Public Choice and the Legal Academy

Jonathan R. Macey
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
http://digitalcommons.law.yale.edu/fss_papers/1424

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
BOOK REVIEW

Public Choice and the Legal Academy


REVIEWED BY JONATHAN R. MACEY*

INTRODUCTION

In *Greed, Chaos, and Governance*—a truly good good book about the modern administrative state—Jerry Mashaw employs public choice to analyze a number of the most important topics in public law, including rationality review, delegation of lawmaking power to administrative agencies, administrative process, judicial review, and the separation of powers. Professor Mashaw offers interesting and important insights that should significantly impact the scholarly debate in these areas. Before presenting his wonderfully insightful material, Professor Mashaw devotes the opening two chapters to public choice generally. After criticizing public choice theory in these chapters, Professor Mashaw curiously applies the theory in his subsequent chapters—with every chapter of the book better than the one preceding it. By chapter three, the book has become interesting and provocative. By chapters six and seven, the book has become very good, and the last couple of chapters are truly great.

All in all, Professor Mashaw has produced a book that is simultaneously interesting, important, unusual, and frustrating. Interesting and important because it contains an extended and informed discussion of constitutional law, statutory interpretation, the administrative state, and the design of public institutions. Unusual because it strikes a rare balance between the bitterly competing ideological sides in the debate over the place of public choice analysis in policy analysis. And frustrating because this balancing act leaves readers with the impression that the author occasionally avoids firm conclusions.

*Greed, Chaos, and Governance* is frustrating for the same reason it is unusual. It is so relentlessly middle-of-the-road about important controversies that it will likely fail to satisfy those looking for conclusions. For example, with regard to both statutory interpretation and the legitimacy of rationality review (the legitimacy of allowing courts to strike down statutes because they are arbitrary, unreasonable, or otherwise irrational), Professor Mashaw starts from

* J. DuPratt White Professor of Law, Cornell Law School; J.D., Yale Law School, 1982; B.A., Harvard University, 1977.
1. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997) [hereinafter GREED, CHAOS, AND GOVERNANCE].
the position that the world has something to learn from public choice theory.² Mashaw, however, quickly backpedals from this position by adding that he does not mean that public choice offers ideas to adopt or arguments useful in evaluating rationality review.³

The growing acceptance of public choice analysis will lead to a healthy cynicism about the role of government. I think that the weakness of his chapters on public choice and positive political theory stems from the fact that Professor Mashaw identifies weaknesses (some real, some not) in various papers employing public choice analysis, and generalizes from those examples to the unsupported conclusion that the entire discipline of public choice should be condemned. In other words, while Professor Mashaw occasionally identifies genuine weaknesses in some of the articles that have employed public choice methodology, the mere identification of some weak papers within a field fails to justify condemnation of the entire field. Presumably, a number of weak papers also litter the field of evolutionary biology, but it does not follow that the entire field of biology should be condemned because of flaws in some papers.

Professor Mashaw opens his book with a critique of public choice to argue that people should not take public choice theory too seriously. Of course, nobody, even the most ardent proponents of public choice analysis, thinks they are taking public choice too seriously. And, unless Mashaw convinces his readers that the theory is somehow flawed, he is unlikely to convince them that its implications should be ignored, particularly in the absence of a rival replacement theory.

To restate the point more precisely, public choice is a branch of economics, which is, in turn, one of the social sciences. Social scientists develop testable hypotheses and subject these hypotheses to rigorous empirical scrutiny. No social science theory is perfect. Flaws exist because social science models necessarily simplify the highly complex real-world phenomena that they were designed to describe. In the social sciences, theories survive until a competing theory more accurately rationalizes the real-world phenomena the theories were designed to describe.

From this perspective, it is difficult to know what to make of Professor Mashaw's plea not to take public choice too seriously. He offers no alternative theory with which to replace the doctrine he criticizes. Therefore, it is difficult not to accord public choice analysis primacy of place among the competing theories that seek to explain the process by which law is generated in democracy. After all, as the saying goes, it takes a theory to beat a theory. And the only competitors to public choice theories are public interest theories. But among serious scholars, the economic approach to regulation contained in public

². See GREED, CHAOS, AND GOVERNANCE, supra note 1, at 51.
³. See id. At this point, I would be remiss if I did not disclose that it should not surprise readers that I find the book frustrating. After all, I am a vocal proponent of the very public choice analysis that Professor Mashaw finds somehow to be vaguely threatening.
choice analysis "long ago put public interest theories of politics to rest. These theories have been correctly viewed as normative wishings rather than explanations of real-world phenomena. They have been replaced by models of political behavior that are consistent with the rest of microeconomics."4

In other words, Greed, Chaos, and Governance will ultimately frustrate readers because—like other critics of public choice—Mashaw suggests no alternative method of analysis with more explanatory power.

Professor Mashaw may assert correctly that many scholars utilizing public choice analysis in their research take the methodology too seriously. But it would be nice to know who they are. After all, nobody thinks that public choice theory captures all of what transpires in public life. Indeed, most of us who labor in the field of public choice cheerfully admit that the theory has major theoretical deficiencies and empirical shortcomings. Contrary to Professor Mashaw's notions, the reason public choice is such an attractive approach for so many people is not because it explains everything, but because it explains more than any of the other available approaches to the study of democracy and public institutions. Thus, even when Professor Mashaw's criticisms of public choice are on the mark, as sometimes they are, in the end we cannot reject public choice in the absence of a satisfactory alternative approach.

Professor Mashaw's book implicitly acknowledges this final point. After initially criticizing public choice, Professor Mashaw devotes much of the balance of the book using this desperately flawed approach to evaluate the use of rationality review by the Supreme Court,5 the administrative process,6 the delegation doctrine,7 judicial review of administrative agency action,8 and the separation of powers.9 And Professor Mashaw recognizes the value of public choice in resolving the "countermajoritarian difficulty" of judicial review in democracy.

Part I of this review examines Professor Mashaw's treatment of public choice theory. Part II takes a highly selective look at some of Professor Mashaw's ideas about public law. A conclusion follows.

I. Mashaw's Public Choice

As the title of his book suggests, Professor Mashaw is disturbed by the fact that late twentieth-century Americans predominantly view public life as a world of greed and chaos, private self-interest, and public incoherence. Professor Mashaw worries that this view provides a big challenge for designers of public institutions because according to this view, all public actions are deeply sus-

5. See GREED, CHAOS, AND GOVERNANCE, supra note 1, at 50-80 (Chapter 3).
6. See id. at 106-30 (Chapter 5).
7. See id. at 131-157 (Chapter 6).
8. See id. at 158-80 (Chapter 7).
9. See id. at 181-98 (Chapter 8).
As a descriptive matter, Professor Mashaw correctly identifies the people's cynical view about government, and public choice theory both contributes to and reflects this cynicism. But what about Professor Mashaw's unsupported assertion that this cynicism is a recent phenomenon? The Framers were pretty cynical about government, too. Indeed, concerns about the corruption, incompetence, and systemic failures of state governments informed much of the Framers' actions as they designed the Federal Constitution. Would Mashaw have wanted the Framers to abandon their preoccupation with controlling the destructive power of interest group politics, which they called "the violence of faction"? And what about Professor Mashaw's unsupported normative assumption that this cynicism is somehow harmful? Would he really prefer unexamined acceptance of the outcomes generated by public officials and public institutions? Would blind faith in the benign power of government be an improvement over America's long-standing reliance on self-help and individual responsibility that eschews the toxic codependence on government that crippled so much of the world after World War II? Professor Mashaw accurately asserts that Americans are becoming increasingly cynical about government, but he never explains why this cynicism is so bad.

Public choice theory applies game theory and microeconomic analysis to the production of law by legislatures, regulatory agencies, and courts. As Richard Posner has observed, much of public choice 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." In this model, politicians maximize political support to get re-elected. Citizens provide political support to politicians. Sometimes citizens demand laws and regulations, and sometimes they demand relief from laws and regulations. Citizens express their demand by voting, lobbying, and joining interest groups—like labor unions, bar associations, and other trade groups—that exert political pressure on elected officials and bureaucrats. Citizens also supply laws by paying taxes and complying with regulations that provide benefits to other individuals and groups. Groups compete among each other for political influence. The price that winning interest-group coalitions pay:

is determined both by the value of the legislative protection to the group's members and the group's ability to overcome the free-rider problems that plague coalitions. Payment takes the form of campaign contributions, votes,

10. See id. at 4.
implicit promises of future favors, and sometimes outright bribes. In short, legislation is “sold” by the legislature and “bought” by the beneficiaries of the legislation.\textsuperscript{14}

Politicians must maximize aggregate political support to survive in the Darwinian world of politics in which they must outcompete their rivals to retain office. Politicians who do not respond to interest-group pressures will be replaced by those who do.

As a descriptive matter, it is uncontroversible that:

\[\text{the major portion of government activity is devoted to the transfer of resources among citizens. The political support maximizing regulator or legislator serves both as broker and as entrepreneur. As a broker he gains political support by transferring resources among the various groups in society. As an entrepreneur he seeks to create groups that he can benefit, in order to receive political support from them. The discussion above implies not only that certain sorts of groups are more effective in obtaining desirable legislation, but also that certain sorts of issues will be most attractive to entrepreneurial politicians.}\textsuperscript{15}\]

Under public choice analysis, interest groups and politicians bargain under what might be described as Coasean conditions.\textsuperscript{16} In other words, differences in the transaction costs faced by rival groups will determine the outcomes of groups’ efforts to obtain favorable legislation. These transaction costs take two forms: information costs and organization costs. Information costs are the costs of determining the effects of a particular issue on an individual’s personal welfare. Organization costs are the costs of identifying similarly situated individuals and persuading them to participate in an effort to influence a particular legislative outcome.

Groups that are focused on discrete issues, well organized, and well funded will likely exert greater influence on the legislative process than those groups that lack clearly defined preferences, and are poorly organized and poorly funded. Not surprisingly, “individuals who want to affect the legislative process will find it advantageous to organize into political pressure groups in order to economize on the high costs of obtaining information about the welfare affects of impending legislation.”\textsuperscript{17}

Professor Mashaw argues that public choice theory is interesting and important, but should not be taken too seriously by policymakers. Professor Mashaw believes that public choice ought not be taken too seriously because: (1) the

\begin{itemize}
\item \textsuperscript{17} See Macey, \textit{supra} note 15, at 47.
\end{itemize}
theory makes some obvious predictive errors;\(^\text{18}\) (2) the theory is not well specified;\(^\text{19}\) and (3) its accounts of the electoral and legislative processes are implausible.\(^\text{20}\)

A. PREDICTIVE ERRORS IN PUBLIC CHOICE

What are the predictive errors of public choice theory that Professor Mashaw finds so troubling? First, he claims that public choice theory fails to explain the existence of deregulation. This claim is false. The same political dynamic that explains regulation also explains deregulation. As I have pointed out before, "[d]eregulation, much like regulation itself, is a rational political response to pressure from discrete economic groups that benefit from such deregulation."\(^\text{21}\)

Second, Professor Mashaw falls into the trap of equating public choice with elementary capture theory, suggesting, for example, that the fact that the Civil Aeronautics Board was not captured by the airlines is inconsistent with the result that would be predicted by public choice theory.\(^\text{22}\) As I have pointed out previously, however, public choice theory posits only that politicians maximize political support. Public choice theory does not assume that politicians generally maximize political support by organizing administrative agencies to allow capture by a single special interest. Rather, the winning strategy of politicians generally calls for compromise, instead of capture, when competing groups clash.

\[\text{Contrary to popular belief, the public choice model is, in fact, inconsistent with the rather primitive "capture theory" of economic regulation which posits that one particular interest group rather than a group of interest groups drives legislation or regulation. Competition among rival pressure groups with drastically differing views about what the legal landscape ought to look like leads to legislative compromise, not because compromise is in the public interest, but because it is the most effective strategy politicians have for maximizing political support.}\(^\text{23}\)

Professor Mashaw stands on no firmer intellectual ground when he contends that much legislation, particularly antipoverty programs, appears inconsistent with public choice theory, because such legislation apparently does not involve wealth transfers from the politically weak to the politically powerful (as public

---

18. See GREED, CHAOS, AND GOVERNANCE, supra note 1, at 32-34.
19. See id. at 34-35.
20. See id. at 35.
22. See GREED, CHAOS, AND GOVERNANCE, supra note 1, at 33.
23. Macey, supra note 15, at 46 (footnote omitted).
choice theory would predict). Public choice theory, however, accurately predicts the process of implementation of these programs, that is, it describes how interest-group activity dominates the day-to-day implementation of such legislation. Public choice has a lot of explanatory power in this context because interest groups are the only entities with the resources and the incentives to remain involved in the legislative process after the initial fanfare about the passage of a statute has died away. In other words, organized interest groups:

> do little to oppose legislation that is potentially adverse to their interests, especially when public opinion strongly favors the legislation. But, as opposed to individuals who voted for the legislation and who quickly forgot it once it was passed, the affected organized interests will be unrelenting in their efforts to influence the day-to-day details of the legislation's implementation. This influence will typically not be exerted on behalf of the broad public interest. Government attempts to help the poor, protect the consumer, and regulate business pricing and practices provide additional examples of supposedly general interest legislation that is subverted by organized interest groups. The initial motivation for the legislation may have been dominated by ideological considerations, but narrow economic concerns motivate the special interest influence that does so much to determine its effect.\(^2\)

Contrary to Professor Mashaw's claim, public choice does address the point that a great deal of legislation apparently serves the public interest. And, while narrow interest groups may only subtly benefit from statutes that apparently serve the public interest, public choice theory best explains the structure, implementation, and details of such statutes.

B. THE VAGUENESS OF PUBLIC CHOICE

Professor Mashaw complains that public choice theory is not sufficiently well specified for his tastes. This, too, is a weak argument. Public choice is as specific as other well-recognized social science theories, such as corporate finance, that operate at similar levels of abstraction. The relevant issue is whether the specific testable models that comprise the various components parts of the theory can be developed. They can be, and they have been. For example, an obvious implication of the public choice idea that politicians exchange legislation for political support is the prediction that "legislators seek assignment to those committees that have the greatest marginal impact over their electoral fortunes."\(^2\) In other words, legislators use their committee memberships to maximize political support. This simple observation yields a number of empirical insights. Members of committees are disproportionately successful in


bringing to their own jurisdictions the pork barrel projects generated by legislation in their committees. For example, John Ferejohn found that each member of the Public Works Committee in Congress obtained 0.63 additional projects for his state over nonmembers. Similarly, R. Douglas Arnold found that if a member of Congress wants a water and sewage grant for his or her home state, the chances for success are 80% higher if the member sits on the relevant appropriations subcommittee and 60% higher if he or she is a member of the relevant authorizing committee. These examples were chosen more or less at random. There are thousands of other examples of solid, highly particularized empirical research utilizing the insights of public choice theory. Two of my favorites are the finding that members of the Armed Services Committees received a statistically significantly greater share of defense spending than nonmembers, and the finding that businesses in congressional districts with oversight responsibility over the Federal Trade Commission (FTC) get investigated less frequently by the FTC when compared with their less well-connected rivals. This work constitutes a decisive refutation of Professor Mashaw's claim that public choice is too vague. Social science disciplines like public choice—or corporate finance—are robust because they provide a framework that permits researchers to develop and test interesting hypotheses.

Professor Mashaw illustrates his argument about the vagueness of public choice by pointing out that the theory does not predict whether the statutes conferring benefits on private groups will be drafted in specific or in vague terms. He observes that sometimes public choice theoreticians predict that legislation will be specific to assure interest groups that they receive something of value, while at other times, they predict that legislation will be vague in form and contain broad delegations of authority to administrative agencies to permit interest groups to benefit from agency capture. Here Professor Mashaw seemingly misses the point that both sorts of legislative drafting contain costs as well as benefits for interest groups. For certain issues and certain interest groups, the costs of a specific statute outweigh the benefits, while for other issues and other groups, the opposite will be true. The world is sufficiently complex to prevent one solution from dominating the rent-seeking process.

For example, when an issue is highly salient, and involves many different interest groups, the probability of one particular group capturing the relevant administrative agency is slight. Here a specific statute likely would be favored over a vague one involving open-ended delegation to an administrative agency. On the other hand, when an issue is highly complex and lacks salience with

30. See id.
voters, and when there are few competing groups interested in defining policy, a vague statute coupled with a broad delegation would appear desirable.

Professor Mashaw makes an excellent point about the state of public choice theory when he says that some interest-group theorists model interest-group bargains as being reached between interest groups and politicians, while others model interest groups as demanding legislation that is supplied by the general public. In this latter context, politicians serve as intermediaries among competing interest groups. But this is hardly a criticism of public choice theory. Rather, it is simply a recognition of the fact that there are competing schools of thought within public choice analysis, just as there are competing theories in other areas of academic inquiry, not only in the social sciences, but in the natural sciences as well.

C. THE IMPLAUSIBILITY OF PUBLIC CHOICE

Professor Mashaw argues that public choice theory is unsatisfying because it is implausible. In particular, Professor Mashaw notes that voters often do not behave in ways that public choice theory would predict. (Public choice predicts that voters will seldom be well-informed and interested and will generally be ignorant and apathetic.) Professor Mashaw seemingly argues that because people actually vote (at least occasionally) and because going to the voting booth is costly, voters must not be acting like the economic automatons predicted by public choice theory. Because any single vote in a particular election has almost no chance of determining the outcome, voting seems irrational, at least from an economic perspective.

Public choice literature has dealt extensively with this topic. To a large extent, voters vote because they enjoy voting. And there is every indication that people who vote do so according to their own private interests. Because everyone belongs to or identifies with some special interest group or another, there is nothing inconsistent between the practice of voting and public choice theory.

More importantly, voting is a much weaker signal of people's preferences than the signal conveyed in market-based consumption decisions. This is because an individual bears the full costs of bad decisions concerning the purchase of products and services, but all share in the costs of bad political decisions. It is no wonder that voters are so poorly informed. As Dwight Lee observed:

People do not go to the polls to vote for one candidate over another for the same reason they go to the supermarket to choose one product over another. In the supermarket an individual's product choice is decisive; the individual receives the product he chooses because he chose it. The motivation for making choices in the supermarket is dominated by outcome considerations. This is not the case at the polls. The probability that an individual's vote will

31. See GREED, CHAOS, AND GOVERNANCE, supra note 1, at 35.
be decisive in a typical election is effectively zero. An individual may or may not receive the political outcome she favors, but not because she voted for it. The outcome will be the same whether she votes yea, nay, or, not at all. The expectation of affecting the outcome has little to do with an individual’s motivation to vote.\textsuperscript{32}

Unless stupid, people do not vote because they think the election in which they are participating would otherwise likely end in a tie, so that their vote would be outcome determinative. They vote for other reasons:

people receive satisfaction from participating in processes they feel are important, from supporting things they believe are good, and from opposing things they believe are bad. People are motivated to go to the polls and vote for much the same reason they are motivated to go to the sports arena and cheer.

It is the satisfaction that comes from participation and expression, not the expectation that they will determine the outcome, that draws people to the polls and to the sports arena. There is no more difficulty reconciling voting with private interest than there is with reconciling attendance at sporting events with private interest.\textsuperscript{33}

The basic idea that interest groups play an enormously important role in shaping public policy seems so well settled as to be practically uncontestable. In the end, Professor Mashaw recognizes this, as he must. He concedes that none of his arguments should be interpreted “to deny that interest group activity is massive and that the potential impact of faction on politics should be a cause for concern.”\textsuperscript{34}

So what, then, is the point of Professor Mashaw’s complaints about public choice theory? Professor Mashaw claims that his criticisms about the state of public choice theory permit the conclusion that civic virtue, public spiritedness, and pursuit of the public interest are not dead. But here Professor Mashaw engages in a bit of intellectual sleight of hand or, perhaps he is not being completely honest with himself. After all, if Professor Mashaw demands that public choice theory generate unambiguous, highly precise, credible predictions, he should also demand that his public interest theory meet the same high standard. Mashaw, however, does not subject this alternative conception of public life to any scrutiny whatsoever. It seems very odd that the theory being rejected is the one receiving all of the critical analysis, while the theory being embraced is not analyzed at all.

II. POLICY

The starting point for any analysis of public choice as a policy tool must be the current status of judicial review of economic regulation. At present, the

\textsuperscript{32} Lee, \textit{supra} note 24, at 193.

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{GREED, CHAOS, AND GOVERNANCE, supra} note 1, at 36.
judiciary does not review economic regulation. The rule of the land is anything goes: Congress and state legislatures can do whatever they want.\textsuperscript{35} Professor Mashaw's analysis of this deplorable state of affairs is flawless, and fully consistent with public choice analysis. Professor Mashaw observes that courts' current, highly deferential posture toward economic legislation is justified by the argument that judges should not exalt any particular economic theory over any other economic theory. The requirement that legislatures justify statutes that interfere with freedom of contract gives "'freedom of contract' an unexamined and powerful constitutional status."\textsuperscript{36} At the same time however, Professor Mashaw points out that:

the current posture of the Court with respect to rationality review has a similar defect. From the perspective of public choice, it can easily be viewed as giving a similarly privileged position to the view that "democracy works" or that legislation "reflects the general will"—at least within the domain of what the court calls "social and economic legislation."

By refusing to review the substance of state economic legislation, the Court asserts the preeminence of the democratic political process. As fundamental values go, democracy is of course pretty unobjectionable. The point is that it is not always unobjectionable, nor does the category "social and economic legislation" identify a domain within which objections to democracy do not operate.\textsuperscript{37}

Professor Mashaw persuasively argues that courts should not refuse to review economic and social legislation. His argument is also fully consistent with public choice theory. Thus, one might ask why Professor Mashaw would criticize public choice theory so harshly in the two preceding chapters before making this excellent point: one which is consistent with the theory he attacks.

Professor Mashaw further points out that courts often engage in subterfuge to bypass the self-imposed prohibition on substantive judicial review of economic legislation. He recommends that judges hold legislative acts to a rationality standard. He counsels that the law should require facts supportive of legislative theories, and he points out that "[j]udicial restraint demands neither abdication nor deception."\textsuperscript{38} Not even the most hard-boiled public choice theorist would disagree. Public choice theory does not deny the existence of the public interest. Public choice theory simply recognizes that this public interest is often submerged to the narrow self-interest of discrete groups. To require that private activity be constrained only to serve the public interest, as Professor Mashaw recommends, would be fully consistent with the Constitution and with the

\textsuperscript{36} \textit{GREED, CHAOS, AND GOVERNANCE}, supra note 1, at 59.
\textsuperscript{37} \textit{Id.} at 59-60.
\textsuperscript{38} \textit{Id.} at 80.
theory of public choice. As Professor Mashaw writes, "[c]itizens have a constitutional right to demand that public law be public-regarding. Otherwise their private harms are constitutionally inexplicable." 39

Of course, Professor Mashaw is not unique in his view that judges should use techniques of statutory interpretation, as well as judicial review, to evaluate legislative enactments. In chapter four, Professor Mashaw reviews the analyses proposed by a number of people—including Justice Antonin Scalia, Judges Frank Easterbrook and Richard Posner, Professors William Eskridge and John Ferejohn, and myself—as to how judges should respond to public statutes that serve private interests. For various reasons, Professor Mashaw finds all of these approaches unsatisfying.

There is a strange tension between chapters three and four of Professor Mashaw’s book. In chapter three, Professor Mashaw persuasively argues that judges should require that statutes be public-regarding. Professor Mashaw, however, offers no guidance about how judges might meet this requirement. Then, in chapter four, Professor Mashaw evaluates the approaches of a number of people who have suggested specific approaches to statutory interpretation to accomplish Professor Mashaw’s stated goal of changing judges’ approach to interest-group oriented statutes.

In the end, Professor Mashaw finds all of these approaches deficient for various reasons. This would seem to suggest that Professor Mashaw knows of a better strategy for accomplishing his objectives of making statutes public-regarding. But if he does, he never discloses it. In other words, Professor Mashaw never provides any guidance about how to effectuate his desire to make public statutes public-regarding.

Moreover, Professor Mashaw offers strange criticisms of the existing analysis. For example, he somehow magically transforms my argument that judges employing “the traditional approach of statutory interpretation” can fulfill the constitutional requirement that statutes be made to serve public rather than private interests40 into advocacy of “judicial activism of a quite swashbuckling variety.” 41 This is indeed a strange accusation for someone who merely argued that judges engaged in statutory interpretation should start with the language of the statute being construed, and then reach a decision “that applies that language to a particular set of facts in a way that is consistent with the publicly articulated purpose of the statute.” 42

Contrary to Professor Mashaw’s accusation, I do not recommend that judges attempt to unravel the details of the interest-group bargain that may have precipitated the underlying statute. In fact, I specifically reject this approach, and criticize Judge Easterbrook for embracing it.43 While one can speculate on

39. Id.
40. Macey, supra note 11, at 260-66.
41. GREED, CHAOS, AND GOVERNANCE, supra note 1, at 90.
42. Macey, supra note 11, at 250.
43. Id. at 252-53.
the nature of the interest-group bargain underlying a particular statute, such speculation is not only extremely uncertain, it is also well outside the competence of the judiciary.

My point here is not simply to point out that Professor Mashaw’s criticisms of some of the existing work in public choice seem somewhat forced. My point is that Professor Mashaw wrongly assumes that public choice cannot influence statutory interpretation unless judges begin employing public choice analysis. Instead, my own work makes clear that traditional methods of statutory interpretation can make law more public-regarding. Judges need not become political scientists to respond to the problem of interest-group rent-seeking.

Equally important, because Professor Mashaw rejects all of the existing methods for implementing his ideas about rationality review, he should either articulate an alternative method, or concede that his suggestion cannot be implemented as a practical matter.

Because Professor Mashaw is one of America’s foremost authorities on the administrative state, readers will not be surprised that his chapters on administrative law are the strongest, most well-reasoned parts of the book. But Professor Mashaw significantly blunders in trying to describe what public choice has to say about the administrative process. Professor Mashaw asserts that public choice theory predicts that Congress will use the “administrative process to insure agencies’ fidelity to the congressional will.” He further writes that public choice theory predicts that Congress “should be continuously involved at all of the levels of procedural design.”

This is not at all what public choice theory would predict.

Perhaps the most acute bargaining problem facing politicians and interest groups who wish to strike deals is the problem of nonsimultaneity of performance. Nonsimultaneity of performance is a problem because politicians generally seek political support from interest groups (before an election) prior to the period (after the election) when they are able to “pay for” this political support by sponsoring legislation favored by the interest group. Interest groups therefore have reason to worry that the politicians will renege on their promises of support. Similarly, incumbent politicians often will be called upon to provide political support for a particular bill favored by an interest group in exchange for a promise of future support by the interest group. The final and most serious simultaneity of performance problem results from the fact that, even if an interest group successfully gains passage of a particular statute, there can be no promise that future legislators will not renege on the previously agreed upon legislative compromise. This problem becomes magnified if the initial power structure among interest groups changes over time, that is, if the interest group that possessed adequate power to affect legislation loses such power.

Much of the industrial organization of Congress is designed to deal with this simultaneity of performance problem. Congress has a strong incentive to re-

44. GREED, CHAOS, AND GOVERNANCE, supra note 1, at 124.
solve this problem because the nonsimultaneity of performance problem makes it difficult for members of Congress to make a credible commitment to an interest group that a particular legislative scheme will have the characteristic of durability. More durable statutes and regulations have greater value to politicians than less durable statutes and regulations because interests groups willingly pay for durability.

The basic way that Congress and regulators deal with this nonsimultaneity of performance problem is by making it difficult to pass legislation in the first place. The more difficult it is to pass legislation, the more difficult it will be to repeal legislation later on. Arguably, the committee system was developed to concentrate legislative power in the hands of a small number of people who would be closely linked to the interest groups associated with particular legislation. Similarly, the bicameral legislature, executive veto, and independent judiciary all address this nonsimultaneity of performance problem by moving the voting rules for passing new laws closer to a unanimity requirement, and thus, making laws difficult to modify once enacted.45

Politicians and interest groups also address the nonsimultaneity of performance problem by establishing administrative agencies to make legislation more durable. Administrative agencies make legislation durable by creating a stable of professional bureaucrats whose own futures are inextricably linked to the maintenance of a particular regulatory regime. Thus, for example, the securities laws and the banking laws benefit certain industry participants both by creating barriers to new entry, and by creating other rigidities favorable to incumbents. These laws also create significant bureaucratic structures that have made reform and repeal of these laws surprisingly difficult.

Professor Mashaw mistakenly asserts that public choice theory predicts that Congress will continuously make incursions into the administrative process. Instead, Congress creates administrative agencies to delegate rule-making. And Congress delegates rule-making to tie the hands of subsequent Congresses. As Professor Mashaw recognizes, “Congress acts generically and leaves the crucial details of procedural implementation to agencies...”46

Public choice theory clearly explains such delegation. Interest groups have more confidence in their ability to influence agency outcomes than to influence congressional outcomes. Therefore, interest groups find broad delegations to administrative agencies that deprive Congress of the power to influence subsequent agency action to be highly desirable.

Professor Mashaw also tackles the related issue of whether legislators should make broad delegations to administrative agencies.47 The arguments against broad delegations are too numerous to catalogue. Most of them relate to the

46. GREED, CHAOS, AND GOVERNANCE, supra note 1, at 125.
47. See id., at 131-57 (Chapter 6).
problem that broad delegations of power undermine political accountability. Professor Mashaw's response is ingenious: he argues that broad delegations are bad, but can be justified on the grounds that specific delegations are no better.\footnote{See id. at 147.} The real argument in favor of broad delegations to agencies is that big government is good, and big government would not be possible without powerful administrative agencies.

But, like much of the rest of the book, even this analysis contains some interesting observations. For example, Professor Mashaw is absolutely right to argue that just as unconstrained agency decisionmaking has its flaws, so too does unconstrained majoritarianism.\footnote{See id. at 157.} His conclusions of the administrative process, however, seem hopelessly romantic. He asserts that:

\begin{quote}
Administrators at least operate within a set of legal rules (administrative law) that keep them within their jurisdiction, require them to operate with a modicum of explanation and participation of the affected interests, police them for consistency, and protect them from the importuning of congressmen and others who would like to carry logrolling into the administrative process.\footnote{Id. at 156.}
\end{quote}

Professor Mashaw places a lot of confidence in the administrative process. It is democratic processes that seem to worry him. I expect that this romantic view of the administrative process is not shared by many lower-income people who have been subjected to IRS audits.

Professor Mashaw becomes increasingly receptive to the contributions of public choice as the book progresses. In concluding his chapter on legal control of administrative policymaking, for example, Professor Mashaw observes that "[p]ublic choice can assist in the achievement of our ideals, not just reshape or mock them."\footnote{Id. at 180.} Similarly, Professor Mashaw effectively applies public choice analysis in his sophisticated analysis of the separation of powers.\footnote{See id. at 181-98 (Chapter 8).} Particularly important is his discussion of the costs and benefits of increasing the transparency of the administrative process.\footnote{See id. at 189-91.}

As Professor Mashaw points out, increasing the transparency of the rulemaking process seems to be the policy analysts' flavor of the week for reforming the administrative process. According to this argument, increasing agency transparency reduces the incidence of interest group shenanigans by lowering the costs of oversight. As Professor Mashaw observes, however, "if interest group theory works even somewhat similarly to what the public choice fraternity believes, transparency is a double edged sword."\footnote{Id. at 190.} Greater transparency may simply
“help special interests monitor”\textsuperscript{55} their contacts within the agencies and the political branches, without benefitting the public, because the information generated by the increased transparency is highly unlikely to increase the political salience of congressional or administrative activities enough to make a difference.

Here Professor Mashaw employs public choice analysis to good effect—making an excellent point while undermining his own earlier misgivings about the general applicability of public choice, as well as his earlier assertions that public choice analysis is an ideological one-way street. The latter two-thirds of \textit{Greed, Chaos, and Governance} are replete with solid public choice analysis. The sophisticated insights that Mashaw generates by applying public choice theory effectively undermines the dismissive remarks about public choice in the first two chapters of his book.

Indeed, by the end of the book Professor Mashaw seems to have come full circle. He spends the first two chapters outlining public choice theory, and arguing that “\textit{[there are . . . a number of good reasons to reject some of the more general implications of the [public choice] theory of legislation.}”\textsuperscript{56} By the end of the final chapter, Professor Mashaw is beyond the mere notion that public choice “raises fruitful and interesting issues concerning conventional legal understandings and the design of public institutions.”\textsuperscript{57} He recognizes that public choice allows us to see basic questions about public law and majority rule in a different and sharper way.\textsuperscript{58} Professor Mashaw concludes “public choice analysis provides a plausible and unconventional answer”\textsuperscript{59} for each of the substantive areas raised in his book: (1) rationality review; (2) statutory interpretation; (3) administrative law; (4) political decisionmaking by administrative agencies; (5) judicial review; and (6) separated powers. Following a rather hostile start, Mashaw’s final sentence reads almost like a brief advocating public choice.

\textbf{CONCLUSION}

Public choice provides a rigorous, disciplined analytical framework for studying public law and the political process. But the depiction of the political process provided by public choice is very unromantic. Politicians are portrayed as calculating, political support maximizers, who survive by appeasing powerful special interests, rather than by effectuating their noble conceptions of the good. Not surprisingly, public choice is unpopular with the “inside-the-beltway” gang and other apologists for the modern welfare state. Public choice is not, in popular vernacular, politically correct. But it is the best, and certainly the most

\textsuperscript{55} Id.
\textsuperscript{56} Id. at 32.
\textsuperscript{57} Id. at 207.
\textsuperscript{58} See id.
\textsuperscript{59} See id. at 208.
rigorous available method of analyzing governmental processes. Professor Mashaw successfully combines his thorough understanding of constitutional and administrative law, and examines the important issues raised in these fields through the lens of public choice. Rarely, if ever, has anyone with such a nuanced understanding of the institutional details of administrative law utilized public choice analysis as systematically as Professor Mashaw.

And certainly no one ever has done so as reluctantly as Professor Mashaw! Indeed, Professor Mashaw’s relationship with public choice is much like my relationship with the computer in my office. I hate the thing, but I use it every day in my work, and cannot imagine researching and writing without it. Likewise, Professor Mashaw does not appear to like public choice analysis very much, but he certainly uses it effectively.