs associated with Disney expansions. The written law sounded promising, but the implemented law was far different.").

[73] *Id.* at 1305. The continuation of Disney's special privileges when it causes uncompensated harms to the region is perplexing:

> [I]n the eagerness to attract growth, state officials actually abdicated most governmental powers to Disney and continued to provide Disney substantial favored treatment long after Disney was "married" to Orlando. State and local governments' desire for growth, institutional and personal links to Disney, and adept political maneuvering by Disney resulted in the near absence of governmental correction of Disney externalities, even those ills borne outside Disney World's borders.

Id.

> [Q]uasi-cities should lose the law's support when confined to serving a particular powerful local group or benefiting a developer by converting what should be a nimble and transient entity into a perpetual and rigid body. Such were the quasi-cities found in Part II [including the RCID] to install long-term company towns, to empower affluent urban fringe residents to resist annexation, and to privilege specific areas within a city. The compliant lawmakers who enable these quasi-cities' founders do not exercise flexibility to promote normative goals, but rather in order to abnegate normative goals.[74]

Buzbee reaches a similar conclusion: "The overly complete merger of the private and the public may simply be a bad combination, whether starting with a government seizure of market functions or a private sector behemoth's successful grab for government power."[75] Instead, "[a] separation of functions, with a critical distance between the regulator and regulated, perhaps would have led Disney and Orlando to a more socially beneficial state of affairs."[76] Each of these conclusions make sense and are supported by research in the field. Although Shoked and Buzbee do not dive into the public choice literature for confirmation, their conclusions are nonetheless also predicted by that model described below. When the door to power is opened specially to powerful interest groups, they will distort and corrupt the institutions they enter and capture.

Finally, a few thoughts on the utility of normal governmental processes are in order here. One of the narratives advanced in support of public-private partnerships is that suspension of normal order is necessary for the private actors to be sufficiently incentivized to do some specific thing or things that serve the public. As noted above, for example, Disney claimed it needed flexibility and access to and control over its own private government in order to "efficiently" develop Walt Disney World.[77] There is reason to

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[74] Shoked, *supra* note 13, at 2029-2030.

[75] Buzbee, *supra* note 2, at 1306-07.

[76] *Id.* at 1307.

[77] Buzbee explains the pitch:

> The benefits of merging public and private powers are mostly evident in the planning and building of Disney World. Disney was able to carry out its massive infrastructure and building effort in rapid fashion, also using its flexibility in building code design to embrace and test innovative techniques. As scholars of regulation often assert, reducing constraining regulations facilitated private sector innovation. Disney's efficient initial efforts are also consistent with arguments voiced in favor of privatization of government functions.

Id. at 1302.

doubt such suspension of normal order was actually necessary to make Disney World successful. Private enterprise thrives all the time without extraordinary privileges from governments. Indeed, while it is often said that Disney has been successful and the economy has grown because of their special status, we cannot prove a negative or assess the counterfactual. Thus, we risk becoming trapped by the narrative. It may very well have succeeded at the same level or even exceeded its current success level if the special privileges had never been created or had been temporary.

Disney was wise to get the 1967 Act locked in place and create the conditions upon which a co-dependency developed between Central Florida's economy and the tourism and entertainment provided by Disney.[78] That condition makes their claims that what's good for Disney is good for Central Florida and what's bad for Disney is bad for Central Florida harder to reject,[79] especially with the creation of path dependency on tourism and theme parks created by sunk costs by the community in those industries.[80] They have created a public relations narrative about their indispensability, further solidifying the durability of their initial investment in gaining the privileges of the 1967 Act.

Yet, we do not know what kind of growth would have occurred without the 1967 Act, and we do not know what kind of growth and innovation might have been stymied by giving Disney an artificial advantage over its direct competitors or over competitive alternative uses of the land. It is possible that growth, development, and innovation—with or without Disney—might have been even stronger with more normal governance regimes and more robust competition. But even assuming for the sake of argument that there is a real, supportable argument that the 1967 Act created a kind of efficiency or flexibility that produced results, efficiency is not a proper metric for driving the decisions on how to structure government.

The efficiency mask (discussed again from a public choice perspective below) is alluring but ignores the fact that, while efficiency may be good for private enterprise, it cannot be the lodestar for governmental action. Authoritarian regimes are extremely efficient. The dictator need not ask permission or navigate any costly processes before acting. Yet, in contrast, the liberalism underlying our state and federal constitutions and grounding the institutions created under them rejects the ideas that an efficiency rationale is a proper way to run a government that operates of the

[78] FOGLESONG, *supra* note 8, at 8-9, 102, 121.
[79] *Id.* at 9 ("Another complication is that divorce is sometimes too costly.")
[80] *Id.* at 12-13.

people, by the people, and for the people.[81] Fundamental democratic principles and separation of powers will not tolerate abandoning the procedures that check governmental abuse to achieve efficiency in governance.

Process is good because it creates checks on power. The Framers recognized the flaws of human nature when designing institutions for the new Republic. Constitutional safeguards to protect against the temptations of man to abuse power were embedded in the governmental structure. James Madison in the famous "if men were angels" passage of *The Federalist* observed the necessity of governmental accountability when he wrote:

> But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.[82]

There are many ways that we make political decisionmaking hard and slow to concurrently prevent abuse and maximize the chances of adopting sound policies, because the existence of the auxiliary precautions makes time and space for many ideas to be introduced and all ideas to compete in the deliberative process.

Governance systems in the United States create what are sometimes called "veto points" and "choke points." These are purposeful institutional restraints on the production of legislation, regulation, or government approval decisions in our constitutional systems.[83] As University of North Carolina School of Law Professor Michael Gerhardt has explained:

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[81] Todd William Gretton, Comment, *Responsible Corporate Environmental Policy: Available in Fantasyland; Coming Soon to Main Street U.S.A. A Glimpse at a Corporate Owned And Operated Special Purpose District and Its Impact on the Environment in Central Florida*, 15 PENN ST. ENVTL. L. REV. 151 (2006) (acknowledging that a tradeoff may exist, concluding that the RCID "is more efficient than a typical local government, but seemingly less democratic).

[82] FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed. 1961).

[83] As James Madison explained, a government is not judged as successful because it is easy to produce voluminous laws. Indeed, the rule of law demands checks on the volume of laws, as Madison explains:

> The principal kind of gridlock is structural gridlock. Both the constitutional design and the design of Congress allow for—indeed, anticipate—many more ways in which lawmaking may be stopped than achieved. These impediments or complications are called veto-gates or the myriad paths by which laws can fail to be approved. Structural gridlock is reflected in numerous counter-majoritarian features of the Constitution.[84]

The barriers and blockages that these choke points create are intentional and beneficial, so that you might say constitutional government is often *purposefully inefficient* to make room for checks and accountability mechanisms to be effective.

These barriers have a deliberation-forcing nature that ensures better, even if slower, decisionmaking. Because they also make it more costly to get private benefits from governments, public choice theory explains that the added expense also deters private interests from lobbying for special favors and pushes them back into trying to obtain advantages by innovating in the private marketplace instead.[85] When costs increase to lobby for government favor because it is harder to get it, then demand decreases, causing a concomitant decrease in production.

What some people cast out as "gridlock" is usually just the constitutional system achieving "the usual benefits every time the legislative process works—deliberation, consensus, representativeness, and accountability."[86] These tiers or filters through which legislation or other government decisions must pass make it more difficult (or costly) to pass legislation or change regulations, consequently decreasing the total amount of outputs produced by the system. This is all built into the constitutional

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> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

THE FEDERALIST No. 73, at 421 (James Madison) (Jacob E. Cooke ed. 1961).

[84] Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2110 (2013).

[85] Donald J. Kochan, *Public Use and the Independent Judiciary: Condemnation in an Interest Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998) (discussing "cost enhancing" rules that make production of government outputs difficult, therefore more costly for interest groups interested in investing in their production).

[86] Gerhardt, *supra* note 84, at 2109.

design at the federal level and replicated in the design in Florida's constitutional structure as well.

In *Federalist Number 73*, Alexander Hamilton made the point that the Founders understood the tradeoffs—some "good" laws may be prevented because we make things hard, but that loss is far outweighed by the number of "bad" decisions that would be allowed if efficiency were preferred over process in our system:

> It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. . . . The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones.[87]

In all, the state and federal constitutional structures are designed to ensure deliberation so that all ideas for how to use governmental power are implemented only after standing up to rigorous challenge while the bad ideas are, more often than not, filtered out by multiple steps designed to reveal their flaws and prevent their implementation. These processes also create transparency, including shedding light on the details of legislative or other political deals favoring private businesses, thereby giving lawmakers and the public much needed information about how to prevent exploitation of the public powers for private gains. Never is it contemplated in the liberal form of government that these integra features of good governance should be sacrificed under the mantle of efficiency.

[87] THE FEDERALIST No. 73, at 496 (Alexander Hamilton) (Jacob E. Cooke ed. 1961).

IV. PUBLIC CHOICE THEORY AND ITS EVALUATION OF INTEREST GROUP INFLUENCE IN GOVERNANCE

Public choice has become a dominant paradigm[88] for analyzing the production of legislation, regulation, or other political decisions—including the incentives driving interest groups to obtain favorable advantages from government action or inaction that are either unavailable in the market or only available to obtain at a much higher cost when forced to work within the private market for such advantage.[89] In his review of Foglesong's book, Buzbee does not himself conduct a public choice analysis of the Disney and RCID situation, he notes how apt the facts on the ground are to the application of public choice. In his words, "This rich, four decade story of Florida, Orlando and Disney could be viewed as a somewhat sordid picture. Public choice scholars applying their skeptical wares equally to all of the players and actions in this book [*Married to the Mouse*] would find many confirmations" of their theories about interest groups and politicians to respectively seek and use government powers to provide favors in politics[90] that concentrate benefits on some while dispersing costs on many. I wholeheartedly agree and find this project fosters the occasion for one of the most fascinating case studies of public choice "in the wild" available today.

Although the extraordinary facts of the 1967 Act lend themselves to substantial application of and confirmation of tenets of public choice theory, to my knowledge there has not been an in-depth analysis of the 1967 Act, the RCID, and the Disney influence from a public choice perspective until this Report. This Report begins the application but, as noted in the intro, there are still substantial opportunities in later phases of this CFTOD review to learn from and evaluate these public choice concepts when further investigation of the facts on the ground are conducted with even greater intensity.

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[88] Bruce Yandle & Stuart Buck, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENVTL. L. REV. 177, 188 (2002) ("The economic theory of regulation is so instructive that, as one economist observes, 'opposing theories of regulation have been pretty thoroughly driven from the scene.'").

[89] On public choice theory, see generally MAXWELL L. STEARNS, PUBLIC CHOICE & PUBLIC LAW: READINGS & COMMENTARY, at xviii-xxiii (1997) (summarizing major schools of public choice scholarship); KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963); BUCHANAN & TULLOCK, CALCULUS OF CONSENT, *supra* note 4; MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

[90] Buzbee, *supra* note 2, at 1309.

Critical to public choice analysis is the concept of rent seeking. Rent seeking[91] for legislative advantages ensures that most political decisionmaking, including legislation, is the culmination of an interest group bargain that leads to sub-optimal wealth transfers concentrating benefits on some while dispersing the costs on the general, unassuming public.[92]

One of the reasons the public remains in the dark during these practical political processes is because of the phenomenon known as "masking."[93] Advocates label legislation so that it looks like it is public regarding.[94] This tactic has been described as placing a mask,[95] a curtain,[96] cloak,[97] or a veil of legitimacy over the decision, making the private-regarding nature less obvious (thus harder to discover and oppose). It reduces transparency in order to dim the probability of critique. The purpose expressly stated for legislation or other political decision is often a façade[98] or a charade[99] to make it harder for observers to discover that there is a private-interest motive driving the action. The point is to hide that there is a primary beneficiary that is a private actor rather than the public or to make it seem, like with Disney, that the primary benefits are public and the private actor is just a servant of those interests rather than an entity seeking any

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

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

[93] *See generally* Donald J. Kochan, *The Mask of Virtue: Theories of Aretaic Legislation in a Public Choice Perspective*, 58 ST. LOUIS U. L.J. 295, 300, 336-348 (2014) (analyzing the masking phenomena).

[94] On the framing effects of labels, see generally Donald J. Kochan, *The ~~[Takings]~~ Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 FLA. ST. U. L. REV. 1021 (2018).

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

[96] POLITICAL ENVIRONMENTALISM: BEHIND THE GREEN CURTAIN (Terry L. Anderson ed. 2000); Jonathan H. Adler, *Rent Seeking Behind the Green Curtain*, 1996 REGULATION 26 (1996).

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

[98] Gregory S. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV.147, 155 (2009) ("In some cases, "public interest" statutes may serve as a facade, providing a symbol of government concern while masking government inaction.").

[99] Michael Abramowicz, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 1013 (2009) (in administrative law, "the notice-and-comment process can be a charade, a purported exercise in objective analysis that seeks to mask inevitably political choices.").

personalized privileges at the expense of others. The private nature of the bargain is, therefore, less susceptible to challenge or at least the information costs are increased making it more difficult or expensive to uncover the true nature of the legislation. These attempts to pull the wool over the eyes of the potential opposition or electorate provide increased durability to the deals cut in the political process.

As a consequence of this confluence of factors that make the political system so vulnerable to private interest bargains, it is actually imperative that legislators and other government officials refrain from being complicitous in such interest-group bargains and their concomitant wealth transfers. As guardians of constitutional limits, protectors of the rule of law, and defenders of the public—duties embodied in public officials' oaths—it is then equally a duty of these governmental actors to take corrective action when they become aware that the public interest has been sold out to a private interest.

Indeed, government officials are sometimes the only ones capable of discovering and exposing these harms, given the lack of incentives (discussed below) for citizens to challenge these bad deals. The stakes are just too low for each individual citizen to have an incentive to resist given that the costs are widely dispersed; and information deficits or imbalances often make it costly or impossible for the average citizen to even appreciate that a private interest is getting a sweetheart benefit at their and the public interest's expense. Government actors are also the ones who can erect barriers to these kinds of private-privilege actions, including passing laws and injecting procedural barriers that make getting legislation or other favorable acts from government harder and more costly in time and other resources, thereby pricing many interests out of the government favors game and back into earning their competitive advantages through the market instead of through coercion.

A. THE PUBLIC CHOICE THEORY OF REGULATION

Political decisionmaking, including legislation, is regularly the product of interest group bargaining by interest groups like Disney for rent-seeking and private advantage.[100] If the private entity can concentrate on itself benefits conferred through creation of government structures or conditions favorable to its ability to achieve gains, while dispersing the costs of those political decisions on a diffuse public, the interest group will do so. They obtain a positive wealth transfer along the way—gaining something

[100] STEARNS & ZYWICKI, *supra* note 91, at 46 ("public choice theorists claim that interest group influence on legislative outcomes is commonplace, with the effect of producing narrow tax exemptions, protective tariffs, industry subsidies, and competitive restrictions (also known as barriers to entry).").

cheaper from the change in politics than they could by working hard for the same ends in the market. Indeed, that is precisely what Disney did in lobbying for the 1967 Act and in subsequent action to secure the gains it received from the Act. Public choice theory helps us to understand the phenomena, predict behavior, and evaluate processes, constraints, and institutions that might be constructed to guard against destructive self-interested behavior that serves private interests like Disney over the public interest.[101] It also helps us understand why the absence of such procedures or constraints, like those absent in the 1967 Act and within the RCID structure, only help to encourage and facilitate private investment in private gains through public powers.

As noted in the Introduction to this Report, this is all in stark contrast to the now-outdated notion of "public interest theory." For many decades, the public interest theory dominated in political science and in the evaluation of how laws are produced.[102] The public interest model speculates that lawmakers (regulators and legislators included) regularly make decisions based on their assessment of what is in the best interest of the overall public and in order to maximize social welfare.[103] If this were true, then the 1967 Act would have arisen organically and without need for lobbying and influence by Disney. Over time, this "idealized" or "romanticized" view has faced substantial criticism,[104] particularly given the realities of interest group influence in political decisionmaking as revealed in public choice theory.[105] Legislation, regulation, or other government action and political decisionmaking often concentrates benefits on a few while dispersing costs

[101] JERRY L. MASHAW, GREED, CHAOS & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 28 (1997) (if public choice "has a good description of human behavior in political contexts, then it should give us some guidance on the question of what sorts of processes and institutions are possible for us and how to construct them").

[102] Andrew P. Morriss, Bruce Yandle, & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 214 (2005) [hereinafter "Morriss et al, *Choosing*"] ("The oldest theory of regulation, the public interest theory, holds that regulators purposefully seek to improve the nation's overall well being.").

[103] *Id.* at 215 ("Each regulator is motivated to serve a broadly defined public interest. . . . The theory posits that regulators generally seek to serve the public interest, not special interests such as the interest of one state or community, or the interests of a particular industry or firm."); Todd J. Zywicki, *Baptists? The Political Economy of Environmental Interest Groups*, 53 CASE W. RES. L. REV. 315, 325-26 (2002) (explaining the public interest model).

[104] Buchanan, *supra* note 6, at 11 (explaining how the romance of public interest theory must meet the realities exposed by public choice). *See also generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1971); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

[105] STEARNS & ZYWICKI, *supra* note 91, AT 44-45 (presenting the tenets of the public interest model and explains how the public choice model identifies the "failings of an idealized view of regulation" seen in the public interest model).

on the many in a manner that is ultimately inefficient, suboptimal, and sometimes quite unjust.[106] This is not to say that all lawmakers are seeking to subvert the public interest,[107] but instead that the mechanics of the exercise of legislation and regulation work against the achievement of truly public interested ends.

The way to get closer to public-regarding political decisionmaking is to make interest group gains difficult to achieve in the political process. By erecting barriers—through things like robust democratic accountability mechanisms, separation of government and business, separation of powers, layers of decisionmaking authority, an empowered electorate, etc.—we can price interest groups out of the marketplace for government favors and push them back into achieving their desires through private ordering and the market.

B. Interest Groups, Rent-Seeking and Public Choice

Public choice theory posits that interest groups and economic principles play a key role in how legislation develops and is passed. It views political decisionmaking— including legislation or regulatory action, and the receipt of governmental "permission" to act, or immunities from regulations (including insulating Disney from county regulation and replacing them with a more favorable regime designed to prefer Disney at the RCID)—as a commodity.[108]

Supply and demand principles operate for legislation and regulation in much the same way as with any other economic good—interest groups wish to obtain legislation and legislators have the capacity to provide the product sought. Public choice theory generally provides a mechanism to predict all governmental actions broadly understood – including legislation and administrative agency and other executive regulatory actions as well as forbearance of action or promises to provide more lenient governance

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[106] Morriss et al., *Choosing*, *supra* note 102, at 215 ("There are obvious flaws with the public interest theory, not the least of which is that measures furthering special interests at the expense of society as a whole appear too frequently to be best explained as random noise.").
[107] *Id.* ("Publicly interested public servants do exist and, while it would be wrong to assume agencies are populated only by angels, it would be equally wrong to assume they are populated only by devils. It is often the angels we need fear the most, however.").
[108] *See* George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); Richard Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); JAMES BUCHANAN ET AL., TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (1980); Daniel A. Farber & Philip Frickey, *The Jurisprudence of Public Choice*, 65 TEX L. REV. 873 (1987); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339–71 (1988); Jonathan R. Macey, *Promoting Public Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986) [hereinafter "Macey, *Public-Regarding*"].

regimes where the interest group is stationed, such as in the RCID. As noted, the theory is also not limited to the affirmative act of legislation. Interest groups may often bargain to block legislation, to block certain jurisdictions from having control, to limit the number of competitors that could exist within a jurisdiction, to limit the number of voters that can act as costly veto points like Disney has done by isolating itself inside the RCID with few other taxpayers or landowners, or to generally receive regulatory forbearance.[109]

Interest groups—including both those in favor of and opposed to regulation—seek to use the government to obtain more favorable prices for their desired gains than would be available under competitive market conditions.[110] Public choice theory posits that individuals are motivated to escape market prices for the accomplishment of their desires through a process of "rent-seeking"[111]—expending resources to obtain favors from government, which include direct subsidies or benefits, including establishing a favored position where compliance costs are lower than a nearby competitor; or by seeking regulations that could directly harm or impose costs on a competitor to put them at a comparative disadvantage to the favored interest group.[112] If a "rent seeker" can obtain something from the legislative process by spending less than they would need to spend in another forum to obtain the same advantage, a rational interest group will invest in obtaining their preferred result through legislation or other government action and include the savings in their profits.[113]

Disney's extensive lobbying efforts show precisely this kind of public choice motivation. One highlight of Disney's plans for Florida is the well-known secretive efforts at land assembly for Disney World.[114] While not

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[109] *See generally* Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

[110] *See generally* Farber & Frickey, *supra* note 108.

[111] *Id.;* Gordon Tullock, *The welfare costs of tariffs, monopolies, and theft*, 5 WESTERN ECON. J. 242-232 (June 1967); Robert D. Tollison, *The Economic Theory of Rent Seeking*, 152 PUBLIC CHOICE 73 (2012) (describing rent-seeking) [hereinafter "Tollison, *Economic Theory*"].

[112] STEARNS & ZYWICKI, *supra* note 91, at 50 (defining rent seeking as "meaning affirmative lobbying efforts to secure beneficial legal protections against competition").

[113] Tollison, *Economic Theory*, *supra* note 111, at 80 ("groups who can organize for less than a dollar in order to obtain a dollar of benefits from legislation will be the effective demanders of transfers").

[114] *See, e.g.,* Katrina M. Wyman, *In Defense of the Fee Simple*, 93 NOTRE DAME L. REV. 1, n. 116 (2017) ("Another famous example of a private acquisition using secret purchase is Disney's acquisition of land for Disneyworld."); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 22-23 (2006) ("Disney used undisclosed agents in Orlando, Florida, and Manassas, Virginia, to avoid the holdout problem and assemble thousands of acres for its theme parks."). *See also* David S. Hilzenrath, *Disney's Land of*

illegal, the subterfuge accomplished by purchasing necessary lands while buyers were unaware of the intended use, to keep the asking prices low, highlights the savvy and strategic nature of the Disney operations. Disney quickly shifted that strategic focus to making the land more valuable than it otherwise would be by seeking to formalize a public-private partnership in favorable treatment under existing drainage district laws and later by legislation.[115] One private goal was to ease the way and decrease the regulatory costs of dredging and filling the space that was to become Disney World. Obtaining authority to operate as a Drainage District accomplished that end.

Next it needed to build and sustain Disney World without interference from less-friendly county regimes or under the watchful eye of constituent citizens. Walt Disney's sales pitch was strategically designed to make a bold ask while convincing legislators and the community that his demands were based in indispensable requirements if Disney's operations were to come to Florida and deliver benefits to communities in the state.[116]

The lobbying did what it was intended to do: make the Legislature believe it was doing good by helping Disney get private gains from decisions about how to use public power. As one commentator explains, "The Florida legislature, apparently enamored with the Disney Company, made unique concessions to ensure that Disney would make central Florida its new home."[117] In lobbying for enactment of its draft of the 1967 Act, Disney put on quite a show to accomplish the rent-seeking task, including hosting a Hollywood-like premiere for unveiling and explaining its legislation to legislators and the world, complete with a fancy, polished video that cast the

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Make-Believe: Acquisition Agent Used Ruse to Prevent Real Estate Speculation, WASH. POST, Nov. 12, 1993, at A1 ("stealth approach"); Mark Andrews, *Disney Assembled Cast of Buyers To Amass Land Stage for Kingdom*, ORLANDO SENTINEL, May 30, 1993, at K-2 ("Working under a strict cloak of secrecy, real estate agents who didn't know the identity of their client began making offers to landowners"); Tim O'Reiley, *Playing Secret Agent for Mickey Mouse*, LEGAL TIMES (Wash., D.C.), Jan. 10, 1994, at 2 (describing "Disney's elaborate scheme to hide its identity as it amassed about 3,000 acres for a proposed theme park in Northern Virginia," an ultimately abandoned project).

[115] Gretton, *supra* note 81, at 155 (acknowledging that "What Walt Disney was looking for, and what he would find in Orlando, was a freedom from the type of oversight that had compelled him to leave Missouri in the first place," describing the story as "about what the Disney Company required and what Orlando was willing to give up, legally and environmentally, to make the partnership work.").

[116] *Id.* at 153-54 (describing Walt's sales pitch for why Disney needed extraordinary powers and the promises made in the pitch).

[117] *Id.* at 158.

project in futuristic and utopian terms, playing of the fantasies and aspirations of legislators turned dreamers.[118]

Disney sought and gained extraordinary favorable treatment. Foglesong does an excellent job documenting this all in Chapter 4 of his book *Married to the Mouse*. And, Buzbee has done such a great job summing up these categories of Foglesong's observations that his work is worth quoting at length:

> From the moment Disney acknowledged its Orlando aspirations, the company sought favorable legal treatment: Walt Disney stated that Disney's grand plans depended on "'how fast the state will work with us'" (p. 51). Walt Disney's exact plans remained vague, apart from his revelation that the complex would exceed Disneyland in size and would include "'a model city, a City of Tomorrow'" (p. 51). Much as the scale of its land acquisitions went well beyond typical business real property investment, Disney proceeded to secure a remarkable array of extraordinary political breaks and broad assumption of what are typically governmental powers. Businesses, the press, and state and local officials initially saw Disney's plans as a boon for Orlando, predicting "'phenomenal'" real estate growth and "'unparalleled economic returns'" (p. 56). Governor Haydon Burns promised the "state's '100 percent cooperation'" (p. 56), and the legislature and state agencies soon delivered. The Disney company was able to avoid 40 percent of usual sales taxes on its attractions by convincing state tax officials that a similar percentage of Disney World's operations would be research, design and engineering expenses (p. 57). To gain the benefit of lower county level taxation for agricultural lands, Disney ensured that cows grazed on company lands (p. 57). The thornier and more innovative Disney plan was to establish an autonomous political district that would be recognized by the state, be protected from unwanted changes in the legal landscape, and be largely immune from typical county government powers over building and land use, police, fire and waste treatment.[119]

The tug of economic investment is a powerful force that makes it hard for politicians to fend off the demands of a powerful interest group willing to

[118] FOGLESONG, *supra* note 8, at 66-67.
[119] Buzbee, *supra* note 2, at 1294-95.

make "investments" in a community in return for tax offsets, relaxation of regulatory burdens, the provision of land, or some other benefits to be offered in the rent-seeking game. It often brings allies to an interest group's cause from non-competitor local businesses who hope to ride the wave of new investment. In the Disney case, Foglesong writes that "Disney seemed like a partner too fantastic to be true. The local business community was 'transported into a dreamland from whence they could see nothing but unparalleled economic returns,' gushed the *Sentinel*."[120]

As public choice theory would predict, the powerful interest group with much to gain is well-positioned to take advantage of well-minded politicians, masking their request for special privileges as necessary to provide benefits to the community. Disney had highly concentrated interests and superior information in a way that they were able to outplay the less sophisticated lawmakers who were allured by the perceived economic benefits of attracting Disney to the state.[121] And Disney's lobbying successes are not limited to the 1967 Act. The RCID comprehensive plan should be presumed driven by Disney interests and not the public interest, meaning we cannot presume it is optimal. The conclusion follows for a number of reasons, one critical one being that there is little opportunity for consideration of alternative, non-Disney uses for RCID land and resources. The plan is generated under a presumption that the plan should be designed to benefit the incumbent use. It presupposes without adequate investigation that the status quo uses should drive the plan rather than an objective view of the public interest that might take into account anticipation or planning for dynamic new uses and that might better balance the concerns of, and take better account of the impacts on, diverse interests across interconnected communities.

As earlier noted, rent-seeking is successful because of the dynamics established when there are "concentrated benefits, with dispersed costs."[122] Interest groups—whether they are single individuals, companies like Disney, NGOs, or other organizations—have an incentive to use available means to

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[120] FOGLESONG, *supra* note 8, at 55.

[121] Buzbee, *supra* note 2, at 1310 ("Disney's substantial long-term stake in Disney World led it to invest substantial monetary, political and human capital up front to lock in an advantaged position, long before local or state officials were equally sophisticated."). *See also* FOGLESONG, *supra* note 8, at 73 (describing it as unequal bargaining power, which was preserved by the 1967 Act with the perpetuity clause that made bargaining over future restrictions presumptively unavailable).

[122] Robert W. Hahn, *Ethanol: Law, Economic, and Politics*, 19 STAN. L. & POL'Y REV. 434, 461 (2008) (public choice "theory examines the motivations of individuals, interest groups and politicians to help explain policy outcomes. . . . these groups are able to exert influence because the benefits of such policies are concentrated but the costs are diffuse.").

influence governmental outcomes.[123] Legislators or other government officials can provide government assistance to the interest group—creating a concentrated, private gain or benefit.[124] Politicians often understand that they control a valuable, demanded commodity otherwise known as legislation, regulation, or leniency.[125] The government actors may offer a deal knowing the consequences, but the asymmetrical incentives and the dynamic created also occur when the governmental actors are not intentionally trying to participate in a wealth transfer. The interest group has an incentive to convince the political decisionmakers that what they are doing is in the public interest by masking the requested "product" in public-regrading terms during their sales pitches and public relations campaigns. The interest group is willing to pay for this benefit so long as the amount they must invest is less than what they would need to pay to obtain the same benefit in an alternative forum, such as the private marketplace. Interest groups have an incentive to obtain the legislation by convincing political decisionmakers to act in a way that brings the interest group benefits so long as it means the interest group is getting something it wants cheaper than it could get it by other means—*i.e.*, the cost of the investment does not exceed the benefit they will obtain.[126] These incentives and their asymmetrical structure explain the success of rent-seeking behavior.[127] There's a high incentive to invest when the gains are big, and a low incentives to fight against the deal when the stakes are really low for those in the group suffering the highly dispersed costs to pay for the transfer of a benefit to the concentrated interest group. When groups "enjoy lower information and transaction costs than others, they will succeed in obtaining wealth transfers to themselves at the expense of other groups. These differential costs are the sine qua non of rent-seeking."[128] And, the interest group has low information costs for determining what privileges will be beneficial to it, while the dispersed public has very high information costs to identify the wealth transfer affecting them (and then face a second hurdle

[123] Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012) (generally describing the mechanics and operations of lobbying and how it works).
[124] Morriss et al., *Choosing*, *supra* note 102, at 224 (discussing concentrated benefits, dispersed costs).
[125] Tollison, *Economic Theory*, *supra* note 111, at 80 ("The individuals who monitor the supply-demand process are politicians, bureaucrats, and other political actors. These individuals may be conceived of as brokers of legislation, and they essentially act like brokers in a private context—they pair demanders with suppliers of legislation.")
[126] STEARNS & ZYWICKI, *supra* note 91, at 46 ("an economic rent arises when an economic activity, for example labor, earns a return that exceeds the opportunity cost of the income-producing asset").
[127] For a general discussion of the incentive structure resulting from concentrated benefits and dispersed costs, see Macey, *Public-Regarding*, *supra* note 108, at 229.
[128] Macey, *Public-Regarding*, *supra* note 108, at 229.

whether it is even worth the fight to save a few pennies even if they know they are suffering a cost imposed from the interest group getting the benefit).

Disney has sought power under the 1967 Act and from the entities authorized under the Act to expand influence and gain competitive advantages it might not have gained absent assistance from the legislative and regulatory advantages bestowed upon it. For example, the power available to Disney through the RCID structure as set up by the 1967 Act means that fewer competitors emerge vying to provide superior services to Central Florida, including in the tourism and entertainment industry. Disney's artificially created market advantage not only lowers its costs, but it also imposes costs on potential challengers to their dominance (because those potential challengers do not have the legislative or regulatory benefits and consequently have higher overall operational costs than Disney).[129] It would be as if all the incumbent Home Depots in one county had lower permitting costs and special access to government privileges. Lowes—Home Depot's competitor—is unlikely to come in as a disruptor when costs are sufficiently comparatively higher than Home Depot's costs that it cannot effectively compete. That differential treatment effectively forms a barrier to entry into the county. Consequently, Home Depot does not have to innovate, does not need to keep prices low in order to keep a captive consumer base (at least up until the point that their costs are so high that people are willing to drive long distances to shop at the competitor), and can suppress wages because there is no upward pressure on wages from a competitive employer. This is bad for consumers, for employees, for the community, and for the general economy. The analogy can be extended to the situation with Disney in and around the RCID and the barriers to entry for competitors.

Further exploiting its legislatively-imbued status, Disney has used its privileges to expand into unanticipated areas, like building a hotel empire at lower costs than competitors because of its statutory privileges and comparative advantages over those entities subject to county regulations.[130] Included in its profits have been those from a "spate of new projects that were immune from impact fees" in the 1980s.[131] All of these and similar examples provide further evidence that the results of their rent-seeking activities were to create a competitive advantage.[132]

Politicians will provide the products interest groups desire for myriad reasons. Sometimes, their ideological preferences or views of the public

[129] FOGLESONG, *supra* note 8, at 90 (providing examples of where stagnation occurs because Disney is not challenged by competitive market forces).
[130] *Id.* at 108, 112.
[131] *Id.* at 112-113.
[132] *Id.* at 113.

interest—which themselves may sometimes be colored by the influencing effects of information or disinformation campaigns from the interest group seeking the benefit—are in line with what the interest group desires. When there is widespread belief that the actions are in the public interest or furthering a political agenda shared by constituents, a decisionmaker may see financial and other support flow from their constituents, separately motivating their willingness to believe in and adopt the position.[133] In such situations, a legislator may actually be acting according to principle, but the alignment-inducing efforts by the interest group help the chances that the interest group is, in effect, specially benefitted.

Often, interest groups will exploit such alignments or control information seeking to "re-align" the legislator's ideological conclusions.[134] The self-interested legislator will do something favorable for the interest group, because it feels good to do it—after they have been convinced that doing something special requested by Disney, for example, is doing good for the people of Central Florida. The masks discussed below play a key role in this process, where interest groups can convince a legislature that what they are proposing is "good for Florida" first and only secondarily good for Disney. An effective interest group lobbyist might also pressure constituents to encourage their elected representative to adjust a position.[135]

The legislator or government official may in fact be rationally ignorant of the true private interest nature of the legislation.[136] Some officials may even believe that legislation or another requested government action is in the public interest, believing the mask that is placed on it is actually the

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

[134] Lloyd Hitoshi Mayer, *What is This "Lobbying" That We are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 523 (2008) ("interest groups may try either to convince a legislator that the group's position matches the legislator's personal policy preferences or to shift those preferences to better align with the group's preferences."); Macey, *Public-Regarding*, *supra* note 108, at 230-31 ("This control of information, particularly regarding complex issues, enables interest groups "to distort congressmen's thinking on an issue—normally all an interest group needs to achieve its ends.'").

[135] Mayer, *supra* note 134, at 523 ("Interest groups also try to convince the legislator's constituents that the group's position should be preferred by them and, if they are successful, the groups then try to communicate that preference to the legislator.").

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

genuine face.[137] In other situations, a legislator may cooperate in an interest group bargain when vote trading is at stake, supporting interest group legislation because they anticipate future performance from the requesting legislator on legislation the go-along legislator cares about (for whatever reason she cares).[138] Other modes of influence could be exercised by an interest group to curry favor from a political decisionmaker as well. On the more cynical side, researchers identify that this game is sometimes successful because cooperation inducing measures can include "political support, promises of future favors, outright bribes, and whatever else politicians value,"[139] including honoraria for speaking engagements, promises of employment (in lobbying or elsewhere) after retirement,[140] getting invited to the best parties, or free passes to and special perks for the legislator, district official, or other decisionmaker of consequence capable of affecting the interest group's interests and her family when visiting a theme park, for example, might be traded for governmental action or inaction beneficial to the interest group. The desire to be reelected, seeking higher office, or seeking a lucrative or prestigious post-legislative job could induce a legislator

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[137] Macey, *Public-Regarding*, *supra* note 108, at 251 (explaining that "statutes may also be passed with public-regarding facades because special interest groups often control the flow of information to lawmakers. Congress, relying on this information, may pass statutes that it believes are unambiguously in the public interest, but which in fact are riddled with incidental benefits to interest groups.").

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

[139] Macey, *Public-Regarding*, *supra* note 108, at 228. Zywicki further explains the politician's incentives:

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

Zywicki, *Externalities*, *supra* note 136, at 890.

[140] Greg Easterbrook, *What's Wrong with Congress? Before Congress can lead the Nation, It must be able to lead Itself.* 254 ATLANTIC 57, 70–72. Mayer describes a wide range of favors interest groups might offer to legislators:

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

Mayer, *supra* note 125, at 524.

to support an interest group preference.[141] But again, these interest group privileges are often generated with none of those overtly self-serving dynamics at play.

Using any of these techniques, from appeal to ideology all the way to the appeal to campaign budgets, pocketbooks, and ego, interest groups know how to hit the "pressure points" where legislators can be swayed to vote for a private interest bargain—sometimes unknowingly subverting the public interest because the information control operation by the interest group has been so effective.[142] The political decisionmaker may authorize what ends up being a concentrated interest group benefit without corresponding gains for the public interest believing the action sometimes believing it principally serves a public interest goal, knowing of the private interest nature of the legislation, sometimes knowing of the private interest nature but believing it serves a greater public interest, sometimes willfully blind to the private interest gain, and sometimes just ignorant of the fact that the primary beneficiary of the legislation is a private interest group.

Public and political decisionmaker information costs play a pivotal role in interest group success.[143] The information costs incurred to discover the impact of any single legislative issue on the taxpayer are high, thereby deterring him from identifying his interests in the first place.[144] Fighting

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[141] Zywicki, *Externalities*, *supra* note 136, at 888 (discussing "fame, power, and money" and the need for money in reelections and campaigns for higher offices).

[142] Mayer provides a useful list of these "pressure points":

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

Mayer, *supra* note 125, at 522.

[143] Macey, *Public-Regarding*, *supra* note 108, at 229. As Macey explains:

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

Id.

[144] Morriss et al., *Choosing*, *supra* note 102, at 225 (describing the role of rational ignorance in rent seeking).

against the government is thereafter expensive, and it is seldom cost-efficient to wage a fight against any particular piece of special interest legislation even when one can see the harm being done. That is the brilliance that makes rent seeking successful for interest groups. The dispersion of costs, itself, is meant to limit the incentives for any one person to challenge a particular piece of interest group legislation. The dispersion also creates substantial information costs to the public in obtaining and exposing the private nature of any legislative deal. [145]

As Macey explains, "One of the primary reasons for the public's failure to rise up in indignation at the special interest nature of certain pieces of legislation is simply the cost of discovering what Congress is doing."[146] It will be rational to remain ignorant of the effects of legislation, even when such legislation could do one harm.[147] It is just too expensive to learn of the offending legislation, and even after learning of it then expending resources to prevent the harm would be irrational as well.

Consider, for example, an individual that lives near an industrial park that includes a number of different polluting facilities. This individual suffers $1 of harm from the pollutants present in the air which might be caused by and traceable to one of the nearby facilities. First off, this harm is so negligible that the person may not even know she is suffering harm. In such a case, she does not even know she needs to see a doctor and does not even know that she should be upset at the polluters. Meanwhile, assume that while

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

[146] Macey, *Public-Regarding*, *supra* note 108, at 256.

[147] Morriss et al., *Choosing*, *supra* note 102, at 225-26 ("Rational ignorance means that individuals consider the benefits and costs of being informed. . . . When there are no perceived benefits to having additional information but there are costs, the individual rationally chooses to be ignorant on that topic."). Zywicki also explains the concept:

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

Zywicki, *Externalities*, *supra* note 136, at 855.

feeling completely normal she wants to see a doctor for $10 to ask whether she is suffering any harm or hire an expert for $10 to test the air in order to discover the $1 of harm. It would be irrational to take either diagnostic step, the cost of which already exceeds the harm let alone what would be required for the cure.

Assume next, alternatively, that the harmed individual knows she is suffering $1 harm. This individual is not likely to spend what is required—let us say again $10—to investigate the source of the harm, bring a lawsuit, and ultimately hope to recover the $1 in damages. Thus, the rational individual either a) never discovers that she is being harmed, or b) discovers that she is being harmed but again considers it irrational to try to fight against the harm. The same is true of the general member of the public suffering negligible harm from any one piece of legislation as the costs are dispersed across the population. Consequently, even if there were an opposition force to Disney's actions capable of becoming informed about the special interest nature of Disney's deal and the costs it disperses, or imposes, on them; and even if that person or entity were then interested in challenging the action; it would likely not be worth it to them or at least not worth enough that they would be willing to outspend Disney, the party getting the concentrated interest.

Furthermore, when there is an absence of robust and diverse constituencies sounding concerns, it is in the interest of those seeking favor to create or play on biases in their favor. Only when competitive views are present can those tactics be diffused or can the biases be effectively challenged. Of course, in the RCID example, there are concerns with a failure to encourage consideration of diverse options grounded in a public interest guidepost, rather than a Disney-focused definition of public interest. Furthermore, the absence of a diverse set of landowners and taxpayers builds in an unnatural limit on the number of voices even present within the RCID to generate critical review, let alone incentivized enough to make themselves heard.

Dispersion helps avoid transparency and helps those involved in interest group bargains escape scrutiny. Thus, the true impact of private interest legislation is hidden by a kind of "pocketbook depletion by a thousand cuts." Each single cut is effectively safe from challenge by the high costs to get the information necessary to decide whether to challenge, by the high costs of the fight itself, and then by the low gains even if such a challenge is successful.

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

they create (the absence of legislation) with everyone.[148] Known as the "free-rider" problem, it is irrational for most individuals to incur the costs of fighting alone.[149] Identification of similarly situated individuals and collective action problems make it too difficult to form a group that could share the cost of a legislative fight to defeat the legislation or other political act.[150] Thus, there will be little incentive for affected persons to come together to fight legislation or regulation, especially in light of the low prospects for success when facing more organized, pre-existing coalitions.[151] As a result of the public ignorance, there are few repercussions for political decisionmakers that are complicit in, or simply mistakenly allow, interest group transfers that benefit a single private party or small set of private parties at the expense of general public or constituents sharing a widespread cost.[152]

All of these dynamics demonstrate why it is not surprising that the 1967 Act sailed through despite being a massive transfer of private gains to Disney through public means. Indeed, aside from the impact dispersed among all citizens of Florida, the 1967 Act also is dispersing higher costs on certain individuals most directly suffering indirect impacts because they live nearby or competitors who are put at a disadvantage. But these outsiders actually have very limited ability to hold RCID actors accountable as well even if the higher burden would change their cost calculus. These affected parties are not only potentially blinded by the masking effects or suffering such a low burden from the dispersion of costs that they will never be incentivized to resist. They are saddled with another constraint that will keep them from acting as a check on this kind of arrangement—principally that, as outsiders, they have no access to RCID powers.

Interest groups face no such information cost or spending barrier. With a concentrated benefit on the line, the interest group involved has almost no information costs to identify that they like the legislation or what the legislation says—they, after all, propose, draft, and set the contours of the legislation or other request for political favor themselves. When lobbying for

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[148] Macey, *Public-Regarding*, *supra* note 108, at 229-230 ("It is costly to acquire and disseminate information about these wealth transfers, and any gains from efforts in this regard must be shared with everyone. Consequently, rational members of the public will not try to acquire information about these transfers"); MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 41–47 (1982).

[149] ROBERT MCCORMICK & ROBERT TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT 17 (1981).

[150] *See id.* at 18.

[151] As Macey explains, "[p]re-existing coalitions and groups of allied individuals will be more effective than dispersed individuals in obtaining transfers of wealth from society as a whole to themselves." Macey, *Public-Regarding*, *supra* note 108, at 229.

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

things like the 1967 Act and when seeking permissions from the RCID, Disney knows what it wants and knows how much it is worth it to them to get it.

The interest group will spend up to the amount of the large, concentrated benefit in order to obtain the rent, and this amount will almost always exceed what a rational individual who is sharing a diluted and dispersed cost would be willing to spend to oppose. Thus, with the imbalance of the interests and incentives, the calculus is tipped toward rent-seeking success.

Interest groups can also control the flow of information better than the regular, individual citizen, especially on more complex issues, thereby encouraging positive reaction to their agendas in legislatures and to the electorate.[153] That was certainly the case with Disney and the 1967 Act. Indeed, as discussed earlier, Disney had great command over the narrative, used creative ways to spin the project, and even exhibited a willingness to hide its true plans regarding maintaining few inhabitants in the RCID. It knew the tale it needed to tell and told it. Foglesong presents documentary evidence from Walt's notes on plan documents that it was clear, from the lobbying effort for the RCID and beyond, "Walt wanted no permanent residents in his model community."[154] He had a privately-understood redline against voters yet presented a public face that promised something completely the opposite.

In recognition of the importance of information costs in determining the success or failure of interest group bargains, both legislators and interest groups have incentives to make the general public believe that their actions are public-spirited, and that the legislative agenda has nothing to do with private gain.[155] While this "masking" concept is discussed in greater detail in the next section, a few words are instructive here. Both the suppliers (legislators or other government officials) and the consumer-demanders (interest groups) of legislation or other governmental action or inaction will engage in activities that erect barriers to the public discovery of the true nature of their actions and that increase the information costs for any of curious members of the public or competitors.[156] They will do their best to

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[153] *See* NORMAN ORNSTEIN & SHIRLEY ELDER, INTERESTS GROUPS, LOBBYING AND POLICYMAKING 75-76 (Robert L. Peabody ed., 1978); GRAHAM K. WILSON, INTEREST GROUPS IN THE UNITED STATES 113-14 (Clarendon Press 1981).

[154] FOGLESONG, *supra* note 8, at 55.

[155] Morriss et al., *Choosing*, *supra* note 103, at 225 ("Politicians . . . seek to minimize their own costs when acting on behalf of interest groups or the general public.").

[156] Kysar, *supra* note 95, at 563 (2009) ("in the special interest context, lawmakers have strong incentives to obscure the true nature of the provision intentionally by masking it in

mask their activities in some public interest. While the actual effect of the legislation is a private interest transfer, the public face of the legislation—like massive economic growth, inviting the public to be part of building an exciting new City of Tomorrow, regional technological innovation, employment opportunities, etc.—is something that is harder to oppose (or in fact easy to support) and less likely to be investigated (even in the few instances where it might otherwise be economically rational to expend resources to oppose).[157] This is most successful when the public is deceived enough that this is truly a public-regarding effort to decide there is no need for them to engage in an investigation to figure out who the real winners and losers are in the political effort—*i.e.*, the public accepts the masking story. It also works, however, when the mask itself is enough to make it too expensive for anyone to consider investigating and expending resources to get enough information to determine whether the outward-facing justification for the legislation is or is not true. Those high information costs make masking work, which in turn makes rent-seeking successful.

Interest group investments and competition for the creation of legislation or regulation (or the defeat of legislation beneficial to a competitor) produce nothing. A few typically benefit, while many usually lose.[158] Zywicki calls these costs imposed on the general public "political externalities."[159] As Macey states, the rent-seeking model illustrates that "government will enact laws that reduce societal wealth and economic efficiency in order to benefit [specific] economic groups."[160] Simply put,

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public regarding terms; accordingly, one should expect ambiguity to arise often as a result of such subterfuge.").

[157] Macey, *Public-Regarding*, *supra* note 108, at 232.

[158] *Id.* at 230 ("The economic theory of legislation does not predict that all laws will enrich the few at the expense of the many, but it does predict that this will be the dominant outcome").

[159] Zywicki, *Externalities*, *supra* note 136, at 854 ("Through manipulation of the political process, benefited groups are able to impose externalities on the public without paying full compensation for the imposition of those externalities.").

[160] Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 479–80 (1988). Macey details some of the problems:

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

rent-seeking leads to a misallocation of societal resources disrupting the efficient functioning of the marketplace and stymying competition and the field of innovation that usually develops when firms compete.[161] It creates "deadweight losses" both as a result of the unproductive expenditures to create legislation[162] and the increased costs to "consumers" as a result of the rents created.[163] Moreover, spending to obtain or defeat legislation is diverted away from more productive ways to use those resources.[164]

C. MASKING AS A TOOL FOR RENT SEEKING BEHAVIOR

Public choice theory also reveals dangers of "masking" in the drafting and passage of legislation. Masking is the means of creating an outward *appearance* for legislation with *claimed* beneficiaries and promised positive public effects that are different from the inner motivations of the legislation with actual private beneficiaries and real negative effects on the public.

As noted earlier, the ruse, façade, or charade is accomplished in a manner that has taken many names in the literature including a mask, a curtain, cloak, or veil of legitimacy. Masking generally works to disguise the true nature of political decisionmaking in order to deceive the public and to increase information costs for uncovering the true private nature of any government action resulting from political deals.

The masking process is perhaps the most effective means for making private interest transfers successful.[165] With successful masking, the private interest transfer takes on a public-regarding appearance.[166] McGinnis and Mulaney explain masking as follows:

Congress may create opportunities to create "factual findings"

Id. (quoting OLSON, *supra* note 148, at 74).

[161] Tollison, *Economic Theory*, *supra* note 111, at 74. Tollison explains:

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

Id.

[162] *See* Tullock, *supra* note 111, at 228–30; Peter H. Aranson, *Theories of Economic Regulation: From Clarity to Confusion*, 6 J.L. & POL. 247, 270–72 (1990).

[163] Tullock, *supra* note 111, at 225.

[164] Alm describes the necessity for even those in unregulated industries, to expend resources to influence or block legislation. *See* James Alm, *The Welfare Cost of the Underground Economy*, 23 ECON. INQUIRY 243, 243 n.1 (1985).

[165] Macey, *Public-Regarding*, *supra* note 108, at 251.

[166] *Id.* at 251 n. 135 (discussing the "engrafting of 'public value' onto a statute to 'justify the exercise of governmental power.'").

> supporting their preferences and those of interest groups to shape interpretation of legislation and to "also provide a façade to mask what is really driving the content of legislation. For instance, if a powerful company is asking for anticompetitive regulations, the committee may create a focus on consumer complaints in the area. In fact, public choice predicts that members of Congress will try to create information to confuse the opposition while pleasing concentrated interest groups."[167]

The mask helps to increase the costs that opponents to legislation or the harmed general public must bear if they are to discover the underlying deal and effectively expose the private nature of the bargain.[168] In other words, it takes resources to peel back the mask. These high information costs are part of why masking is effective—most deals never get the exposure that would defeat them.[169]

Regardless of whether a legislator or other political decisionmakers knows that a piece of legislation or other public act they support is principally designed to concentrate benefits on a particular private interest and is not truly public regarding, the government decisionmaker will almost always spin their support in public interest terms and as consistent with their vision of good policy. Sometimes they will believe their own spin. Sometimes they won't. Either way, they can pretty easily generate effective cover. Private bargaining is indeed often hidden simply because the politicians statements about the benefits of the government action will usually mirror the politician's "ideological commitment" rather than reflect an image of private interest gain.[170]

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[167] John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 95-96 (2008).

[168] John O. McGinnis, *The Bar Against Challenges to Employment Consent Decrees: A Public Choice Perspective*, 54 LA. L. REV. 1507, 1530-31 (1994) (explaining the means by which politicians can raise the information costs for those opposing their actions by disguising the true objectives of their actions); Macey, *Public-Regarding*, *supra* note 108, at 232 n. 47 ("By masking the true purpose of a statute and claiming that it is actually in the public interest, legislators and interest groups lower the cost of passing statutes that transfer wealth to themselves.").

[169] Zywicki, *Externalities*, *supra* note 136, at 890 ("the average rationally ignorant voter lacks the time and resources to attempt to see behind this self-serving rhetoric and determine whether it is true, partly true, or even completely fabricated," and "[w]here a voter has no incentive or reasonable ability to ascertain the truth of certain statements, individual preferences for government action are likely to be highly malleable and manipulable.").

[170] Helen A. Garten, *Devolution and Deregulation: The Paradox of Financial Reform*, 14 YALE L. & POL'Y REV. 65, 91 (1996) ("ideology helps to mask the bargaining process from public view and criticism"); Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491,

Legislators or other political decisionmakers—to the extent they understand and are not themselves deceived by the lobbying happening for the wealth transfers accomplished through the special privileges they support—have as much incentive as interest groups to hide the private interest nature of political deals.[171] Exposure of the private interest nature and bargain in the production of any piece of legislation or similar product of governmental action is harmful to the public decisionmaker's sale to the electorate or other constituencies and concomitantly harmful to the interest group's quest for durability, because transparent private interest deals are more susceptible to challenge.[172] It also is harmful at the ballot box. It may cost too much to defeat legislation or regulation for it to be rational for a voter to expend resources trying to oppose it; but voting against a legislator or board member you think is in the pocket of a private interest group is pretty cheap. Thus, there are real consequences to legislators if they are exposed to be "in bed with a special interest."

It is almost always possible to make some claim that the public interest is advanced in legislation.[173] And, it is difficult to see past the patina covering the real purpose even if that gloss is only thin.[174] Furthermore, "the question [of] whether the legislative action has a public purpose is always one that the legislature purports to have decided affirmatively,"[175] regardless of whether that is true. To the extent they know of it, no rational legislator or political decisionmaker would admit openly to the general public the rent-

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2539 (2005) ("As Gordon Tullock remarked, most citizens 'realize that the government can be expected to do things in their personal interest only if it at least superficially fits the public image.' Many are surely sincere in their ideology, but that ideology also matches their self-interest.").

[171] Macey, *Public-Regarding*, *supra* note 108, at 232. Macey explains masking as follows:

> Interest groups and politicians have incentives to engage in activities that make it more difficult for the public to discover the special interest group nature of legislation. This often is accomplished by the subterfuge of masking special interest legislation with a public interest facade. To the extent that this can be carried out successfully, the political costs to legislators of enacting special interest legislation will decline.

Id.

[172] William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975) (explaining interest groups' desire for durability in legislation)

[173] RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 382 (1981) (arguing generally policies under the lens of interest-group theory, if "evaluated honestly and realistically, would be found to lack any true basis in the public interest.").

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

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

seeking deal that lies beneath. To the extent these decisionmakers do not know of it because they have been convinced by the mask, they suffer the same information deficit as the public and are unable to inform the public of it.

And legislators who understand there is a private beneficiary but are in favor of the action will make efforts to ensure that the private transfer is not transparent from the face of the statutory text nor from an examination of the supporting background materials like legislative reports or other pieces of legislative history.[176] It is, therefore, exceedingly difficult to expose private interest motivations in legislation, regulation or other public decisions.[177] The more hidden the true nature of the deal, the harder (and therefore more expensive) it will be to find out the true beneficiaries in the act, making for conditions that ensure a low probability of exposure.[178] Lofty terms like economic growth, community development, social justice, environmental concerns, or the public good regularly abound to mask private deals.[179]

The mask not only hides the true nature of the deal, but it also gives people a rationale, or a justification, that allows them to buy in to the purported goal and thereby support the legislative bargain without feeling a need to further investigate the true nature of the deal. When the supplier-politician believes in the purpose the mask projects, they become less interested or unaware of the need to reveal what is behind that mask.

Indeed, an interest group will sometimes be interested in deceiving the lawmakers as well, rather than working together with them on a redistributive deal. Sometimes legislators and other political decisionmakers

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[176] Macey, *Public-Regarding, supra* note 108, at 239 ("The interest group nature of a statute will not generally be available on the statute's face or in the legislative history.").

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

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

[179] Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reenforcement*, 83 DENV. U. L. REV. 1, 18 (2005) (Public choice theory "burst the bubble" of the civic republic model by explaining that "Laws adopted ostensibly to help the public are in reality the masked use of government to help one group at the expense of others – be it business interests who are helped by regulation of their competitors or outdoor enthusiasts aided by laws restricting private development in parklands.").; Georgette Chapman Pointdexter, *Land Hungry*, 21 J. L. & POL. 293, 319 (2005) (It is a "reality that the most vocal advocates of [sprawl] legislation are purely self interested actors. Reliance on the more politically palatable arguments of the environment and of social justice masks the true motivation of preservation of their own land value and way of life.").

will be duped into believing that private beneficiary legislation or other output is public regarding because the mask is so persuasive and effective, and they are a target of the masking campaign. Disney, for example, was very good at directly selling legislators on its big picture justifications for its requested private governance regime.

Part of the reason why Disney's influence has been sustained, why the belief that Disney is vital to the community has become so embedded, and why the use of governmental resources to benefit Disney has been so deeply accepted as legitimate, stems from highly successful masking that has covered the blemishes of the 1967 Act and hidden the wealth-transferring nature of Disney's influence. Disney clearly deployed several masks in its public relations campaign posturing that the 1967 Act, RCID powers, and Disney privileges were in the public interest, many of which it still uses to hide the private benefits it receives from the public entities over which it exerts substantial influence and control. Those masks have shielded Disney's actions from optimal scrutiny.

One common mask used by most developers is the "promotion of economic growth as a public interest" mask. As explained earlier, the grand promise of impressive infusion of capital into the Central Florida economy was an attractive pitch. It was promoted that the company is investing in the community, so you should not look too closely at how it is being done. If you curtail it, your community will lose out on the growth, new businesses, and jobs created. Many variations of "what is good for Disney is good for Florida" pop up across the debates over the 1967 Act and in the general media coverage of Disney and its critics. Indeed, in my conversations with CFTOD employees, I observed that several continue to hold a belief that helping Disney is a public purpose, rather than presenting their thought processes as identifying first what is in the public interest and then deciding independently whether to do it regardless of its impact on Disney.

Futurism, with attendant progress, was another alluring mask. Comparing the future under Disney to the troubling and struggling image of cities then present in the 1960s offered a vision of hope and wonder.[180] It also made it easier to sell the idea of dispensing with traditional notions of governance as outdated and perhaps even as impediments to progress. The notion pitched was that the "City of Tomorrow" cannot be anchored in outmoded theories of democratic governance of the past. Walt Disney's famous promotional film for EPCOT touted that Disney would fill a "public need" with its "special kind of new community."[181] By framing the rejection

[180] *See, e.g.*, Foglesong, *supra* note 8, at xi.
[181] *Id.* at 67.

of old systems of governance as a pathway to progress, the mask made it seem less like Disney was seeking exceptions from clearly established and respected modes of governance. The idea of needing flexibility to always be in "a state of becoming" projected an image of dynamism with adaptability to a fast-paced future that would be driven, in part, by Disney's pioneering spirit.[182] Indeed, the idea that innovation required an experimental city with no voters even attracted local newspapers to sell the anti-democratic concept as visionary and revolutionary.[183]

Similarly, Disney promoted an efficiency and flexibility mask—explaining that government barriers were impediments to efficient decisionmaking and progress. To the extent Disney sought relaxation of standards, it was simply to make things move faster and to allow adaptation to the city that would be always in a "state of becoming," always improving, and never in stasis. Disney's large operation could only be successful if there was this flexibility, so they claimed, and any insistence on application of normal government rules would delay the gains from Disney's investment. As noted earlier, this mask ignores the reasons why governments are intentionally inefficient at generating rules to preserve other values of liberalism, including transparency and democratic accountability.

Walt Disney also dressed up his proposals in a "privatization and deregulation" mask.[184] Closely related, he had a regular claim that this was all in the spirit of "free enterprise without help."[185] Never mind that the 1967 Act would be more accurately labeled "government sponsored enterprise with coercive help." These masks were designed to make these proposals seem market-driven and libertarian. And, they are powerful covers. Nonetheless, the mask hid the fact that it was really crony capitalism that Walt was proposing, with the abuse of government power to favor some over others. The insulation of some favored private activity from political accountability—with concomitant government sponsored competitive advantages doled out to certain companies and not others— is not the same as privatization. And, "free enterprise" is the absence of government, not the private commandeering of government for artificially-created market advantage.

In addition to masking, there are other means of coloring the perspectives of potential critics, decreasing the likelihood they might mobilize in opposition. And there are other tactics for motivating others to become allies. Several mechanisms have been deployed by Disney to make

[182] *See, e.g., Id.* at 6-7.
[183] *See, e.g., Id.* at 65-66.
[184] *See, e.g., Id.* at 11.
[185] *See, e.g., Id.* at 104.

it harder for members of the RCID and the community to appreciate the dangers of Disney's vast influence over irregular governing processes or to generate biases in Disney's favor. Disney has a constant incentive to manufacture alignment of interests between it and the political decisionmakers in and around the RCID and Florida generally. And, it has a constant incentive to influence the public narrative in its favor. Disney has planned the demographics and conditions of residency to make the existing "voters" in the RCID and the employees of the RCID purposefully aligned with Disney rather than truly independent voters. As one group of commentators recently opined, for those areas of governance where the residents have voting powers, "Because the residents work for Disney and only pay $900 annually for a lot space, it is safe to assume the votes sway in the company's favor."[186] Foglesong documents a lot of personnel overlap and successive employment situations between working for Disney and working with the RCID,[187] meaning the community is steeped in Disney's propaganda and reliant on Disney for its lifestyle.

Disney doles out perks to generate good will. For example, the RCID for decades had been, at Disney's suggestion, purchasing "Annual passes to Disney's theme parks [as] a benefit for Central Florida Tourism Oversight District employees, retirees and their families"—purchased by the RCID at the direction of Disney.[188] The passes gave RCID employees perks not available to the general public, and evidence of their power is seen in the uproar that ensued when the CFTOD discontinued the passes benefit this year.[189] As the CFTOD explained when making the cut: "For decades, the former Disney-run RCID used taxpayer funds to provide season passes and amusement experiences to its employees and their family members, cover the cost of discounts on hotels, merchandise, food, and beverages, and give its own board members VIP Main Entrance passes. In 2022 alone, it cost taxpayers over $2.5 million;" [190] and "The latest bill sent to CFTOD from Disney features a charge of $492,382.96 for 'Q1 FY22 Tickets.'"[191] Foglesong also explains how similar free pass schemes were used to create alignment with legislators. For example, the "silver passes that Disney gave to elected officials throughout the state. They provide unlimited access to the

[186] Rockwell et al., *supra* note 25, at 51-52.
[187] *See, e.g.*, FOGLESONG, *supra* note 8, at 126.
[188] Luana Munoz, *Central Florida Tourism Oversight District employees push for Disney pass benefits*, WESH2, available at https://www.wesh.com/article/disney-passes-central-fl-tourism-board/45131072.
[189] See, e.g., id. (covering the news development."
[190] Press Release: *Referral Made to Inspector General Regarding Scheme to Funnel Millions of Taxpayer Dollars to Disney as Season Passes*, available at https://www.rcid.org/pr_igreferral/.
[191] *Id.*

park for the car card holder, a spouse, and three guests."[192] Although Disney ultimately pulled back on the silver pass initiative as an automatic perk for legislators after concerns were aired about ethical problems associated with these gifts, the practice continued just in a different form because officials could still ask for the passes.[193] These and other measures create a natural constituency for Disney.[194] They make individuals feel indebted to Disney. And, Disney makes conscious efforts to make people, including RCID employees, feel proud to feel like their public service responsibilities are aligned with acting as agents of Disney. Each of those consequences of Disney's influence efforts are threats to independent decisionmaking grounded in the public interest. There is a concerning level of influence and control in the structure and culture of governance, making these circumstances worthy of further scrutiny and reform from the CFTOD Board or the Florida Legislature.

V. CAPTURE AND REPEAT PLAYERS

The positive political theories that seek to explain how and why institutions operate, including public choice and other aspects of the law and economics discipline, offer several additional insights from the perspective of analyzing limited purposes government entities, limited constituency public entities, the impact of the repeat player phenomenon, and the conditions that make public entities susceptible to capture by private interests. Disney had an interest in creating the type of special district over which it could increasingly exert control. Again, the law and economics literature predicts that regulatory entities with a highly narrow and limited constituencies can easily be captured[195] by those constituencies such that the

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[192] FOGLESONG, *supra* note 8, at 117 (as a result of the ethical concerns raised, "Disney Co. in 1990 stopped sending these passes to officeholders as an automatic perk, though officials could still call and ask for them.").

[193] *Id.*

[194] Skyler Swisher, *Don't take our Disney perks, employees urge DeSantis' tourism board,* ORLANDO SENTINEL, Aug. 23, 2023, available at https://www.orlandosentinel.com/2023/08/23/dont-take-our-disney-perks-employees-urge-desantis-tourism-board/ ("Employees at Gov. Ron DeSantis' tourism oversight district urged leaders Wednesday not to strip them of their theme park passes and Disney discounts, calling the longtime program a treasured benefit that drew them to work there.).

[195] Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105 n. 3 (1995) ("The term "captured" is drawn from "'capture theory,' a primitive version of the economic theory of regulation which predicts 'that over time regulatory agencies come to be dominated by the industries regulated."') (quoting Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 341 (1974)).

entity starts to serve the interests of the regulated rather than the public interest or their statutory mandate.

Applying these insights, we can see that the creation of single interest districts—especially when the legislation creating them is drafted by and lobbied for by private interests—predictably leads to a governing entity driven to serve the private concerns of the private companies it regulates. In fact, empirical studies show that very narrow purpose regulatory entities are easily captured when they have a narrow group of constituencies.[196] What especially makes this work is the repeat player phenomenon. Professor Jonathan Macey of Yale Law School explains that, "Interest groups that are repeat players before an agency are likely to be favored by an agency over groups that seldom interact with the agency. Single interest group agencies are likely to favor the interest groups they regulate over other groups."[197] An example is useful. Macey documents, for example, how, much like the RCID with Disney, the "Comptroller of the Currency is a single-interest-group regulatory agency," with that interest group "comprised of national banks, which have received the undivided loyalty of the Comptroller in their efforts to enter the business of dealing in securities."[198] The Comptroller becomes captured by the banks and becomes their de facto agent rather than an independent actor monitoring the banks. In the Disney and RCID situation, capture will become more costly and less likely only by erecting hurdles to government action, adding separation of powers-like layers, or imposing other constraints, or by diversifying the types of constituencies vying for the Board or future alternative governance authority's attention.[199]

The RCID, from the start with its structure set up in the 1967 Act, had a design flaw, captured from the outset by the dominating interest group that lobbied to create it, Disney, to act as that interest group's private government. Capture dynamics predict that the RCID is unlikely to be independent and will be incapable of adequately considering policy choices that are against Disney's interests, as Disney is a dominant constituency, repeat player that—absent adequate safeguards built into the system—will always have built-in disproportionate influence and the capacity to capture the RCID/CFTOD's powers for private gain. Only by injecting more process and diversifying the constituent base in the CFTOD can this kind of capture be guarded against. Any considered reforms should take these and other insights from positive political theory into account.

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[196] Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992).
[197] *Id.* at 678.
[198] *Id.* at 688.
[199] *Id.* at 691.

VI. CONCLUSION

Time-tested structures designed to limit governmental action and prevent private cooptation of governance for private profit have purpose and utility. They prevent the concentration of benefits on a few powerful special interests at the expense of the public and ultimately at the expense of market competition. Favored private actors, like Disney, should not be given an artificial leg up over other less-favored or less-powerful private actors in the marketplace.

This Report is a first step in a much-needed inquiry into the legal and constitutional authority and infirmities and structural strengths and abnormalities that exist within the governance of the former RCID (now CFTOD) and associated governance regimes and from the statutory or regulatory privileges granted to specific corporate entities. It has evaluated the contours of the 1967 Act, the authorities of the RCID, and the good governance and democratic accountability concerns associated with each. And, it has conducted an initial, first-of-its-kind assessment of the 1967 Act and RCID authority from a law and economics perspective, including applying public choice theory to reveal the interest groups bargains at play in the Act and corresponding governance regime, the potential for Disney capture of the governance regime, and the masking process that has made it difficult to expose or reveal the private-regarding nature of the RCID authority and 1967 Act and that has, thus, helped some of the Disney's the RCID's actions and authorities escape critical review. Much of the Report also exists as a predictive model explaining what the academic literature would expect to happen with the governance arrangements currently in place.

While this Report has already identified substantial factual support to test those predictions, a continuation of this evaluative process should be a major focus of future investigative efforts to develop an even more complete record regarding RCID and Disney operations on the ground across the past fifty-six years. The standards of good governance and democratic accountability can be restored to this area, but doing so will require an analysis of the infirmities in the system across those metrics. And it requires an acknowledgement of the duty to take corrective action to infuse the system with these features and to excise from the system the undue private influence that is propped up by the 1967 Act, by the RCID structure, and by the failure to expose and publicly acknowledge the infirmities brought by private interest dominance.