

# Chicago-Kent Law Review

---

Volume 65  
Issue 1 *Symposium on Post-Chicago Law and  
Economics*

---

Article 8

April 1989

## The Economics of Politics and the Understanding of Public Law

Jerry L. Mashaw

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 Chi.-Kent L. Rev. 123 (1989).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol65/iss1/8>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

# THE ECONOMICS OF POLITICS AND THE UNDERSTANDING OF PUBLIC LAW

JERRY L. MASHAW\*

The utilization of economic analysis in constitutional and administrative law and in the interpretation of statutes is hardly novel. The battles of the 1920s and 1930s over the constitutional legitimacy of state regulation are conventionally characterized as battles over "economic substantive due process." The theoretical underpinning of traditional administrative regulation of rates and entry is borrowed from welfare economics and the economics of industrial organization, and the rationale for the new wave of health and safety regulation in the 1960s and 1970s comes primarily from the literature on the economics of public goods and externalities. It has become conventional to evaluate the performance of modern regulatory agencies in terms of their capacity to produce an excess of benefits over costs. Indeed, many public law statutes, such as the Sherman Antitrust Act can hardly be understood except in terms of basic economic categories like "the relevant market," "market share," "market power" and "consumer surplus."

In all of these circumstances, economics provides substantive criteria for the application of law, describes its underlying rationale or defines parameters for the evaluation of the law's success or failure. Moreover, the relevance to legal thought of the economic categories that inform and rationalize various public law regimes is relatively non-controversial.<sup>1</sup> There may be much controversy, to be sure, about the proper way to do various economic analyses and the way in which those analyses are meant to be structured into the governing legal norms. Certain "economic" ideas, such as economic substantive due process, may be viewed as sufficiently problematic in themselves, or when applied to particular questions of law, that they cannot serve as complete or even appropriate criteria for legal judgment. But these limiting cases do not prevent eco-

\* William Nelson Cromwell Professor of Law, Yale University. The author thanks participants in the Yale Law Faculty Workshop for helpful comments on a prior draft.

1. Most criticism of the use of economic analysis to inform antitrust or regulatory regimes faults economists for an exclusive reliance on economics as a guide to the normative acceptability of public law. There is also much criticism of the failure to recognize explicitly the essentially unresolvable theoretical problems that are masked by certain assumptions in standard cost benefit analysis. See, e.g., Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (pointing out a number of these difficulties).

conomic theory and methodology from being a familiar feature of legal discourse in standard public law fields like antitrust, economic regulation, or environmental protection.

Post-Calabresian law and economics scholarship—forms of analysis that were developed and applied initially in the context of the private law—has also had considerable impact on public law thinking. Indeed, one might describe Calabresi's basic insight in *The Costs of Accidents*<sup>2</sup> as a translation of private law into public law terms. In his hands the interactions of plaintiffs and defendants in ordinary tort suits were but a part of a larger system of social ordering. The private law of torts and the public law of crimes or administrative regulation thus became alternative or coordinate instruments for addressing the same public problem. And as Calabresi saw regulation and criminal sanctions as means for rationalizing "private" accident law, so more recent regulatory reformers have seen liability rules and insurance as techniques for reforming public law regimes. In this process the lines between public and private law have sometimes virtually disappeared.

Similarly, the basic ideas that Richard Posner developed for the evaluation of the efficiency of procedural rules<sup>3</sup> applicable to private lawsuits can be, and have been, applied to public administrative procedures. Indeed, it is perfectly plausible to describe the Supreme Court's current criteria for administrative due process as based squarely,<sup>4</sup> if not always coherently, on the sort of cost-benefit calculus that Posner advocated.

Given this rich history of law and economics talk in public law fields, the question is, "What's new?" The answer is, "public choice"—or, in other terms, the economic analysis of politics and political institutions. I do not, of course, want to overstate the novelty of recent developments. Some of the basic ideas utilized by public choice theorists have been around at least since the eighteenth century,<sup>5</sup> that is, as long as American public law has existed. And the "modern" social choice literature begins in the 1950s at the latest.<sup>6</sup> Yet it is only within the last decade that these ideas have begun to penetrate the legal literature. And only within the last four or five years have debates about the relevance of

2. G. CALABRESI, *THE COST OF ACCIDENTS* (1970).

3. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

4. See Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Mashaw, *Administrative Due Process as Social-Cost Accounting*, 9 HOFSTRA L. REV. 1423 (1981).

5. See M. CONDORCET, *ESSAI SUR L'APPLICATION DE L'ANALYSE À LA PROBABILITÉ DES DECISIONS RENDUES À LA PLURALITÉ DES VOIX* (Paris 1785).

6. E.g., A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

such things as “interest group theory” and “Arrow’s Theorem” begun to achieve prominence in legal academic discussions of constitutional and administrative law and statutory interpretation.<sup>7</sup>

This penetration of public choice into public law can be sharply distinguished, however, from public law’s earlier reception of the ideas of neo-classical and welfare economics. First, the issues posed and sometimes answered by the new political economy are almost exclusively issues of institutional structure and decisionmaking process rather than issues of substantive policy. As such they bear directly on more abstract, and perhaps more fundamental, questions of institutional design and interpretative method. Public choice talk has thus, at this stage, engaged primarily academics, and academic theorists at that, rather than practitioners, judges or administrators.

Second, while the application of public choice ideas to practical issues of political organization and political process is in some sense in its infancy, there already has been a tendency in the emerging legal literature to choose up sides. Roughly speaking, those on one side of the debate take the position that social choice theory provides a relevant, even determinative, perspective on virtually any public law question that one would care to name. On the other side, the position is that social choice theory is empty or false at its core and, in any event, has absolutely no relevance to the major issues that exercise public law scholars.<sup>8</sup> In my view, there is clearly something to both of these positions. But, I hope to convince you that we are now at much too early a stage to determine either which has the better case or where precisely one might like to occupy the middle ground between these extremes.

My discussion must be incomplete as well as inconclusive. After sketching some of the dimensions of current controversies I can here discuss only one or two of the major issues that divide the contestants. Nevertheless, this should be enough to bolster the claim that we are now nearer to the beginning than to the end of an inquiry, hopefully a fruitful one, into the understanding of public law via the modalities of public choice.

7. See sources cited in Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, n.4 (1987).

8. Compare the contribution, for example, of Judge Abner Mikva with that of Professor Robert Tollison in the recent symposium on the theory of public choice. Mikva, *Foreword, Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988); Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988).

## I. A MAP OF THE CONTESTED TERRAIN

By now, most will be familiar with the basic parameters of the field of public choice.<sup>9</sup> Although I previously termed it the application of economics to politics, there are two rather distinct strands of public choice literature that have been brought to bear on public law issues. The first is a branch of decision theory symbolized and much-informed by Kenneth Arrow's general possibility theorem.<sup>10</sup> This literature is concerned predominately with the structure of voting rules and with the effect of voting structures on the outcomes of collective decisionmaking.

The second branch, sometimes called "interest group theory," is concerned with explaining or predicting the behavior of voters, politicians, bureaucrats, indeed any political actors. Within this literature analysts go off in numerous directions, but are unified by a basic axiom: Political actions are to be explained in terms of a simple hypothesis concerning human behavior—people act to further their own material interests. Both parts of public choice theory are obviously essential for an overall theory of political action. We need to understand both how individuals behave, or are likely to behave, and how their resulting collective action may be shaped or influenced by the institutions and decision rules through which that action is mediated.

While potentially relevant to public law concerns, the utilization of public choice ideas in public law domains is highly controversial. The most basic finding of the Arrowian branch of public choice theory might be characterized as indicating that collective action must be either objectionable or uninterpretable. A stable relationship between the preferences of individuals and the outcomes of collective choice processes can be obtained only by restrictions on decision processes that most people would find objectionable. At its most extreme, Arrowian public choice predicts that literally anything can happen when votes are taken.<sup>11</sup> At its most cynical, it reveals that, through agenda manipulation and strategic voting, majoritarian processes can be transformed into the equivalent of a dictatorship.<sup>12</sup> In a more agnostic mode, it merely suggests that the out-

9. A brief clear description can be found in Farber & Frickey, *supra* note 7, at 878-79. Perhaps the most straightforward and accessible survey is D. MUELLER, *PUBLIC CHOICE* (1979).

10. K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

11. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976); Schofield, *Instability of Simple Dynamic Games*, 45 REV. OF ECON. STUD. 575 (1978); Schofield, *Formal Political Theory*, 14 QUALITY & QUANTITY 249 (1980).

12. Levine & Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561 (1977). See, e.g., W. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 167 (1982).

comes of collective decisions are probably meaningless because it is impossible to be certain that they are not simply an artifact of the decision process that has been used.<sup>13</sup>

While Arrovian public choice suggests that we have a rather stark choice between stable dictatorship or democratic chaos, interest group theory argues for an equally distressing middleground. Political outcomes are, for these theorists, reasonably stable and predictable, but oligarchic. Public law is to be understood as a set of "deals" among those self-interested actors who have the positions and resources to deflect public power to the pursuit of their private ends.<sup>14</sup> Within this literature the predictions about the welfare consequences of political outcomes are almost uniformly depressing. Generally speaking, analysts in the "interest group" tradition predict that governmental programs will be too large, directed at the wrong ends and perversely redistributive.<sup>15</sup> Faced with these unflattering visions of public law, public law lawyers can hardly be faulted for wanting to reject the theory itself.

Ordinary experience suggests to most lawyers that there is something badly wrong with these theories. Chaos, dictatorships, and the unbridled greed of powerful "interests," is not unknown in the work-a-day world of legislative and bureaucratic politics, but it hardly appears to most of us to be its dominant tendency. Decrying the unreality of public choice theorists' mathematical constructs, for example, Judge Abner Mikva recently announced: "[U]ntil we start voting for the computer, I will dissent from the public choice advocates."<sup>16</sup> Many will doubtless echo these sentiments.

"Rational ignorance" of public choice can be premised on more than its lack of "fit" with ordinary experience. The coherence, methodology, interpretation, even the morality, of public choice can be, and has been, criticized. To paraphrase Paul Simon,<sup>17</sup> there are surely fifty ways to leave public choice behind us, although I doubt that anyone is interested in having them all listed and discussed. Indeed, I will here be more concerned with the implicit subtext of Simon's ballad: the real question is how good we are likely to feel if we take any of the many exits out of the world that the public choice literature has been constructing.

13. Farber & Frickey, *supra* note 7, discuss much of the literature. They provide a further discussion with citations to some of the more recent papers in Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 425-37 (1988).

14. See, e.g., Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

15. See, e.g., Fiorina & Noll, *Voters Bureaucrats and Legislators*, 9 J. PUB. ECON. 239 (1978).

16. Mikva, *supra* note 8, at 176.

17. The reference here is to Paul Simon's *Fifty Ways to Leave Your Lover*.

To keep matters somewhat manageable, I must adopt two simplifying strategies: First, I will here treat only the "interest group" branch of public choice theory.<sup>18</sup> Second, I will lump potential exits into two generic forms: Normative-Strategic and Methodological-Empirical. By the first category I mean to capture a family of claims that includes: "Public choice propositions should be rejected because they are based on offensive ethical premises;" or, "public choice should be ignored in order that public law and the public order can be constructed on the basis of attractive ethical norms." By the second category, I mean claims such as: "Public choice theory's predictions and explanations are untrue;" "public choice theory cannot demonstrate the truth of its propositions;" or, as in Judge Mikva's lament, public choice propositions cannot be applied to real world situations.<sup>19</sup>

These categories are hardly exhaustive. Neither necessarily captures, for example, the claim that public choice theory is internally inconsistent or hopelessly vague.<sup>20</sup> And each type of claim has many variants. In this essay, therefore, I will have to be content with a few important examples of each genre. I am not trying to adjudicate finally between Jean Paul Sartre<sup>21</sup> and Paul Simon. The modest claim is that travel through any of these exits is, at the present time, an intellectually uncomfortable journey.

## II. THE IMMORALITY OF PUBLIC CHOICE

### A. Claims.

The moral criticism of public choice is a sometimes confusing amalgam of empirical, conceptual, normative and pragmatic arguments. In general terms, the idea is that public choice theory misconceives the purposes of collective action and of the institutions for collective decision-making. According to this view, the purpose of collective action is not just to *do* something that has already been determined to serve the individual ends of the participants, but instead to discover and express collective or public purposes.<sup>22</sup> Hence, the institutions of public or collective

18. The Arrovian branch of the theory is treated more extensively in this Symposium by Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI-KENT L. REV. 161 (1989).

19. Mikva, *supra* note 8, at 176.

20. Mark Kelman, for example, does a persuasive job of taxing public choice theory with both of these criticisms in his *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).

21. The reference here is to J.P. SARTRE, *HUIS CLOS (No Exit)* (Gallimard 1945).

22. See, e.g., Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Kelman, "Public Choice" and Public Spirit, 87 PUB. INTEREST 80 (1987); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L.

choice must be constructed to facilitate collective or public discovery and expression of public ideals and public demands. Public choice theory's view of collective choice mechanisms as mere techniques for preference aggregation, and of individual participation in public choice as aimed merely at achieving the most advantageous bargain given pre-existing individual preferences, cannot possibly lead to an appropriate understanding of how citizens or officeholders should behave in their public roles or of how public institutions should be understood or designed.

As I said, this is a complex moral claim that has a number of dimensions. One way of understanding it is as a very general claim about the possibility of bargaining one's way toward the right, as well as the good.<sup>23</sup> But we can take the idea in a more straightforward way if we just imagine the claim to be that any collective choice mechanism, like any individual choice process, must either exclude some preferences or arguments for realizing those preferences from consideration or be immoral. This is a quasi-definitional sort of argument; it says only: "Morality always entails laundering preferences or viewing certain preferences as morally illegitimate. Public choice theorists take preferences as given and non-controversial. Therefore, public choice can at best be amoral, and from the perspective of any particular moral system, it will be immoral."<sup>24</sup>

Another way to understand the immorality claim is as an argument about what acting in a public mode entails.<sup>25</sup> Saying, "Because I want to," may be a perfectly sound and convincing explanation of why I am going to the movies. It will not get me very far toward the use of the family automobile, however, in the face of the conflicting plans of others. If I am going to get those car keys, I had better start persuading my siblings and parents that they have some reasons to respect my claim. And, of course, in doing so, I leave myself open to counterargument and persuasion. This dialogic enterprise always has built-in moral features or commitments that constrain the conversation.<sup>26</sup> And it is just those moral constraints that would be violated by allowing "Because I want

REV. 4 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). See generally Elster, *The Market and the Forum: Three Varieties of Political Theory* in FOUNDATIONS OF SOCIAL CHOICE THEORY 104 (J. Elster & A. Hylland eds. 1986).

23. See, e.g., D. GAUTHIER, *MORALS BY AGREEMENT* (1986). See also D. REGAN, *UTILITARIANISM AND CO-OPERATION* (1980); R. HARDIN, *MORALITY WITHIN THE LIMITS OF REASON* (1988).

24. See generally Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 75 (J. Elster & A. Hylland, eds. 1986).

25. See Elster, *supra* note 22, at 104.

26. See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); Ackerman, *Why Dialogue?*, 84 J. PHIL. 5 (1989).



to” (without more) to form a reason for a collective decision.<sup>27</sup>

Some Republicans, neo-republicans and others take another more “strategic” approach in attacking the morality of public choice. In the republican view, the purpose of politics is the “rationalization” of individual preferences via public debate. Politics is, thus, precisely the transformation of private interests into public interests through discussion and persuasion. But from this didactic perspective, to talk about politics the way public choice theorists do involves more than just a conceptual or empirical error. It undermines the very process of political education. For, it is only by habitually talking about politics *as if* it were directed at the public or common good that participants can learn to align their own behavior and their own preferences in morally appropriate ways.<sup>28</sup> Public interest talk is the pathway to public interest attitudes. Hence, to construct theories of public choice on the hypothesis that political action is nothing more than the pursuit of private gain is not just to misdescribe politics, but to undermine public morality.

### B. *Answers.*

Public choice theorists in the “interest group” tradition might make several responses to these charges. The most general is that the moralist critics have mistaken positive for normative theory. Public choice is concerned with how institutions work, or whether they can work at all, under various conditions. No one in the public choice fraternity is arguing that public life *ought* to be guided by self-interest—only that we would understand better what is happening if we assumed that political actors *are* self-interested. Indeed, it would not be a major distortion to describe the public choice community as motivated by much the same concern for the improvement of public life as is its critics.

From this perspective, the public choice theorist can admit the truth, but deny the relevance, of the first two criticisms. To be sure, we are amoral, but that is the “scientific” perspective. To be sure, it is conventional to use a very different style of speech in the market and in the forum. The problem for our science of politics, however, is that public

27. Without self-consciously engaging public choice theory as such, Joseph Raz has developed a powerful account of the MORALITY OF FREEDOM (1986) which leads very much in the same direction. To state boldly the conclusion of a very complex argument, Raz finds that authority is legitimate only to the extent that it can give reasons for obedience that the (idealized) subjects would accept as grounds for their own actions. The potential for persuasion plays the same role here vis-à-vis legitimacy as does the actual dynamic of persuasion vis-à-vis morality in the argument put forward in the text.

28. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Kelman, *supra* note 20; Sunstein, *supra* note 22.

interest rationales for private interest positions are so ubiquitous that we think it likely to be more fruitful to focus on material conditions than on articulated rationales as predictors or explanations for political behavior. This is not an assertion that one (material conditions) is real and the other (articulated views of the public good) is fictional or insincere. But we don't know the reasons that many political actors might give for why they behave as they do in particular circumstances. Hence, we cannot use those reasons in our models. We can, however, obtain some proxies for, or approximations of, voters', politicians' or bureaucrats' material interests. If those turn out to be good predictors of political behavior, then we have a good, positive model even if materialistic incentives are a very small part of the true motivation for political action.

This latter claim is itself disputable on various grounds, but exploring those grounds would lead us in the direction of some of the empirical and methodological arguments that we will canvass later.<sup>29</sup> For now, we might simply accept at face value the notion that public choice theorists do not mean to assert anything about the normative character of self-interested behavior in politics. Issue then must be joined on the question of strategy or "moral pragmatics," the potential effects of the public choice approach on public morality.

In my view this moral criticism deserves serious attention. There is a case to be made that the basic background assumptions with which we now work, both in constructing public law institutions and in interpreting public law itself, are drawn from or broadly congruent with the pessimistic or even cynical conclusions of much of the public choice literature. We will return later to the difficulties of utilizing public choice analyses in either institution building or in interpretation. For now, consider the admittedly inconclusive evidence suggesting that public law is already to a degree in the grip of public choice.

### *C. Institutional Reform*

The interest group theory of representative democracy surely seems to have had a substantial impact on institutional reform, both in the "activist" regulatory period of the late 1960s and early 1970s and in the deregulatory and privatization crusades of the past decade. Like their New Deal counterparts, the political activist of the 1960s, viewed most social issues, whether civil rights, poverty, population, or product safety, as problems to be solved by the application of federal governmental power. These activists were influenced heavily, however, by an intellec-

29. See *infra* text accompanying notes 49-62.

tual climate that was quite different from that which permeated the New Deal. Post-war governmental critics of both the right and the left had portrayed the pantheon of New Deal agency heroes—the NLRB, the FCC, the FPC, and virtually all their alphabetic brethren—as stagnant bureaucracies which had failed to generate effective policy in their respective regulatory domains. The most prominent reason given for this regulatory lethargy was a variant of interest group theory, the “capture” of the agencies by the groups that they had been designed to regulate.

The 1960’s activists were optimistic, however, that this difficulty could be surmounted through institutional reform.<sup>30</sup> In the view of activist political science, capture had been made possible by a combination of institutional errors—vague delegations, collegiate forms of administration, broad prosecutorial discretion, independence from executive direction, and inefficient case-by-case adjudicatory technique. Hence, they sought to assure that the new “social regulation” agencies then under construction would be different. Their mandates were more specific; their power was more concentrated in a single politically responsible administrator; their enforcement discretion was more circumscribed by explicit directions and time limits; their decision processes encouraged the participation of their putative beneficiaries; and they were expected to operate primarily through the establishment of mandatory general policy by rule. Recognizing that interest groups were a standard feature of the political-regulatory scene, the 1960’s institutional reformers hoped to even up the odds between the regulated “special interests” and the general public who were meant to be the beneficiaries of the new health and safety regulation.

The prominent deregulatory and privatization movements of more recent years have also been informed by the interest group theory of politics. But, whereas the reformers of the 1960s saw broadened interest-group competition as the means for developing policy in the public interest, the new conservative coalition has been deeply skeptical that this competition can produce improvements in the general welfare. Rather than seeing newly-empowered consumers or environmentalist organizations as representatives of the public interest, critics have seen them as mere special interest groups pursuing their own ends. Study after study, moreover, has purported to show that the regulatory efforts of the new agencies have produced modest improvements in the general welfare,

30. For discussion of the new administrative law that emerged from these activities, see, e.g., Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (discussing evolution of administrative law doctrine); S. MEINICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 5-9* (1983) (describing the “new regulation” in general terms).

while making massive redistributions of income from one group to another.<sup>31</sup> The power of putative beneficiaries to reinforce their participation by resort to judicial review is increasingly described as misdirecting rather than promoting sound public policy.<sup>32</sup> And some studies depict pernicious coalitions of traditional "special interest" and newer "public interest" groups which pursue converging organizational aims at the expense of both the public health and the nation's economic growth.<sup>33</sup>

This combination of positive theory and "empirical" evidence seems to have produced a quite remarkable change in general perceptions. The activist optimism of the 1960s has been replaced by pessimism bordering on the cynical. Governmental efforts are viewed as inevitably flawed. Public policy reform during both the Carter and Reagan Administrations has been characterized by a search for devices to prevent the implementation of costly regulatory policies and where possible to get the government out of the business of regulation. Institutional reform has consisted largely of the creation of executive roadblocks to regulatory initiative, if not the withdrawal of both regulations and regulatory authority.<sup>34</sup> For some, the only public purpose worthy of respect seems to be the elimination of the public sector itself.<sup>35</sup>

#### D. *Legal Interpretation*

This intellectual climate should also have an impact on legal interpretation. If a 1984 paper could plausibly claim, as it did, that, "[t]he economic theory of regulation long ago put public interest theories of politics to rest,"<sup>36</sup> then we should expect that the meaning of public law norms and the approach to their interpretation should have changed radically since the New Deal. Consider the strikingly different interpretative predispositions of these two views of the world.

A "New Deal public interest" theorist would perhaps urge the approach to legal interpretation made famous by the Hart & Sachs Legal

31. Some prominent examples include Bartel & Thomas, *Direct and Indirect Effects of Regulation: A New Look at OSHA's Impact*, 28 J.L. & ECON. 1 (1985); Linneman, *The Effects of Consumer Safety Standards: The 1973 Mattress Flammability Standard*, 23 J.L. & ECON. 461 (1980); Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677 (1975); Viscusi, *Consumer Behavior and the Safety Effects of Product Safety Regulations*, 28 J.L. & ECON. 527 (1985).

32. See Melnick, *supra* note 30.

33. B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* (1981).

34. See, e.g., Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RES. L. 1 (1984); Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985).

35. See Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

36. Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984).

Process materials of 1958.<sup>37</sup> The interpreter should imagine that the designers of any public law statute were "reasonable people pursuing reasonable purposes reasonably." A number of mental attitudes seemed to follow from this basic posture: First, statutes should be interpreted as if they were understandable and coherent. They, after all, represent the application of organized intelligence to human affairs. Second, the purposes that are being served should have widespread normative appeal. For governmental action in a democracy is responsive to public demands for the solution of pressing public problems. Third, in cases of doubt, or when confronting the proverbial "unprovided for case," a construction should be put on the statute which promotes its underlying purposes. In particular, those purposes should also be consulted when courts address procedural, evidentiary, or remedial questions within a statute's general domain. Although such issues are often given inadequate attention in legislation, their resolution may dramatically influence the efficacy of particular statutory schemes as well as the overall coherence of the public legal order. Interpretation thus should be approached as facilitating the pursuit of the public interest in a constantly evolving polity.

The basic interpretative mind-set induced by attention to public choice theory would obviously be quite different. Courts interpreting statutes should be skeptical that statutes *have* public purposes, much less that they have been understandably or coherently expressed in the statute that has emerged from the legislative process. Statutes are instead the vector sum of political forces expressed through some institutional matrix which has had profound, but probably unpredictable and non-traceable, effects on the policies actually expressed. There is no reason to believe that these expressions represent either rational instrumental choices or broadly acceptable value judgments. The court interpreting such a statute is, at best, engaged in the enforcement of a compromise among contending special interests. At worst the court is implementing legal rules that virtually no one wanted or approved.

How might a court taking this view of the political world, but nevertheless committed to legislative supremacy, be expected to go about its interpretative job? First one might expect that such a court would have a narrowly "positivist" view of the law. Law is, after all, in this description not the expression of underlying communal purposes or broadly acceptable social norms. It is rather an artifact of arbitrary institutional processes combined with self-interested political mobilization. This is

37. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

law as will, not law as reason. Second, and closely connected to the first, one might imagine that such a court would take a rather formalist view of the legitimacy of the statutes and regulations that happen to emerge. In a world deeply skeptical of both democratic expression and collective rationality, the legitimacy of norms would seem to depend critically on their institutional pedigree.

Third, one might expect that judicial construction of statutes would be highly "literal" in its approach. After all, deductions from underlying purposes or descriptions of the social problem to be solved by legislation could be quite misleading. Moreover, where legislation is the result of political compromise and arbitrary institutional features, there is no reason to believe that the various sections of the statute should hang together in any reasonable or coherent fashion or have a perceptible relationship to other statutes that address seemingly analogous problems. The only evidence of what was meant by what emerged is what emerged. Fidelity to the statute, if that principle is to have any meaning, would seem to demand close adherence to the literal words in the statute book however impossible we view the intellectual task of "literalism."

Finally, a court imbued with this vision of legislation should not be expected to extend the reach of statutes by filling in gaps or applying them in situations not clearly addressed. Procedural, evidentiary and remedial developments similarly should be constrained. After all, these traditional issues of judicial implementation cannot be motivated by statutory purpose unless a purpose is perceived. And, if purposes are just the purposes of privately interested groups who have momentarily seized state power, those purposes have scant normative claims to elaboration and extension.

Putting this cluster of attitudes forward in the positive predictive spirit of public choice theory, one should expect that this new learning would induce courts to be positivist in their legal philosophy, formalist in their approach to constitutional legitimacy and literalist in their interpretative technique. Does this describe the legal world that we currently inhabit? Although it would be foolish to ascribe various judicial tendencies directly to the influence of an arcane public choice literature only recently filtering directly into legal discussion, there is considerable evidence in the jurisprudence of the Burger Court, as well as its Rehnquistian successor, that is at least congruent with the public choice perspective.

Students of the Burger Court's procedural due process jurisprudence will need little convincing that positivism is a distinctive feature of

that Court's interpretative approach.<sup>38</sup> And many see strong formalist tendencies in the Court's separation of powers and administrative process jurisprudence.<sup>39</sup> The case for literalism is more mixed perhaps. To be sure, the Burger Court's jurisprudence is replete with instances of literalist interpretation in quite strong forms, but one can also find a large number of non-literalist examples. Although Justice Scalia is now arguing quite forcefully for literalist approaches,<sup>40</sup> it is difficult to find persuasive evidence that the Court was converted prior to his ascension.

Somewhat stronger evidence emerges from decisions having to do, not with the interpretation of particular terms, but with the reach of federal public law legislation. In several related doctrinal areas the Court seems intent upon constraining the reach of public law norms—a posture that might be explained by a belief that public law statutes contain no underlying principles that could guide remedial extension and development. Consider first “standing” doctrine. Although the “liberal” doctrines of the early 1970s have not been abandoned, current Supreme Court majorities seem increasingly to look for very specific intent on the part of the Congress to include a class of litigants as direct beneficiaries of legislation before giving them standing to obtain judicial review of the implementation of the statutory scheme.<sup>41</sup>

The Court's treatment of the question of implied rights of action under federal statutes is even more uniformly in the direction of constraining the domain of statutory operation to the literal terms provided by the Congress. The general story here is reasonably well known. The Court has retreated from the purposive approach to implied rights of action as evidenced by cases like *J.I. Case Co. v. Borak*,<sup>42</sup> to a requirement that the statute evidence explicit congressional intent to confer a cause of action.<sup>43</sup> Similarly and somewhat ironically, positivist, formalist, and literalist attitudes may also be affecting the development of public

38. J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 104-108 (1985).

39. See Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U.L. REV. 719, 722-60; Elliott, *Regulating The Deficit After Bowsher v. Synar*, 4 YALE J. ON REG. 317 (1987); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 52-58; Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

40. See discussion in Farber & Frickey, *Legislative Intent and Public Choice*, *supra* note 13 at 437-46.

41. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

42. 377 U.S. 426 (1964). See, e.g., *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981) (refusing to develop a federal rule of contribution among joint tort-feasors under a statute that explicitly provided private remedy).

43. See, e.g., *Cort v. Ash*, 422 U.S. 66 (1975); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974).

common law. In domains long subject to federal common law development, such as the abatement of navigational nuisances and the control of interstate pollution, the Court now finds that comprehensive statutory schemes not only provide no rights of actions not explicitly conferred, they also preclude the further development of either federal common law actions or actions based on section 1983.<sup>44</sup> If statutes are unprincipled compromises, this may make perfect sense. The underlying theory of common law development, principled elaboration, would conflict with the basic understanding of how the “democratic will” is expressed in statutes relating to the same subject matter. To turn an old maxim on its head, common law principles are to be strictly construed because principled elaboration is in derogation of positive statutory command.<sup>45</sup>

Again, one should not claim too much based on this evidence. Yet, it is certainly plausible to conclude that, if not public choice theory itself, then a political *zeitgeist* reflecting or paralleling public choice ideas is already coloring our beliefs and understandings of public law regimes. The notion that public choice ideas are likely to, perhaps are, shaping our public law world is more than an abstract fantasy.

That this is no trivial matter, even to public choice theorists, is evidenced by James Buchanan and Geoffrey Brennan’s recent defense of public choice against Steven Kelman’s charge that:

Cynical descriptive conclusions about behavior in government threaten to undermine the norm prescribing public spirit. The cynicism of journalists—and even the writings of professors—can decrease public spirit simply by describing what they claim to be its absence. Cynics are therefore in the business of making prophecies that threaten to become self-fulfilling. If the norm of public spirit dies, our society would look bleaker and our lives as individuals would be more impoverished. That is the tragedy of “public choice.”<sup>46</sup>

To the public choice defenders’ great credit, they explicitly eschew all reliance on the “that’s science” rationale for continuing to pursue the public choice scholarship for which one of them received the 1986 Nobel Prize in economics.

Knowledge without hope, science without a conviction that it can lead to a better life—these are by no means unambiguously value-enhancing, and those who shatter illusions for the sheer pleasure of doing so

44. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1 (1981).

45. Judicial restraint in the face of the apparent arbitrariness of legislative judgments carries over even into the federal courts’ admiralty jurisdiction. Compare *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) with *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

46. Kelman, *supra* note 22, at 93-94.



are not so clearly to be applauded for their "work."<sup>47</sup>

The defense offered instead is both pragmatic and tentative. In Buchanan and Brennan's view, public choice can be justified only by its capacity to produce useful institutional reforms; reforms whose value to the community offset any deleterious effects that public choice talk might have on what Kelman calls the "public spirit." In the defenders' words:

What is the appropriate model of man to be incorporated in the comparative analysis of alternative constitutional rules? In our response to this question, we follow the classical economists explicitly, and for precisely the reasons they stated. We model man as a wealth maximizer, not because this model is necessarily the most descriptive empirically, but because we seek a set of rules that will work well independently of the behavioral postulates introduced.

From our perspective, then, we agree that there is cause for some concern with public choice interpreted as a predictive model of behavior in political roles. Where public choice is used to develop a predictive theory of political processes in a manner typical of "positive economics"—that is, with the focus solely on developing an empirically supportable theory of choice within rules, and with the ultimate normative purpose of constitutional design swept away in footnotes or neglected altogether—then the danger is that it will indeed breed the moral consequences previously discussed [citations omitted].<sup>48</sup>

This is, in my view, both a curious and an ineffective defense for the continuation of public choice research. Curious because it seems somehow to presume that good institutional design can be divorced from good explanations of how institutions work. Surely it is not enough simply to assume the worst and guard against it, unless we also assume that protective or defensive institutional design will in no way inhibit useful collective action. Buchanan and Brennan do not make such an assumption, nor could they do so save in some hypothetical world that no one would confuse with the one we actually inhabit.<sup>49</sup>

The response is ineffective because in an important sense it has no points of tangency with Kelman's complaint. Buchanan and Brennan seem to presume that we can design and operate institutions to protect us from self-interested political action, meanwhile comparing the gains and losses from such an enterprise with the gains and losses from institutional

47. Brennan & Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 187 (1988).

48. *Id.* at 188.

49. The most comprehensive survey of the actions of interest groups at the national level of American politics, for example, concludes that organized special interest groups are more effective in preventing action that they do not like than in promoting action that they want. The "checks and balances" of American Government work for the special interest groups as well as for the general public. K. SCHLOZMAN & J. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 395-96 (1986).

designs premised on a rosier vision of human nature. Properly understood, however, Kelman's argument is that these are incommensurate worlds. If we learn our politics from the design and operation of Buchanan and Brennan's institutions, we will become different people than the ones Kelman envisages. We will have different preferences and values. There just is no Archimedian point from which to measure and compare the costs and benefits of these two worlds. Viewed in this way, not only are the prophecies of the cynics self-fulfilling; the complaints of the critics are unanswerable.

This is not the end of the debate, of course. Indeed, it is about here that things start to become interesting. For notice that we now seem to have gotten past one of the major sticking points that has heretofore divided public choice practitioners and their critics, the dispute about whether preferences should be imagined to be wholly exogenous to politics. James Buchanan, amongst others,<sup>50</sup> now appears to be on the same side of that debate as people like Steven Kelman, Cass Sunstein and Mark Kelman. And while those who have been insisting that the economists' assumption of exogenous fully formed preferences was wrong have sometimes seemed to conclude from this that behavioral models using such assumptions were worthless, they should instead (usually) be read as merely counselling caution. The tough issue is what to make of this more complex vision of human nature.

I do not know the answer to this question. Indeed, I doubt that there is one answer. Two things seem reasonably clear, however. First, preference endogeneity cannot be the whole story of public (or private) life either. If we take this principle in a strong form, one isomorphic with the usual exogenous-preferences assumption, then it posits that interaction within public institutions fully determines the preferences of participants. As individuals become fully socialized through civic participation, their preferences are harmonized and all public choice becomes consensual.

One does not have to deny that such strong forms of community exist to be very dubious that they *often* exist in contexts even remotely like the governance of a modern nation state. Unless contemporary republicans have notions of the proper scope of state action roughly ap-

50. At a recent conference on privatization, for example, Henry Manne suggested that privatizing various functions might be useful precisely because it would avoid "populariz[ing] the idea of government activity" and "condition[ing] popular attitudes" to favor governmental intervention. *Conference Proceedings, Privatization: The Assumptions and the Implications*, 71 MARQ. L. REV. 583, 615 (1988).

proximating those of Nozickian liberals,<sup>51</sup> they cannot realistically imagine that consensus will be the dominant, perhaps even a very important, technique of public decisionmaking. And so we are left necessarily with the public choice theorists' puzzles about how best to aggregate refractory individual preferences, including the necessity of guarding against self-interested behavior.

Second, in order to make some progress on a more integrated theory of public action, one that takes both tastes and taste-shaping seriously, it seems about time for "republicanish" theorists to take up the challenges that Jon Elster laid down several years ago.<sup>52</sup> To paraphrase his points, Elster is asking something like the following questions: (1) What do we know about how institutional taste-shaping works? (2) Assuming that not all tastes shaped by dialogue are good ones, under what conditions is such discussion likely to produce acceptable results? (3) Recognizing that consensus is often incomplete, what do we know about partially laundered or rationalized tastes? Are they better than unlaundered ones? (4) Is it possible to work our way toward republican autonomy by imagining that we are already there? (5) Indeed, is this a status or condition that one can seek purposefully at all?<sup>53</sup>

These are very hard questions, and the answers are not obviously going to support the abandonment of public choice talk. After all, "strong consensus" can be just another term for "herd mentality." The practice of self-interested self-representation and arms-length negotiation may be a prerequisite for a rational autonomous and collectively civilized community. The strategic control of self-interest through institutional design may be essential both to the achievement and the maintenance of a fully rational polity.

I draw a simple conclusion from these two points: The necessary partiality and current vagueness of an endogenous tastes assumption is an argument for the continued relevance and strategic utility of the conventional public choice assumptions. A Kirkegardian leap of faith into didactic republicanism may be a good strategy, but it may also be folly. And in any event, it is a faith that I cannot will myself into.<sup>54</sup> I, at least,

51. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Some of the contemporary republican literature does indeed seem to lead in this direction. See, e.g., Michelman, *supra* note 22; Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988).

52. J. ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 37-42 (1983).

53. *Id.*

54. I do not mean to be stating a personal idiosyncrasy. There is a real question whether one can make oneself good by acting as if one were. At some point we have to be able to forget how we came to be good actors. Otherwise we cannot know whether we are acting to promote the good or acting as if we were good. See Elster's discussion *id.* at 43-108.

am going to need some more persuading that acting *as if* the republican story were true will make it so.<sup>55</sup> We should want to be as good as we can, and we should attempt to avoid activities that make us underestimate our possibilities; but the task of reform almost certainly involves more than imagining a better world peopled by better selves.

Moreover, because ought implies can, it is impossible to disentangle the charge that public choice corrupts the public morals from the question of whether the usual exogenously-formed-and-materially-self-interested hypothesis about preferences provides a good explanation of what public action is like. If the public choice crowd has a falsifiable positive theory 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. And, if that theory provides good explanations of political behavior, particularly in institutional settings that currently emphasize republican virtues of persuasion, then it would hardly be immoral, even in the strategic sense of not promoting morality, to avoid shattering republican illusions. Exhorting people to be better than they possibly can be is the transmission of guilt, not moral education.

I am not here retreating from the view that Steven Kelman's critique is to a degree unanswerable. Tests of public choice propositions can never demonstrate that an entirely new world is beyond our grasp. But, such tests might nevertheless buttress Kelman's position. For, if public choice explanations are poor, they may reinforce the conviction that our imperfect political world can be made better—perhaps by focusing greater attention on the public spirit and on the institutions that nurture it. And, if the predictions are sometimes good and sometimes bad, we might begin to understand better both how to achieve our ideals and the relationship between ideals and institutional arrangements. We cannot, by focussing on morals, avoid the question of truth.

### III. TRUTH, METHOD AND USABLE KNOWLEDGE

The argument that public choice should stop telling harmful truths has not yet been developed in a fashion that persuades me. But I have no moral qualms about condemning lies (or, indeed, distressing truths, if they hold out no prospect for making things better). Is public choice telling us true or false stories about public life? How can we tell? And, even if true, how can this knowledge be used by public law lawyers?

55. I discuss this position somewhat more fully in Mashaw, *As If Republican Interpretation*. 97 YALE L.J. 1685 (1988).

Again, these are issues that are much too broad and complex to be pursued in detail in a single article. Moreover, the questions are interconnected. Whether a public choice "finding" is "true" is generally a function of both the standard of truth or falsity implied by the methodology used and the interpretation of that finding in its application to some public law issue. The question of the "truth" of every finding in the public choice literature, therefore, branches out into a web of linked interpretive and methodological issues. We need some strategy therefore, for avoiding an overwhelming particularity, without, at the same time, falling into some false and grotesque overgeneralization.

The technique employed here to avoid the Scylla of excruciating detail and the Charybdis of bland overgeneralization is to try to comment or "glossate" my way toward my previously advertised "inconclusion" that public choice *probably* has something important to tell public law lawyers. I will use as principal texts some recent scholarship attempting to employ public choice ideas as an aid to statutory interpretation and the excellent 1987 review article by Dan Farber and Phil Frickey called *The Jurisprudence of Public Choice*.<sup>56</sup> I will also continue to restrict the domain of the inquiry by concentrating on only the "interest group theory" aspects of this literature, although the literature itself is obviously broader.

#### A. *Truth through Method*

Farber and Frickey address, in a concise, cogent and sensible fashion, very nearly the same questions that I have just posed. We are all much in their debt. But they could not do everything in one article. Moreover, their efforts were motivated by the pre-Farber-and-Frickey legal literature; a literature which often seemed to celebrate the more cynical aspects of public choice visions on the way to one or another naive application of public choice to public law.

The Minnesota truth squad set for itself, therefore, the task of lending both balance and sophistication to the reception of public choice into public law. I will not here discuss Farber and Frickey's proposals concerning the application of public choice ideas to various public law problems, but instead their attempt to present a critical review of the empirical literature in public choice. In my view, they make a highly successful case for their ultimate conclusion that "reports of the death of 'the public interest' are greatly exaggerated."<sup>57</sup> Even more impressively,

56. 65 TEX. L. REV. 873 (1987).

57. *Id.* at 927.

they do so without requiring us to imagine them as either lawyer-astrophysicists (omnicompetent technical sophisticates) or lawyer-astrologers (hidebound protectors of outmoded visions). In the end, they enjoin public law lawyers to do as they have done—to “learn to be realistic without being cynical.”<sup>58</sup>

Because I agree with most of Farber and Frickey’s conclusions and virtually all of their analyses, I view my task here as one of extension and elaboration. Like them, I want to lend “balance” to the literature, but from a particular perspective. For, although it was clearly not their intent, I fear that *The Jurisprudence of Public Choice* may have given too much comfort to confirmed or incipient astrologers—to those who would respond to its debunking of some of public choice’s more extravagant claims, “Thank God. Another field of social science that we can safely ignore.” My purpose, therefore, will often be to try to take that particular “spin” off of the Farber and Frickey analysis. If in the process I seem to be taxing those authors with complicity in the stimulation of this know-nothing response, I hereby unconditionally absolve them.

### B. *The “Interest”-“Ideology” Debate*

Interest group theory is something like an erector set. Strikingly different models can be built from almost interchangeable pieces. Models that use all the pieces in the set are rare, however. Most analyses concentrate on either voter behavior, or group formation, or legislative voting, or bureaucracy, without attempting to build a complete theory that links all the elements of political action into an overall input-output model. This fragmentation has produced a cluster of partial theories, not all of which can be linked together in one aesthetically pleasing, perhaps not even a logically satisfactory, way.

Models that focus on legislators, for example, tend to emphasize legislator-constituency linkages and the necessity for reelection oriented legislators to pursue the material interests of constituent voters. Theories that focus on pressure group activity, by contrast, tend to highlight interest-group-legislator and/or interest-group-bureaucracy linkages and to downplay, even denigrate, the potential impact of unorganized voters on legislators’ behavior. Both theories are intuitively plausible, but they are potentially contradictory. From one perspective, we see legislators who are simple conduits for the economic interests of numerically significant constituencies. From the other, we observe legislators who pay no attention to anyone not organized into an effective narrow interest group. In

58. *Id.*

one vision, legislators are fixated on votes, in the other the medium of political exchange is material favors.

These apparent inconsistencies, and numerous others, might themselves be bases for criticizing "interest group" theory. But such an attack would not be an assault on fundamentals. True the economic theory of politics has not yet produced an harmonious overall model of the legislative process, linking up all the actors from voters to bureaucrats; but this does not mean that it cannot be done. All that may be required is a meta-theory that segments legislative behavior, for example, according to subject matter, timing, impact, or visibility. A meta-meta-theory also might be required to sort out or integrate these various axes along which political behavior is organized. In principle, however, it is a feasible project.

Indeed, given the current state of the theoretical literature, the multiplicity of perspectives might be a strength, or at least a potential defense, against certain forms of critique. Farber and Frickey, for example, quite rightly point out that both the constituency-control and interest-group-control literatures have a curious amnesia concerning the economic theory of agency.<sup>59</sup> They then conclude from this: "On the basis of general economic theory, then, it seems likely that legislators sometimes will act on the basis of their own preferences, rather than those of the voters or interest groups."<sup>60</sup> So far so good, for Farber and Frickey go on to say immediately that incomplete or myopic theories can still be good predictors, and they then launch into a more extended discussion of the empirical literature that tests the explanatory power of narrow self-interest versus "ideological" models.

The point to note at this juncture however, is this: That legislators may not always be faithful agents, that they may sometimes act on the basis of "their own preferences," is not a demonstration that ideology, as Farber and Frickey define it ("individual beliefs about the public interest"),<sup>61</sup> plays any part in the legislative process. Legislators' preferences could, for example, simply reflect their own material interests in addition to remaining in office. An economic theory of politics has little difficulty incorporating this assumption into its models. Moreover, because the economic theory of politics suggests that, as agents, legislators have mul-

59. They are also strangely silent on the question of presidential, as distinguished from legislative, politics—a politics that I have elsewhere argued may have a strong ideological public-interest flavor even if legislative politics is based on narrow self-interest. Mashaw, *Pro-Delegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

60. Farber & Frickey, *supra* note 7, at 895.

61. *Id.* at 893.

tiple principals, we will have to be very cautious about attributing "unexplained" legislator conduct to legislator preferences, legislator ideology or anything else. The accommodation of the preferences of multiple principals may make legislator behavior very difficult to interpret.

With this caveat, then, let us examine the case for "ideology." Here Farber and Frickey make two basic points. First, work that focuses on the beneficial effects of legislation on particular groups proves nothing.<sup>62</sup> These studies are, at most, testaments to the ubiquity of *post hoc ergo propter hoc* fallacies. Second, studies that focus on legislators' votes rather than on the character and effects of legislation, find ideology a superior predictor to self-interest.<sup>63</sup> As I have said, I think these conclusions are correct; but it is easy to misunderstand what they mean.

Having once agreed with Farber and Frickey's first conclusion, dismissal of the whole of the literature on whose ox was gored and whose calf fattened is surely tempting. It is annoying, to put it mildly, to encounter study after study demonstrating first that one or another group has reaped a windfall from this or that piece of legislation and, then, concluding explicitly or implicitly with a smirking, "See there, rent-seeking again." As Mark Kelman has termed it, this is often nothing more than "democracy bashing."<sup>64</sup> Such studies demonstrate neither that the legislation investigated is without public interest effects, nor that it was adopted because of private interest pressures or concerns.

Yet, sloppy work aside, I do not want to stamp out this approach to the study of legislation. I take this position, in part, because such studies are one useful element in the "old" law and economics approach to public law. We need to know who wins and who loses and by how much, when thinking about public policy. Not only is this a necessary part of strategic public management, it is crucial to a normative consideration of whether the legislation is in the public interest. From this perspective, Richard Posner's implicit criticism of the purveyors of "rent-seeking" imagery, that it is often almost impossible to figure out *ex ante* who will be benefited by legislation,<sup>65</sup> is also an argument for trying to find out *ex post*. Such information properly can inform both subsequent legislative action and the exercise of delegated administrative and judicial discretion, even if it in no way informed the adoption of the legislation itself.

Moreover, I think these studies are useful from a public choice perspective on public law. We need to remember that evidence that does not

62. *Id.* at 895.

63. *Id.* at 896.

64. Kelman, *supra* note 20.

65. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 355 (1974).



*prove* a point may nevertheless be *probative* with respect to that point. A demonstration that legislation has big wealth distribution effects, combined with a demonstration that it has large costs and few benefits, and was enacted through a process that was highly likely to have promoted nefarious forms of rent-seeking by benefited groups, would provide a pretty strong indictment of a particular statute (or statutory provision) on public interest grounds. What to do with such an indictment is, of course, another matter.<sup>66</sup>

The second class of studies reviewed by Farber and Frickey has a more straightforward application to the theory of public choice. These are studies of legislative behavior which attempt to explain legislator voting on the basis of alternative hypotheses concerning legislator motivation. Reviewing this literature, Farber and Frickey's conclusion seems to be that ideology, usually measured by annual ADA (Americans for Democratic Action) ratings, "is a better predictor of legislator behavior than economics."<sup>67</sup> They are quick to point out, however, that this finding merely limits the appropriate claims that can be made for an economic theory of politics. We are left with a "mixed" picture of the political process in which constituent interest, special interest groups and legislator ideology all play a role, varying probably with the type of legislation under consideration.

If this is all public choice research has to tell us about public law, we are likely to find it difficult to stifle our smiles or yawns. Who, but a public choice theorist, would have believed otherwise? And until those researchers can say more about the "mix" of legislative motives in particular cases, we might as well ignore them in favor of our traditional presumption that public policy is formulated and is to be applied in response to some articulable vision of the public interest. Again, Farber and Frickey reject this conclusion, but their discussion of the pro-ideology view is cast in a form that may overwhelm their own conviction that self-interested economic motivations for political action should continue to be taken seriously. We need to explore the ideology versus self-interest literature in somewhat greater depth, if we are to take up the balanced "realist" posture that Farber and Frickey advocate. Several points are of importance here, but they might all be captured by the general notion that in studies of legislators' behavior the relationship between findings, methodology and interpretation is very strong indeed. This is as true for

66. I remain convinced that these findings could provide an appropriate basis for the invalidation of some statutes, particularly at the state level. See Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 *TUL. L. REV.* 849 (1980).

67. Farber & Frickey, *supra* note 7, at 897.

studies that feature ideology as it is for those highlighting economic self-interest.

The basic problem is this, neither legislators' ideologies nor the economic interests they believe to be crucial to their reelection chances (subjective self-interest of constituents) can be observed directly. The former is constructed from voting records that are interpreted to place legislators' views at particular points along some issue-ideology scale. The latter is constructed by observing various characteristics of legislators' constituencies and campaign contributors. These constructs are then entered into models, and statistical routines are employed to evaluate the explanatory power of the variables that have been hypothesized to be important.

A good "mixed" model is one that takes into account at least party membership, constituency characteristics, legislative position, campaign contributions and personal ideology.<sup>68</sup> A moment's reflection on the parameters of this model reveal that not only are the motivators of peculiar interest (constituent and contributor positions and legislator beliefs) not observable directly, they may be highly correlated with each other and with the directly observed phenomena. Moreover, because of the way that it is usually measured, ideology bears a particular methodological burden. Votes in general (as reflected in ideological scales such as the ADA scale) are being used to explain votes on particular issues. If the other variables in the model explain legislator votes on a substantial number of issues, then they also explain the "ideology" that is being picked up in the ideological scale. When legislators' positions on the ideological scale are then entered into the model, "ideology" is being given multiple weighting of an indeterminate amount. "Ideology" thus defined could appear to be a major explanatory variable, and to dwarf all others, simply because it is a function of those other variables. As perhaps the best methodological analysis of the techniques for ADA score laundering puts the matter, in "unclean" studies, "ideology is given weights which, at least, are noninterpretable and probably are vastly overstated."<sup>69</sup>

Farber and Frickey note this problem and go on to explain the necessity for "cleansing" ADA scores in well-constructed empirical research.<sup>70</sup> Yet, their discussion tends to obscure just how shaky the findings of ideological importance in most prior studies have been. Notwithstanding their caveat, for example, they report in the text the

68. For an excellent discussion see Carson & Oppenheimer, *A Method of Estimating the Personal Ideology of Political Representatives*, 78 AM. POL. SCI. REV. 163 (1984).

69. *Id.* at 164.

70. Farber & Frickey, *supra* note 7, at 898.

dramatic, pro-ideology results of “uncleansed” studies.<sup>71</sup> Moreover, their language and referencing in two key paragraphs<sup>72</sup> might be read as suggesting that in well-constructed studies non-ideological variables have been shown to be of minor importance. That is an incorrect reading.

What then of the “cleansed” models? As Farber and Frickey faithfully report, the best research done to date finds that cleansed ADA scores are significantly related (in a statistical sense) to legislative votes and that models containing ideology *and* economic factors outperform *purely* economic models.<sup>73</sup> Note, however, that this conclusion is very restrained. There is no claim here that pure ideological models outperform pure economic models. Nor can any conclusion be drawn from these studies about which sorts of factors are more substantial.

This last point may be obscured by Farber and Frickey’s observation that “cleansed” models may underreport the importance of ideology.<sup>74</sup> That may be true, but we do not know it yet. The reason that we do not harks back to the earlier divergence between constituent and interest-group-centered analysis and the suggestion that legislators may be responsive to both. Probably, the most-often-cited and most-carefully-constructed pro-ideology study, for example, Kalt and Zupan’s analysis of votes on strip mining legislation,<sup>75</sup> does not include contributions by interest groups among its explanatory variables. Such data were unavailable for the relevant time period. It is thus possible that “ideology” is picking up this material interest, because in the Kalt and Zupan-type “cleansed” study, ideology functions as residual. And from this perspective, of course, other unidentified material interests either of the legislator or the legislator’s constituents, may be showing up as captured by the ideological variable.

Farber and Frickey provide grounds for believing that these problems are not large, but their case is hardly overwhelming. The finding that legislators are less willing to vote against constituents’ apparent interests in election years may suggest that legislators trade off electoral support and personal ideology at the margin. But it could also mean that they trade off identified and unidentified constituent interests at the margin, or constituent against contributor interests.<sup>76</sup>

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Kalt & Zupan, *supra* note 36.

76. Indeed, another interpretation of this finding, one that the Kalt and Zupan study itself supports, is that the competition between ideology and self-interest as predictors of political behavior is not a competition between economic and noneconomic theories of politics. If less personal ideol-

Farber and Frickey's other major defense of the residualized ideology variable is the suggestion, elaborated in more detail in Kalt and Zupan,<sup>77</sup> that the possible unaccounted-for material interest would have to be an implausible "interest group" having views and taking influential positions with legislators on issues ranging from school prayer to the protection of the ozone layer.<sup>78</sup> Such a group is, indeed, implausible. But an overlooked combination of presidential pressure (indeed the President could *be* this mystery "group"), logrolling, and specific interest group positions is not. We simply have no idea, for example, how often some version of the strange-coalitions story told by Ackerman and Hassler in *Clean Coal/Dirty Air*<sup>79</sup> is replicated in the everyday life of legislative voting.

The Farber and Frickey discussion of the empirical evidence on voter behavior, also easily could mislead those looking for reassurance that public choice can safely be ignored. Their treatment of the incapacity of public choice theory to explain voting as an investment activity or to exclude the possibility that altruistic voting includes expressing altruistic preferences is certainly correct so far as it goes.<sup>80</sup> But the emphasis placed on the potentially tautological nature of positing a "taste" for voting, and on the empirical literature tending to show that voters do, in fact, vote altruistically, could lead much too easily to the conclusion that the public choice image of self-interested voter behavior has been either disproved or rendered nonfalsifiable.

This is surely not the case. What we still face here are some serious puzzles about why people vote, how their votes are motivated when voting, and what, if any, connection there is between the motivations for voting itself and for voting in a particular way. The puzzles are important because if people vote for public-spirited reasons and, when voting, decide how to vote on the basis of their conception of the public interest, then reelection-oriented legislators consulting only their own interest in retaining office will, nevertheless, be compelled—obviously with some slack—to behave as if they were pursuing the public interest as perceived

ogy is consumed when the price in electoral support goes up, then ideology can be treated as an economic good and the model of politics remains econometric in its fundamental orientation. To find that ideology is important is not to find that the economic approach to politics is not.

77. Kalt & Zupan, *supra* note 36, at 295-97. Farber & Frickey, *supra* note 7, at 899-900 & n.159.

78. Farber & Frickey, *supra* note 7, at 899.

79. B. ACKERMAN & W. HASSLER, *supra* note 33.

80. The literature is cited in Kramer, *The Ecological Fallacy Revisited: Aggregate- versus Individual-level Findings on Economics and Elections, and Sociotropic Voting*, 77 AM. POL. SCI. REV. 92 nn. 2-3 (1983).

by their constituents. The basis for legislation would thus be ideology, but the ideology effectuated would be that of constituents, not legislators.

It probably serves no significant purpose, in this context, to pursue the issue of why voters vote. The more interesting question is why they vote as they do, and the debate about why voters vote is both inconclusive in itself and uninformative on the issue of primary interest. Empirical investigators have, therefore, bypassed the "why vote?" issue to pursue the "why vote that way?" question directly. In order to do so they have constructed tests of whether voters vote their pocketbooks.

The results are to some degree contradictory. Studies looking at aggregate effects tend to confirm pocketbook voting. When economic conditions are bad or worsening the "ins" are thrown out, and when they are improving, the "ins" are retained. By contrast, survey data has tended to show that while voting the nation's pocketbook, voters do not necessarily vote their own. Votes are better correlated with voters' perceptions of how others, or the nation as a whole, is doing economically, than with how they are faring personally. A conventional interpretation of these results would be to believe the second set of individual-voter-level, survey studies. One's initial guess would be that the aggregate level studies' suggestion that voters are voting their pocketbooks has simply committed the "ecological fallacy." Behavior found to characterize a population, at the population level, has been fallaciously assumed to characterize the behavior of individuals within the population.

In an elegant and persuasive article, however, Gerry Kramer has demonstrated that the situation here is almost reversed.<sup>81</sup> A careful exploration of the equations designed in each type of study to estimate the effects of government-induced changes in economic well-being on voter behavior reveals that cross-sectional voter-survey studies simply cannot be constructed to estimate this coefficient. The time-series studies do estimate it, but they cannot, because of their macro level, negative an altruistic or ideological explanation for individual voting. Hence, we are left with something like complete agnosticism about the bases or motivations for voters' individual choices.<sup>82</sup>

#### IV. USABLE KNOWLEDGE AND THE INTERPRETATION OF LEGISLATION

To date, empirical tests of self-interest and ideological motivations

81. *Id.*

82. For the description of some further work tending to support the "nation's pocketbook" view, see Farber, *supra* note 18, at 163-64.

for the behavior of legislators and voters have produced more questions than answers. Progress has been made in the refinement of both behavioral theory and empirical methodology. But, as usual, lawyers must address the question of what to do while we wait for better answers.

Judge Mikva would have us dismiss social choice theory as a set of irrelevant abstractions. Buchanan and Brennan would have us treat public choice hypotheses as if they were true and design institutions that would prevent the worst consequences of self-interested behavior. From our prior discussion, both approaches seem dangerously overgeneral. The path of "practical reason" must lie elsewhere. After all, our common experience teaches us that some mix of self-interest and altruism is generally present in human conduct. To the extent that the social choice literature begins to structure and unpack this insight, it should be of use as we go about the practical business of constructing and manipulating public institutions and processes.

When public choice theorists state, for example, that ideology is an ordinary consumption good, their language seems to be misdirecting inquiry. Yet, there is in this statement a commonsensical notion that is shared alike by public choice theorists and the League of Women Voters. Much general reform activity directed at the structure of democratic politics is designed to reduce the costs of voting, political organization, or political information. This would only make sense if we presume that it is politically useful for voters to express or develop their ideological convictions, while simultaneously presuming that the cost of such expression may reduce citizen participation. The public choice approach to the economics of politics may be understood merely as inviting a more rigorous and careful consideration of how political structures and processes can reduce the cost of beneficial and increase the cost of detrimental political behavior. For it also reminds us that, while reducing the cost of participation in order to promote ideological or public-interested expression, we should be aware of the corrupting influence of those who might use those same reforms to promote their narrow self-interest.

And yet, having said this, there is still the possibility that practical wisdom might counsel the adoption of the Mikva view. For, it is just possible, that the public choice approach cannot be used in a quasi-systematic, pragmatic or practical fashion. To put the question slightly differently, it is just possible that the law is incapable of handling these materials sensibly. For, as we have also seen, questions of truth and methodology are both highly interrelated and highly technical. Moreover, the interpretation of findings is, or can be, extremely treacherous. We cannot simply assume that all scientific knowledge is useful for legal

analysis. At some level, our misunderstanding and misuse of public choice could completely offset any insight that it would otherwise provide us.

Inquiry into the utility of using public choice ideas could take us off in many directions. There are many ideas and they might be used in many ways. For present purposes we might get some purchase on the problem, however, by taking a single example which has stimulated a number of writers to attempt to employ public choice as a guide. The issue is the much vexed question of legislative interpretation.

As we suggested earlier, courts may be utilizing the knowledge or perspective that has been generated by the public choice literature already. Faced with vague or ambiguous statutes the judiciary must use *some* set of background presuppositions about legislatures and legislative behavior in order to give meaning to statutes in a polity that is dedicated to legislative supremacy.

Moreover, those background presuppositions cannot safely be adopted without some positive theory of politics or the legislative process. For assuming that we have some constitutional norm which instructs us to engage in an interpretation that will promote the pursuit of the public interest, that background norm does not tell us that the assumption that all legislation is public interested provides the best method for achieving public interest results. A normative theory of interpretation without a positive theory of politics may lead us simply to defeat our own ends. The question then is what the positive theory of politics tells us that can be used in the establishment of background rules or presuppositions for legislative interpretation, given a normative commitment to interpret statutes to promote the public interest.

A number of authors have thought that public choice was telling us something, although they have read the tea leaves in rather different ways. For Judge Easterbrook,<sup>83</sup> for example, the most cynical version of interest group theory apparently provides a good description of the general nature of public law statutes. He would make that description the predicate for the judicial construction of public law. For him, statutory construction is the equivalent of construing the provisions of arms-length contractual bargains.<sup>84</sup> Statutes should be construed to cover only those domains of human conduct explicitly treated by the statutory language, and should be limited to providing interested parties with exactly what

83. Easterbrook, *supra* note 14.

84. *Id.* at 42-51.

they "bargained for."<sup>85</sup> As in the fully detailed contingent contract, strict construction is the norm.

There is some question, of course, whether Easterbrook has chosen an appropriate interpretative norm for his vision of public law as a set of deals or contracts. Moreover, he gives no normative argument for moving from a positive prediction or explanation of what public law is like to a normative pronouncement about how interpretation should be conducted. There is probably implicit in Easterbrook's proposals, a commitment to judicial interpretation as "publicly interested," as necessarily an attempt to realize the benefits and avoid the cost of legislative activity. But that is mere speculation.<sup>86</sup> The one thing that seems clear is that Easterbrook is quite skeptical that public interest goals are a prominent feature of the statutory landscape. Statutes which either limit entry into markets, provide subsidies for private activities, or entail limitations on private contracting, are presumptively species of special interest legislation. Judged by these criteria, of course, a very large proportion of public law statutes would seem to be of the special interest variety.

Professor John Macey<sup>87</sup> seems to have the same positive perspective as Judge Easterbrook. He views most statutes as in fact the product of special interest deals. However, he develops a quite different judicial approach to interpretation. Whereas Easterbrook counsels judges to take a restrained if cynical, narrow, and literal approach to statutes, Macey argues for a very activist form of judicial intervention.<sup>88</sup> Macey finds in the structure, as well as the specific provisions of the Constitution, a presumptive requirement that all statutes be "public regarding."<sup>89</sup> Combining that norm with the belief that most statutory enactments are not in fact designed to serve public regarding purposes, Macey argues that courts are constitutionally obliged to enforce not the legislative intent to provide private goods at public expense, but a hypothetical and constitutionally necessary intent to pursue the public interest. Macey's position involves, therefore, judicial activism of a quite swashbuckling variety.

Interestingly, Macey's and Easterbrook's approaches can lead to the same result. Both, for example, discuss the case of *Silkwood v. Kerr-McGee Corp.*<sup>90</sup> The issue in *Silkwood*, as it reached the Supreme Court

85. *Id.* at 51.

86. Moreover, Easterbrook's willingness to let the chips fall where they may in his discussion of *Block v. Community Nutrition Institute* gives pause. *Id.* at 49-51.

87. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

88. *Id.* at 261-66.

89. *Id.* at 240-50.

90. 464 U.S. 238 (1984).



of the United States, was whether the Atomic Energy Act of 1954,<sup>91</sup> which established a comprehensive system of federal regulation of the production and use of radioactive materials, preempted an award of punitive damages under state law.<sup>92</sup> In a five-four decision, the Supreme Court held that the jury's \$10 million award of damages could stand.<sup>93</sup>

Both Easterbrook and Macey agree with the majority opinion but they reach that agreement by strikingly different paths.<sup>94</sup> In Easterbrook's view, the Atomic Energy Act, because a licensing statute, is almost certainly private interest legislation.<sup>95</sup> He looks to see what sort of bargain the atomic energy industry was able to get on the question of the application of state tort law to nuclear accidents.<sup>96</sup> He discovers that the Act preserves state remedies, while the Price-Anderson Act limits the total exposure of a corporation for any particular incident.<sup>97</sup> Easterbrook gleans from these statutory provisions that the industry probably wanted complete protection from tort liability, but was unable to obtain it.<sup>98</sup> The Court should, therefore, not give the atomic energy producers the benefit of a bargain they were unable to make.

While Macey agrees that the Atomic Energy Act and the Price-Anderson Act represent private interest legislation (masquerading under a thin veneer of public protection), he views the Supreme Court's majority opinion in *Silkwood* as having given the statutes a public interest interpretation.<sup>99</sup> On its face, the Atomic Energy Act is designed both to improve safety and to encourage "widespread participation in the development and utilization of atomic energy for peaceful purposes."<sup>100</sup> But safety regulation has, in Macey's view, been inadequate—a result that he alleges was fully expected by the industry groups which lobbied for the Act.<sup>101</sup> Hence, in order to further the public interest in safety, the Court should allow state trial juries to award punitive damages, even if those damages are a hundred times greater than the maximum fine available to the Nuclear Regulatory Commission under the statute.<sup>102</sup> Although the punitive damages awarded in *Silkwood* were in direct con-

91. 42 U.S.C. §§ 2011-2296 (1982).

92. *Silkwood*, 464 U.S. at 246.

93. *Id.* at 258.

94. Macey, *supra* note 87, at 252-53; Easterbrook, *supra* note 14, at 42-45.

95. Easterbrook, *supra* note 14, at 45.

96. *Id.* at 43.

97. *Id.* at 44-45.

98. *Id.* at 43.

99. Macey, *supra* note 87, at 252.

100. 42 U.S.C. § 2013(d) (1982) (cited in Macey, *supra* note 87, at 252).

101. Macey, *supra* note 87, at 253.

102. *Id.*

flict with the special interest purpose of the legislation—to limit the tort liability of those supplying nuclear power—the Court should ignore the underlying political reality and further the aspirational safety purposes of this statute as stated in its preamble.<sup>103</sup>

If this is the fashion in which public law lawyers are likely to employ the public choice literature, Judge Mikva may have taken the path of practical wisdom. Both authors write as if there is some strong finding in the public choice literature that licensing statutes are enacted primarily for the benefit of regulated parties. But they cite no such literature nor can I discover any. Moreover, both authors ignored the very substantial practical difficulty of determining how the legislation they analyze serves private interest goals, even if one is committed to the general proposition that statutes usually are designed to do so.

Presumably the engine driving Easterbrook's and Macey's conclusion that licensing is a proxy for private interest legislation is the view that licensing is sought to protect existing firms from competition. But, if so, consider the situation in *Silkwood*. The relevant "interests" here would be those of the electrical utility industry as it was constituted at the time of the passage of the Atomic Energy Act and the Price-Anderson Act. There are no nuclear-fired generating plants at this stage. The significant underlying material interest in imposing a licensing requirement then may be the interest of coal and petroleum producers and transporters who would like to limit the substitution of nuclear energy for fossil fuel. On this view the licensing scheme, by restricting entry, would be peculiarly for the benefit of the fossil fuel industry. But that industry would probably be delighted by the availability of punitive damages against nuclear-powered electrical plants. On that reading of the private interest history of the statutes in question, Macey and Easterbrook have got the result backwards.

I cannot, of course, claim that I have got the analysis of the "real" interest underlying the Atomic Energy Act right and Macey and Easterbrook have got it wrong. Indeed, I can conceive of a number of other plausible private interest stories. It may be, for example, that the real interest at work are the interests of the specialty construction industry, uranium producers, holders of long-term uranium contracts, or whoever. The point is only that "positive theory" at this level of generality is indistinguishable from ideology.

The Macey approach might seem defensible, nevertheless, because arguably public choice theory is doing no work in his interpretive regime.

103. *Id.*

He could be viewed as telling the judiciary only that it has a constitutional duty to promote the public interest through interpretation, whatever might be the policies of legislative enactment. But notice the difficulties with this posture. First, it seems clear that Macey's idea of the public interest to be served is highly dependent on its opposition to the private interest imagined to have had an overweening influence on the legislation to be interpreted. Otherwise it is hard to imagine how Macey *knows* that safety has not been pursued at an appropriate level pursuant to the Atomic Energy Act, that is, how he knows that regulation that has resulted in the virtual abandonment of the industry has nevertheless been too lax.

Second, while one might easily agree with some weak form of Macey's interpretive thesis, *e.g.*, "when in doubt nudge statutes in the direction of some public interest goal," that is not the methodology suggested. The idea here is to treat statutes just like the common law. That a provision is a legislative creation is to have no particular weight. This is an extremely strong form of judicial monitoring *via* interpretation. I can think of no justification for such a judicial posture that does not rely on the belief that legislatures generally are not attempting to implement some vision of the public interest when enacting a statute. For, if one believed that legislatures were enacting such visions, and that there are multiple public values that inevitably lead to public-interested compromises, then interpreting all specific clauses as subordinate to any broadly stated purpose, as Macey proposes, looks like nothing more than judicial revision. This "Council of Revision" is not constrained by even that degree of "modesty" often thought to be induced by articulating revisionary questions as ones of judicial review rather than judicial interpretation.

Not all the legal literature seeking to apply public choice theory to statutory interpretation has been so rambunctious. Moderating his views somewhat after taking on direct responsibility for legislative interpretation,<sup>104</sup> Judge Posner offers a more discriminating approach. In his view, statutes may be of at least four types: statutes pursuing the public interest economically defined (correction of market failures); statutes pursuing the public interest defined in other ways (*e.g.*, the just distribution of wealth); statutes expressing a public sentiment not easily explained in either efficiency or distributional terms (*e.g.*, the regulation of pornogra-

104. Compare Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982) with R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM*, 265-93 (1985).

phy); and legislation furthering the interest of narrow interest groups. Judge Posner suggests that we first classify legislation and then pursue different interpretative strategies depending on the type of legislation presented for interpretation.<sup>105</sup> Public interest legislation should receive a broad purposive construction, while narrow interest group legislation should get the treatment suggested by Judge Easterbrook. Posner specifically objects to the use of presumptions one way or another concerning the nature of legislation.<sup>106</sup> He criticizes Guido Calabresi's book on statutory obsolescence,<sup>107</sup> for example, because Calabresi seems, without any explicit justification, uniformly to assume a public-interest perspective on legislation.

"Judicious" as it may appear, Judge Posner's approach may be unworkable. Consider the legislative scheme at issue in *Silkwood v. Kerr-McGee Corp.*<sup>108</sup> Should we agree with Easterbrook and Macey that this is private interest legislation because it contains exclusive licensing provisions and limitations on liability? Or perhaps because private interests lobbied for its passage? I certainly would be hesitant to so conclude unless I were utilizing Easterbrook's and Macey's presumptions—a methodology that Posner enjoins us to avoid. Regulation by licensing of a technology that has the capacity to produce massive and irreversible catastrophe hardly seems conclusive evidence of a private interest viewpoint. Nor does a limitation of liability under circumstances of enormous uncertainty, but potentially great public gain. Nor would I be convinced by the undoubted presence in the legislative process of those who perceived the incidence of public benefits under the legislation to be skewed in their direction. Some such presence can be identified for all legislation.

The public or private character of the Atomic Energy Act seems rather hopelessly indeterminate. Moreover, I suspect that the same situation would obtain with respect to most all legislation put before a court. When asked to choose between a public interest and a private interest perspective, we will almost always have to vote our presuppositions, not our analysis of the evidence. And the public choice literature simply does not establish a basis for believing in one or another of those presuppositions. Nor does it, we should add, in any way validate the utility of

105. See generally Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, *supra* note 104.

106. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM*, *supra* note 104, at 286-93.

107. *Id.* at 290-93.

108. 464 U.S. 238 (1984).

the interpretative approaches that the three preceding authors have suggested.

William Eskridge's recent attempt<sup>109</sup> to provide a systematic classification of legislation along with attendant interpretive methodologies suffers from similar problems in application. Eskridge uses Michael Hayes'<sup>110</sup> and James Q. Wilson's<sup>111</sup> classification of legislation according to the distribution of the legislation's benefits and costs. This classification scheme combined with some basic ideas from interest group theory provokes Eskridge to provide both predictions about what sort of legislation will emerge from legislatures, and an analysis of the degree to which one should be concerned that a particular type of legislation is the result of competition between narrow self-interested groups or organizations.<sup>112</sup> Each of the four types of legislation that is generated by Eskridge's two-by-two matrix then has an "appropriate" form of interpretation attached to it.

The Eskridge approach is a considerable advance over its predecessor's application of public choice ideas to statutory construction. He uses public choice theory itself to develop his classification scheme. His approach, based on ideas about the supply and demand of legislation, thus has more analytic bite than Judge Posner's intuitive categorization of the legislative territory. His conclusions are less grotesque parodies than Easterbrook's or Macey's of legislative life as revealed both within and outside of the public choice literature.

Even so it would be extremely dangerous to adopt the Eskridge approach as a set of interpretive rules. We need not pursue the difficulties in great detail. First, like Posner's classification system, Eskridge's is not self-defining or self-applying. Indeed, it seems vague or ambiguous at its core. Legislation has multiple distributions of costs and benefits. Moreover, those distributions may change over the life of the legislation. I have grave difficulty assigning even superficially easy cases, like Social Security pensions or the National Labor Relations Act, much less our old friends the Atomic Energy and Price-Anderson Acts, to a box in Eskridge's matrix.

These classification difficulties relate to a more fundamental problem. Eskridge's assortment of interpretive approaches seem to flow in

109. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

110. M. HAYES, *LOBBYISTS AND LEGISLATORS* (1981).

111. J. Q. WILSON, *POLITICAL ORGANIZATIONS* (1973).

112. See generally Eskridge, *supra* note 109.

TABLE 3  
DYNAMIC STATUTORY INTERPRETATION<sup>113</sup>  
(REVISED "LIGHTHOUSE" VERSION)

<b>Distributed benefit/ distributed cost</b>	<b>Distributed benefit/ concentrated cost</b>
<p><b>Danger:</b> The legislature's failure to update the law as society and the underlying problem change.</p> <p><b>Response:</b> Courts can help maintain a statute's usefulness by expanding it to new situations and by developing the statute in common law fashion.</p> <p><b>Caveat:</b> Courts should be reluctant to create special exceptions for organized groups.</p>	<p><b>Danger:</b> Regulated groups' evasion of duties; as agencies are "captured" by groups, regulation becomes a means to exclude competition.</p> <p><b>Response:</b> Courts can monitor agency enforcement and private compliance, and can open up procedures to allow excluded groups to be heard. Courts should seek to make the original public goal work.</p>
<b>Concentrated benefit/ distributed cost</b>	<b>Concentrated benefit/ concentrated cost</b>
<p><b>Danger:</b> Rent-seeking by special interest groups, at the expense of the general public.</p> <p><b>Response:</b> Courts can narrowly construe the statute to minimize the benefits. Courts should err in favor of stinginess with public largesse.</p> <p><b>Caveat:</b> Rule of stinginess not applicable if statute really serves a public purpose.</p>	<p><b>Danger:</b> The statutory "deal" often grows unexpectedly lopsided over time.</p> <p><b>Response:</b> Courts can finetune the statutory arrangement to reflect new circumstances.</p> <p><b>Caveat:</b> Err against very much judicial updating, unless affected groups are systematically unable to get legislative attention.</p>

113. *Id.* at 325.

some mysterious way from the positive analysis of the underlying structure of the legislation. The only hint of why comes from Eskridge's suggestion that the courts, when interpreting, are about the business of remedying "dysfunctions" in the legislative process. But surely we need a better articulated normative view of what courts should be doing *along with some positive explanation of what we should expect from courts*<sup>114</sup> before we can begin to assess the usefulness of Eskridge's rules of thumb.

Eskridge, however, offers his model much more as a set of caveats, not as a set of interpretive rules. If we are unhappy with adopting either a broad presumption about private interests or public interests as the dominant explanations for legislation, Eskridge's typology begins to tell us something about where we might expect the process of legislative enactment to be characterized by one or another of these perspectives. It seems to tell us something about where we might be more or less worried about misjudging legislative intent by using the wrong presuppositions. It provides opportunities for local insights into the dynamics of particular types of statutes; it helps to lead the mind toward appropriately complicated visions of what legislation is about without losing all pretense to be more than a "garbage can" theory.

It is that sort of ambition that led lawyers to have an interest in the economic analysis of law and of public law institutions in the first place. It is the hint that such possibilities might be realized that should probably keep us there as the field of public choice develops. In the meantime some sensitive attempts to use the public choice literature to pose questions and to refine our understanding is likely to be salutary. The Eskridge typology may be flawed as a starting point, but it has the advantage of beating the currently available alternatives. Like the best of the available public choice research, it is telling us, for now, to be skeptical of our prior Panglossian presuppositions concerning the structure and dynamics of political action, but also to be skeptical of the public choice approach's capacity to make definitive findings.

114. The only positive theories about judging that have surfaced to date are hopelessly inconclusive. See discussion in Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989).