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Public Choice Theory and the Fragmented Web of the Contemporary Administrative State

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GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW. By *Jerry L. Mashaw.* New Haven, Connecticut: Yale University Press. 1997. Pp. 209. $28.

Since World War II, public choice theory — defined broadly as the application of the assumptions and methodology of microeconomics to describe or predict the way public officials exercise power — has grown from a fledgling movement, gaining mainstream acceptance and respect for its insights into voting behavior, judicial decisionmaking, and other public actions.[1] Although a theory first explored by economists and political scientists, public choice's normative insights have earned credibility in recent years in academic legal literature.[2] Public choice's acceptance in the law school curriculum is demonstrated by the recent publication of

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1. Public choice insights have also contributed to the understanding of private decisionmaking in areas such as bankruptcy and corporate law. *See* David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship,* 50 VAND. L. REV. 647, 672-73 (1997) (reviewing MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997)).

2. *See, e.g.,* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); *Symposium on the Theory of Public Choice,* 74 VA. L. REV. 167 (1988). Law review articles discussing or deploying public choice ideas are far too numerous to catalogue here, but some representative examples not otherwise discussed in this review include Linda Cohen & Matthew Spitzer, *Term Limits,* 80 GEO. L.J. 477 (1992); Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act,* 75 N.C. L. REV. 1305 (1997); Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?,* 12 INTL. REV. L. & ECON. 145 (1992); Erin O'Hara, *Social Constraint or Implicit Collusion? Toward A Game Theoretic Analysis of Stare Decisis,* 24 SETON HALL L. REV. 736 (1993); Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review,* 26 J. LEGAL STUD. 347 (1997); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice,* 83 CAL. L. REV. 1309 (1995); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications,* 80 GEO. L.J. 1787 (1992).

course material on the topic.[3] However, despite public choice's self-proclaimed positive nature — as a descriptive and predictive tool — it continues to have its share of vigorous opponents, who "angrily reject its pessimistic model of human behavior, and suspect its analysis of being driven by an underlying dislike of regulation and redistribution."[4]

Theories of administrative law have also been the subject of much discussion in the legal literature over the past half-century. Many contemporary scholars have attempted to weave administrative law statutes and cases into overarching theories of bureaucracy. At the same time both bureaucracy and administrative law have had a fair number of vigorous critics, some rejecting delegation as inherently antidemocratic,[5] others condemning the actions of bureaucrats as without common sense,[6] still others decrying theories of bureaucracy as incoherent and illegitimate[7] or the administrative state as unconstitutional.[8]

It thus seems that public choice and administrative law share a common subject matter and vigorous opposition. Jerry Mashaw seeks to address both in *Greed, Chaos, & Governance: Using Public Choice to Improve Public Law.* Mashaw, a Sterling Professor of Law at Yale Law School, has had a major influence on federal administrative law for nearly three decades. His first two books, on the social security disability claims process[9] and the 1970s due process revolution,[10] are cited regularly in the administrative law and public administration literature. A later book on the National Highway Traffic Safety Administration's (NHTSA's) failed auto safety program, coauthored with David Harfst, led the charge against judicial ossification of the administrative rulemaking process and secured Mashaw's reputation for using case-study analysis

3. *See* MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997).

4. Edward L. Rubin, *Public Choice and Legal Scholarship,* 46 J. LEGAL EDUC. 490, 490 (1996). One administrative law scholar ascribes to public choice theory "general skepticism about activist government in all its forms." Thomas W. Merill, *Capture Theory and the Courts: 1967-1983,* 72 CHI.-KENT L. REV. 1039, 1053 (1997).

5. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993) (criticizing Congress's tendency to delegate lawmaking authority to bureaucrats).

6. *See* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994) (providing anecdotal accounts of how bureaucrats lack common sense).

7. *See* Gerald E. Frug, *The Ideology of Bureaucracy in American Law,* 97 HARV. L. REV. 1276, 1377-80 (1984) (decrying as "self-contradictory" models of bureaucratic legitimation).

8. *See* Gary Lawson, *The Rise and Rise of the Administrative State,* 107 HARV. L. REV. 1231 (1994) (arguing the post-New Deal administrative state is unconstitutional).

9. *See* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).

10. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985).

of bureaucracy to shed light on administrative law.[11] *Greed, Chaos and Governance,* more than any of Mashaw's other works, attempts to explore systematically the normative issue of bureaucracy and its role in a tripartite system of governance.[12]

In Part I, I introduce public choice theory and its now-common association with a pessimistic view of public law, Mashaw's bête noire. In Part II, I summarize Mashaw's applications of public choice theory to the modern administrative state, placing his contribution in the contexts of his previous work and the current genre of administrative law scholarship. As I will suggest, although his policy recommendations are tentative, they are related by the use of public choice tools as a mirror for evaluating myths associated with one of the most cherished institutions in our democracy — the legislature.

Mashaw's applications of public choice theory are lucid, reasonable, and often convincing; his is an important contribution toward recognizing defects in the legislative process and giving both public choice and administrative law broader legitimacy. Like Daniel Farber and Philip Frickey, authors of one of the first legal books with a public choice theme,[13] Mashaw is not sanguine about the coherence of using public choice to build grand theories of government or administrative law and searches instead for a middle ground approach.

For Mashaw, public choice is most insightful for public law when it yields usable knowledge, a realism that requires us to listen to "whatever truths modern public choice theory is telling us without succumbing to the excessively negative vision it so often supports" (p. 31). Farber and Frickey, who adopt the neorepublican framework[14] as a unifying perspective in their practical reason approach to integrating public choice and public law, see public choice theory as consistent with pursuit of the public interest.[15] For Mashaw, who distances himself from neorepublicanism and other unifying intellectual perspectives of administrative governance, public choice's self-proclaimed positivism also does not imply normative skepticism about pursuit of the public interest. As I suggest in Part III,

11. *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

12. The book elaborates and extends themes Mashaw developed more than a decade ago in the Rosenthal Lectures at Northwestern University Law School, delivered in February 1986.

13. *See* FARBER & FRICKEY, *supra* note 2, at 116-18 (distancing their examination of public choice from grand theory and espousing a practical reason stance).

14. By "neorepublican" I mean the view, associated with modern civic republican or deliberative democratic theories of governance, that self-interest is not the sole motivating factor for individuals and that at least sometimes individuals will avail themselves of a public-regarding deliberative process.

15. *See* FARBER & FRICKEY, *supra* note 2, at 9-11.

Mashaw's realism is truer to the positivism and method of public choice theory, understood on its own terms, than the efforts of those, such as Farber and Frickey, who utilize public choice tools from a unifying practical reason perspective. Mashaw's fidelity to realism, however, may come at some cost; absent a unifying perspective of administrative governance outside of public choice theory, we can expect little more than rampant pessimism or fragmented lessons from public choice.

I. Public Choice Theory and the Rise of Pessimism About Public Law

Greed, Chaos and Governance, in large part a synthesis of several previously published journal articles,[16] addresses several applications of public choice theory and also distances public choice from both its most ardent critics and its most ideological proponents. At the outset, it should be made clear that Mashaw does not set out to glorify public choice theory. Instead, Mashaw attacks head-on many well-accepted public choice analyses, including justifications for textualist judicial interpretation of statutes — advocated by Judge Frank Easterbrook[17] — and arguments against delegation to administrative agencies — advocated by Peter Aranson, Ernest Gellhorn, and Glen Robinson[18] and, more recently, David Schoenbrod.[19] Yet, at the same time, Mashaw uses public choice to make several tentative policy recommendations.

Mashaw's starting point is the dismal antiregulation, antidelegation stance often ascribed to public choice theorists. This reputation, in part earned by public choice's association with one of its

16. *See* Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law,* 54 Tul. L. Rev. 849 (1980); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law,* 65 Chi.-Kent L. Rev. 123 (1989); Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability,* Law & Contemp. Probs., Spring 1994, at 185; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions,* 1 J.L. Econ. & Org. 81 (1985) [hereinafter Mashaw, *Prodelegation*]; Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes,* 32 Wm. & Mary L. Rev. 827 (1991). Related works by Mashaw that surface from time to time in the book include Jerry Mashaw, *As If Republican Interpretation,* 97 Yale L.J. 1685 (1988) [hereinafter Mashaw, *As If Republican*]; Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development,* 6 J.L. Econ. & Org. 267 (1990) [hereinafter Mashaw, *Explaining Administrative Process*]; Jerry Mashaw, *Imagining the Past; Remembering the Future,* 1991 Duke L.J. 711.

17. *See* Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System,* 98 Harv. L. Rev. 4 (1984) [hereinafter Easterbrook, *1983 Forward*]; Frank H. Easterbrook, *Statutes' Domains,* 50 U. Chi. L. Rev. 533 (1983) [hereinafter Easterbrook, *Statutes' Domains*].

18. *See* Peter H. Aranson et al., *A Theory of Legislative Delegation,* 68 Cornell L. Rev. 1 (1982).

19. *See* Schoenbrod, *supra* note 5.

first cousins, the Chicago School of economics,[20] is reinforced by two primary research agendas: the economist George Stigler's "greed" research agenda, which describes regulation as driven primarily by private rent-seeking behavior;[21] and the "chaos" research agenda, associated primarily with Kenneth Arrow, an economist who early in his career offered a modern proof of the instability of democratic processes.[22]

According to Mashaw, "the way we, as citizens, articulate and understand our most cherished political ideal, democratic governance, has been a product largely of our changing understandings of how human beings *do* behave within particular institutional settings, not changing ideas of the moral underpinnings of democracy itself" (p. 3). To illustrate this thesis, Mashaw turns to the political science of the founding of the Republic and the progressive New Deal era, and then to the modern political science from which public choice theory has sprung. After looking at history, Mashaw characterizes today's "political life . . . as a world of greed and chaos, of private self-interest and public incoherence" (pp. 3-4). This vision provides a challenge for designers of public institutions by making all public action "deeply suspect" (p. 4). Moreover, Mashaw suggests, this negative vision *already has* shaped our understanding of public life.

The insights of modern public choice theory can be traced to James Madison, who was influenced by David Hume and (probably) the French mathematician the Marquis de Condorcet.[23] In

20. There is an apparent tension here, for the Chicago School would suggest that transaction costs may inhibit private economic markets from moving resources to their most highly valued use. *See* R.H. Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960). Yet political markets have sufficiently low transaction costs so as to render political structures indeterminate in predicting the outcome of capture. *See* GEORGE J. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION (1975) [hereinafter STIGLER, CITIZEN AND STATE]; George J. Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECON. & MGMT. SCI. 3 (1971) [hereinafter Stigler, *Economic Regulation*]. Other first cousins include the Rochester School, which builds on William Riker's early work to emphasize how governmental outcomes are arbitrary and unpredictable, and the Virginia School, which builds on the early work of James Buchanan and Gordon Tullock to emphasize the distinction between constitutional rules and positive law. *See* STEARNS, *supra* note 3, at xviii-xix.

21. *See* STIGLER, CITIZEN AND STATE, *supra* note 20; Stigler, *Economic Regulation, supra* note 20. Stigler was awarded a Nobel Prize for his work on interest group theory in 1982.

22. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963). Arrow was awarded the Nobel Prize jointly with John Hicks in 1972, although for work on general equilibrium theory, not Arrow's collective choice research. James Buchanan received the award in 1986, for his pioneering work — with Gordon Tullock — on political economy, which is perhaps most consistently identified as the magnum opus of the early public choice movement. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

23. *See* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 268-69 (1988) (discussing the influence of Hume's *Idea of a Perfect Commonwealth* on Madison). Thomas Jefferson and Madison were familiar with Condorcet. *See* Maxwell L. Stearns, *The Misguided Renaissance of Social Choice,* 103 YALE

Federalist No. 10, "popular democracy's tendencies to instability, oppression, and ineffectualness are set forth as the major problems to be solved when constructing a government that can and will protect individual rights" (p. 4). Madison intended to "eschew what many thought democracy to be about — local autonomy, direct citizen participation, and the sovereignty of popular majorities" (pp. 4-5). Thus, the triumph of the Federalist-era political science is often seen as the triumph of representative over direct democracy in our constitutional structure.[24]

In the New Deal era, the dominant view of human nature (the "is") also influenced normative theories of democratic governance (the "oughts"). By this time, both courts (slow to adapt the Constitution to new societal needs and demands) and representative legislative bodies (perceived as corrupt and incompetent since the turn of the century) had fallen into disrepute. Initially, progressive political scientists returned to the anti-Federalist idea of the referendum, primarily to bypass the inertia of conservative legislatures, but this did not continue for long. Soon, social psychologists' dire visions of irrational drives, passions, and prejudices seemed borne out by historical events, such as the democratic rise of fascism in Italy and Germany.

The New Deal response was an emerging field of positive theory: management science. The industrial revolution had heralded organized intelligence in the corporation as a cure for social ills. According to Mashaw, "[w]hile representative assemblies had failed to further Madison's 'permanent interests of the community,' those interests might yet be furthered by rational planning. Public administration thus was the key to meeting public demands while avoiding the dysfunctions of either popular or representative democracy" (p. 7). Led by the vision of reformers such as Felix Frankfurter,[25] Louis Brandeis,[26] and James Landis,[27] apolitical administrative agencies were a New Deal solution to the perceived failures of markets and, perhaps more important, the perceived ills of democracy.

As Mashaw observes, the Federalist and New Deal political sciences converged. Both were suspicious of popular democracy for the same reason — the perceived tendency of citizen passions or interests to produce majoritarian tyranny. But, unlike the Federal-

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L.J. 1219, 1221 (1994); *see also* Iain McLean & Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 PUB. CHOICE 445 (1992).

24. Contrast the view of the anti-Federalists, based on a fundamentally different view of human nature. For them, direct participation was seen as enhancing civic virtue. P. 5.

25. *See* FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 145 (1930).

26. *See* LOUIS D. BRANDEIS, THE CURSE OF BIGNESS (Osmond K. Fraenkel ed., 1934); BRANDEIS ON DEMOCRACY (Philippa Strum ed., 1995).

27. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS (1980).

ist era, political science in the 1950s and 1960s gave rise to a new positive theory: the theory of public choice. Public choice theory, according to Mashaw, "seeks to explain, or at least to 'model,' 'rational public choice' within the typical institutional environment of the modern welfare state" (p. 10). The unifying thread of modern public choice theory is that "[w]e must always seek to understand political outcomes as a function of self-interested individual behaviors" (p. 11). In other words, the political sphere is a market in which voters and representatives, like consumers and firms, act as if they are rational, maximizing individuals pursuing their self-interests.[28] There is a market for collective social action. Like private economic markets, the collective social action market is also subject to market failure, particularly when chaos results or there is widespread abuse for private gain. Public choice theorists gear much of their institutional design work toward correcting these failures.

Today's public choice theorists regard many majoritarian processes as chaotic. Kenneth Arrow's Impossibility Theorem — which asserts that it is impossible to structure a voting scheme without making a choice which is imposed or dictatorial[29] — illustrates how normal majoritarian voting processes may fail to translate individual preferences into a collective preference. Most voting systems have developed ways to constrain choice to avoid the pitfalls identified by Arrow, but these institutional solutions admittedly entail a choice between incoherence, known formally as cycling,[30] or some form of unfairness. Of particular interest to modern studies of bureaucracy, Arrow's theorem illustrates the awesome power associated with agenda setting.

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28. Mashaw flatly rejects the arguments of those who disavow public choice theory because of its assumption that citizens are self-interested. P. 27. Recent research in psychology suggests that the problem of self-interest may be more difficult than either Mashaw or critics of the self-interest assumption recognize. Jonathan Baron, for example, has found that citizens, believing that they are acting in their self-interest, in fact regularly commit cognitive errors by acting altruistically or cooperatively. *See* Jonathan Baron, *The Illusion of Morality as Self-Interest: A Reason to Cooperate in Social Dilemmas,* 8 PSYCHOL. SCI. 330 (1997).

29. Arrow's theorem basically illustrates that no scheme of voting on individual ordinal ranking of pairs can simultaneously meet the requirements of minimum rationality, the Pareto standard, nondictatorship, independence of irrelevant alternatives, and universal applicability. *See* FARBER & FRICKEY, *supra* note 2, at 38-39. There is no need to reproduce the Impossibility Theorem, a generalization of the eighteenth-century proof known as Condorcet's Voting Paradox, here. In his book, Mashaw nicely illustrates Condorcet's Voting Paradox and the contribution of Arrow's proof. Pp. 12-13; *see also* Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government,* 75 IOWA L. REV. 949 (1990).

30. Arrow's theorem implies cycling only where certain conditions are present. For example, cycling does not occur if members of the decisionmaking group have *unipeaked* preferences, which may occur when legislators implicitly or explicitly agree in advance to rank their choice on similar liberal-to-conservative ideological scales. *See* FARBER & FRICKEY, *supra* note 2, at 48-49; DENNIS C. MUELLER, PUBLIC CHOICE II 67-73, 94 (1989).

In addition, according to modern public choice theorists, the political process is driven by private greed. As Mashaw notes, public choice has grown up to tell a "downright depressing" story about legislatures and bureaucracy (p. 15). George Stigler applied interest group theory to the study of bureaucracy and brought "greed" to the forefront of the modern political science research agenda, helping to secure public choice's reputation as *the* modern dismal science.[31] According to the rent-seeking research agenda, private interest groups seek to use the political process to shift resources from the general public to their members. For example, logrolling allows trading across issues in the political process. As described by public choice theorists, logrolling can help to solve some of the cycling problems Arrow identified.[32] Logrolling, however, raises its own set of problems. By trading across a variety of issues, a bare majority can enact policies that benefit it, but whose net costs to the minority create a loss for society as a whole (pp. 16-18).

Mashaw observes that the intellectual history of public choice theory is long and thoroughly interdisciplinary.[33] But contemporary public choice theory sounds a much more dismal theme than its intellectual predecessors:

> Whereas Federalist and New Deal political science feared only those expressions of popular will unmediated by the rationalizing influence of either a representative assembly or an expert bureau, contemporary theorists despair of expressing the will or preferences of the people through any device whatever. For them, our public laws capture instead only a particular concatenation of private preferences made politically relevant by the dynamics of self-interested behavior on the part of voters and officials alike. The 'public' in 'public law' identifies only the nature of the power that is put in the service of private ends. Legislation elaborates norms without normativity; it expresses neither the passionate commitments nor the reasoned judgments of a political community. [p. 21]

While some of the insights of public choice theory were implemented by optimistic activists in the 1960s and 1970s — making agency statutory mandates more specific, circumscribing enforce-

31. *See* STIGLER, CITIZEN AND STATE, *supra* note 20; Stigler, *Economic Regulation, supra* note 20.

32. Logrolling, for example, might allow the voters considering three distinct funding issues to vote on all three issues in the covert of a single funding bill, thus trading their votes across the different budget items. By avoiding comparison of each item, logrolling avoids cycling.

33. For example, Arrow's twentieth-century contribution owes much to Condorcet, one of Madison's contemporaries. Likewise, Stigler's contribution was shared by Madison in FEDERALIST No. 10 and has a rich parallel in liberal and Marxist political science, as well as in the work of David Hume and Condorcet. *See supra* note 23 and accompanying text.

ment discretion, and enhancing participation in rulemaking[34] — public choice theory has been invoked from the Carter administration forward to justify pessimism about government and public law. The last twenty years have seen movement, supported by arguments from public choice, toward parliamentary-style government, balanced budget amendments, term limits, public finance of elections, sunset laws, Office of Management and Budget rule review, and deregulation. Mashaw writes:

> The striking thing about the public choice literature . . . is the degree of 'government failure' it finds. Indeed, the message is generally not about the ameliorative steps needed to improve the political marketplace. It is instead a message about why political markets *cannot* work to satisfy the democratic wish, that is, to provide the people with the government that they want. Modern positive political theory provides a much bleaker picture of political life than virtually any of its influential predecessors. [p. 12]

The overriding message of conventional public choice theory, Mashaw suggests, is to return to the principles of the Federalists or, better yet, the anti-Federalists: constrain government radically and place trust in the market, voluntary associations, and community-based government.[35]

Together, the orthodox greed and chaos research agendas provide a coherent thematic vision for applying public choice ideas to public law, but the vision is pessimistic about government generally and bureaucracy in particular. Public choice theory, understood exclusively through the greed and chaos lenses, provides strong reinforcement to the market and consensus-based reforms so popular in recent years at the federal and state levels.[36] Apart from such reforms, which focus primarily on dismantling the mechanisms of bureaucratic governance, the future for administrative law on this understanding of public choice is dismal.[37]

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34. For a critique of some of the institutional aspects of the participatory revolution in administrative law, see Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. U. L. Rev. 173 (1997).

35. One recent administrative law scholar, agreeing with Mashaw's assessment, finds support in post-1980 judicial doctrine. *See* Merill, *supra* note 4.

36. *See* Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 Geo. Wash. L. Rev. 479 (1995); *see also* Howard, *supra* note 6.

37. Bruce Benson, succumbing to a similar reading of the public choice literature, writes, "the real problem of bureaucracy is unquestioned acceptance of the belief that government can solve most perceived problems, which allows bureaus to be established and expanded." Bruce L. Benson, *Understanding Bureaucratic Behavior: Implications from the Public Choice Literature*, 2-3 Economia delle Scelte Pubblice 89, 114 (1995). This dismal view nicely dovetails with Niskanen's classic hypothesis that bureaucracies will attempt primarily to maximize their budgets and sizes. *See* William A. Niskanen, Jr., Bureaucracy and Representative Government (1971).

II. MASHAW'S APPLICATION OF PUBLIC CHOICE TOOLS TO THE MODERN ADMINISTRATIVE STATE

Mashaw's book does not endorse the bleak view of democratic governance portrayed by many modern public choice theorists. Instead, the book attempts to extract usable knowledge from public choice tools by putting them to constructive use as a basis for institutional reform. Three applications form the core of Mashaw's project: (a) use of public choice tools to defend rationality review of legislation by courts and to critique the dominant public choice argument in favor of textualist statutory interpretation; (b) use of public choice tools to build a positive theory of delegation of political decisionmaking authority to agencies; and (c) application of game theory to suggest abolition of preenforcement review of agency rulemaking.

A. *Public Choice and the Nature of Judicial Review of Legislation*

Mashaw begins with the institution his earlier works addressed with cynicism: the courts. *Bureaucratic Justice* criticized judicial review of social security disability cases as largely ineffectual.[38] *Due Process in the Administrative State* scolded courts for constitutionalizing participation in the administrative state through due process doctrine.[39] In *The Struggle for Auto Safety,* Mashaw and Harfst argued that the judiciary was largely responsible for NHTSA's failure to adopt rules regarding automobile safety.[40]

One would not, based on his earlier books, think Mashaw a fan of the courts. Yet, as he argues in this book, judicial review of legislative action is not necessarily incongruous with public choice. Mashaw deploys public choice arguments both to justify rigorous rationality review of statutes and to debunk those who invoke public choice theory to demand textualist interpretation of statutes by judges. In both instances, Mashaw attempts to ground normative arguments about the institutional role of judicial review of legislation in public choice terms; his arguments are related by his implicit recommendation that legislation be subjected to judicial constraints similar to those applicable to actions by contemporary administrative agencies.

1. *The Case for Rationality Review*

Courts in the twentieth century have struggled endlessly with the issue of when a court may strike down a statute simply because

38. *See* MASHAW, *supra* note 9, at 185-90.

39. *See* MASHAW, *supra* note 10, at 254-71.

40. *See* MASHAW & HARFST, *supra* note 11.

it is arbitrary — that is, irrational or unreasonable. In the post-New Deal era, courts have displayed almost universal deference to legislation. Courts almost always accept a statute if its ends are legitimate — if it can be said to have any rational basis. Against the grain of most public choice commentators — as well as courts and administrative law scholars — Mashaw, in public choice terms, staunchly defends reinvigorating a more substantive rationality review of legislative decisionmaking.[41]

It is not surprising that public choice theory might justify activist judicial review of legislation. The contributions of Arrow and Stigler have led to widespread perceptions that legislation is either completely arbitrary or the product of special interest deals. For example, those who view statutes through Arrovian or interest group lenses — particularly William Riker[42] and Frank Easterbrook[43] — regard rigorous judicial review of legislation as necessary to preserve individual liberty.

Mashaw's defense of rationality review of legislation contrasts with the strong public choice argument for rationality review. Mashaw maintains that judicial failure to entertain rationality analysis suffers the same fault that Holmes recognized with *Lochner:* it privileges one view of legislation — the view that it reflects the general will — criticized widely by public choice theorists writing after Arrow. Yet in defending rationality review of statutes, Mashaw does not suggest a return to *Lochner.* Rather, Mashaw suggests that courts review statutes for "public regardingness" (p. 67). This approach would suggest

> judicial review of the adequacy of a statute's beneficial purposes when judged in the light of its harmful effects. Any citizen should be entitled to an explanation of why her private harm is at least arguably outweighed by some coherent and plausible explanation of the public good. [p. 68]

Courts should uphold a statute as long as a "coherent and plausible" public purpose can be identified (p. 75). In Mashaw's view, rationality review of legislation is inevitable and should be pursued regardless of the extant doctrinal subterfuges applied by courts and

41. Mashaw can only defend rationality review to the extent public choice allows him to do so. Public choice theory supplies a relatively weak sense of rationality. For the public choice theorist, rationality is taken to mean "transitivity" or lack of cycling, as Arrow's theorem predicts. In other words, collective actions are irrational if they fail to yield consistent results from the aggregation of individual preferences. Mashaw, however, has in mind a more robust sense of rationality review.

42. *See* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislators,* 74 VA. L. REV. 373 (1988).

43. In this book, Mashaw responds to Easterbrook's writings from the years before he became a judge on the U.S. Court of Appeals for the Seventh Circuit. *See* Easterbrook, *1983 Foreword, supra* note 17; Easterbrook, *Statutes' Domains, supra* note 17.

litigants.[44] Moreover, Mashaw argues, public choice theory, particularly interest group theory, can provide a pro-democratic argument for rationality review in contexts in which the legislative process has failed to produce public-regarding democratic results.

However, as Einer Elhauge has argued, interest group theory, applied on its own terms, fails to provide a meaningful baseline for evaluating "what level of petitioning effort is normatively proportional to each group's interest."[45] In other words, public choice theory itself cannot provide a measure of "public regardingness," independent of some set of criteria for evaluating the success or failure of the political process. Mashaw's public choice argument in favor of substantive rationality review seems logical and plausible, and is nicely complemented by recent attempts to justify rigorous judicial review of legislation following *United States v. Lopez*.[46] Public choice theory, however, does not make explicit an adequate set of normative criteria for evaluating the political process, and thus fails to provide a meaningful measure of public regardingness.

2. *Public Choice Against Textualism*

Mashaw also attacks a widely endorsed public choice argument in favor of textualist statutory interpretation. Reacting to a view associated most closely with Frank Easterbrook, public choice arguments allow Mashaw to explore the risks and costs of textualist interpretation of statutes.

New Deal public interest legislation invited courts to discern the general reform purpose that motivated the statute and to promote that purpose in individualized cases (p. 83). Initially, in the 1950s, New Dealers found the legal process approach of Hart and Sacks particularly attractive, a way of rationalizing designers of statutes as "reasonable people pursuing reasonable purposes reasonably" (p. 84). Sometime in the 1960s, however, this optimistic vision began to unravel and eventually was replaced by a cynicism that continues through the present:

> In the 1990s governmental efforts tend to be viewed as inevitably flawed. Public policy reform is directed almost exclusively at limiting direct government expenditure and preventing the implementation of

44. On the pervasive application of subterfuges in due process and equal protection contexts, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

45. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 49 (1991).

46. *See* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication and* United States v. Lopez, 46 CASE W. RES. L. REV. 695 (1996) (observing that judicial requirement of legislative findings can work to promote congressional deliberation); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731 (1996) (endorsing limited judicial requirement of legislative findings as an intermediate level of process review).

> costly regulatory policies. Institutional reform consists largely of privatization, desolution, and downsizing — and of creating roadblocks to regulatory initiative. [p. 84]

The 1990s pessimists' views of statutory interpretation contrast with those of New Dealers. Instead of consulting a statute's purposes, 1990s courts might doubt that a statute, little more than the "vector sum of organized political forces" (p. 84), even has public purposes. On this modern view,

> [a] court, or any interpreter, confronting such a statute will surely be puzzled about how to proceed. At best it may be engaged in the enforcement of compromise among contending special interests. At worst it may be implementing legal rules whose only coherent explanation is the political advantage provided to legislators. [p. 85]

As Mashaw observes, this approach is certain to create a crisis for purposive statutory interpretation. At the very least, it is absurd for the interpreter of such statutes to fill in gaps. Instead, such an interpreter might be led to focus more on the plain meaning of the statute, as some suggest the Burger and Rehnquist Courts have done.

A predominant approach in the political science literature — often associated with Easterbrook — is to understand legislation as a contract or deal. Easterbrook contends that statutory interpretation is nothing more than the enforcement of an arms-length bargain. Statutes therefore should be construed to cover only those domains of human conduct explicitly anticipated in the statutory language. By applying doctrines of strict constructionism to statutory language, courts ensure that interested parties get precisely what they bargained for in the political process.[47]

One problem with Easterbrook's approach, Mashaw notes, is that it is based on Gary Becker's view of legislation, which predicts that such deals will enhance — not reduce — general welfare.[48] "If one believes that private contracting among individuals and firms is socially beneficial (the invisible hand), to put those contracts in legislative rather than contractual language is a mere formal change that should not alter the aggregate welfare effects" (p. 89). Easterbrook, however, does not have an explanation for why legislative deals are inherently evil. And, while Easterbrook does say that contracts should be strictly construed, even this overstates contract doctrine. So, Mashaw suggests, understanding legislation as a

47. *See* Easterbrook, *1983 Foreword*, *supra* note 17, at 15-18; Easterbrook, *Statutes' Domains*, *supra* note 17, at 544-51. The position attributed to Easterbrook precedes his appointment to the bench. He since has softened his position by acknowledging some use of legislative history to explain ambiguous language or to show "that a text 'plain' at first reading has a strikingly different meaning." *See In re* Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989).

48. *See* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

deal can just as easily lead us back to purposivism as strict constructionism. For Easterbrook's application to succeed, at a minimum public choice needs a normative theory for explaining why interest-group-generated legislation is bad. Easterbrook himself harbors much skepticism about public interest goals, but this skepticism is not a necessary condition to the application of public choice tools.

Mashaw has raised a plausible criticism of Easterbrook's position, but his own argument in favor of substantive rationality review suffers a similar defect in its failure to make explicit a normative set of criteria for public regardingness. While Mashaw does not, like Easterbrook, claim that all interest group legislation is inherently suspect, he does believe that such legislation will require reversal if a coherent and plausible explanation of its public regardingness cannot be given. Public choice theory cannot, on its own terms, provide an adequate set of criteria for making this determination.

This normative limitation with public choice analysis aside, Mashaw addresses another problem with Easterbrook's approach. Much of the current attention to statutory interpretation has been generated by Justice Scalia's attacks on the use of legislative history,[49] attacks that can be rationalized in public choice terms. Plain meaning, according to Scalia, reinforces the legislative process as it was envisioned in the Constitution and thus enhances the democratic process as a whole. Voting theory, particularly the work of Kenneth Shepsle suggesting the impossibility of mapping collective decisions onto individual preferences,[50] provides some support for Scalia's views.

However, the authors who write collectively under the pseudonym McNollgast, in contrast to Shepsle, argue that nothing in voting theory undermines the usefulness of legislative intent to aid judicial interpretation of statutes.[51] In practice, contra Arrow, legislative decisions do not cycle endlessly until they are cut off by some arbitrary feature in the legislative process; instead, congressional organization excludes certain preference orderings from the agenda and gives certain people veto or dictatorial powers with respect to the progress of a bill. Focusing on the agency side of public choice analysis thus aids the search for legislative intent. Public choice tools would suggest focusing on the enacting coalition while discounting cheap talk and statements by the minority. For exam-

49. Scalia's first published attack on the use of legislative history is *Hirschey v. Federal Energy Regulatory Commn.*, 777 F.2d 1, 6 (D.C. Cir. 1985) (Scalia, J., concurring).

50. *See* Kenneth A. Shepsle, *Congress is a 'They,' Not an 'It': Legislative Intent as an Oxymoron*, 12 INTL. REV. L. & ECON. 239 (1992).

51. *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter & Spring 1994, at 3. The professors who comprise McNollgast are Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast.

ple, statements by the President early in the legislative process should be given weight, but later statements should be discounted.

Using game theory and inspired by McNollgast, Mashaw goes on to argue that the legislature rarely is able to correct interpretive mistakes in laws. First, he suggests, procedural hurdles and limited time and resources may make correction improbable. Second, and more insightful, even if the legislature can act to correct a mistake with which it disagrees, "it will almost never end up with its original policy reinstated, even if not a single member of the legislature has altered his or her preferences."[52]

Therefore, Mashaw concludes, public choice theory has failed to provide a decisive methodology for interpreting statutes. Indeed, many of its ideas — such as Easterbrook's notion of legislation as a deal and voting theory's chaotic characterization of legislation — have proven "seriously unhelpful" (p. 104). Nevertheless, Mashaw acknowledges some lessons from public choice, particularly a focus on the speaker, notions of dynamic evolution, and the application of game theoretic tools. His most notable lesson is that judicial interpretation can make it impossible in many cases for the legislature to overturn the policy imposed by the judiciary; in most cases, it will preclude the legislature from reenacting the original policy.

The use of public choice to attack textualist approaches to statutory interpretation is related to Mashaw's public choice argument in favor of rationality review. The conventional view is that

> [r]ationality review is strongly antimajoritarian because it forecloses the implementation of the will of the majority. It is thus a danger to democracy and requires extremely strong justifications, none of which have ever been wholly successful. Judicial interpretation of statutes by contrast is not only inevitable, it can be structured to be prodemocratic, that is, to enforce the true will of the majority. Moreover, should the judiciary err, the injury to majoritarian governance is remediable by the legislature itself. [pp. 104-05]

Against this conventional approach, Mashaw suggests another alternative: courts should use rationality review to strike down statutes rather than to interpret them. According to Mashaw,

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52. P. 102 (emphasis omitted). William Eskridge and John Ferejohn model the Article I, Section 7 Game, *see* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992), which Mashaw utilizes to suggest that "interpretation of the law establishes a status quo point that will have the stability that our form of government gives to any existing state of affairs." P. 103. The game goes something like this: Assume the House, Senate, and President are each involved in new legislation. Each has slightly different preferences, but they can compromise and adopt a policy. Basically, if the interpretation leaves at least one of the House, Senate, or President better off, any one of these can take action to block its revision. Thus, tripartite division and the presentment clause favor the status quo. Judicial interpretation of statutes, Mashaw recognizes, has agenda-setting effects in the legislature: "[E]ven when the legislative process can overturn an interpretation, it literally cannot escape the force of the interpreter. Interpretation has rearranged the status quo and thus reconfigured the structure of subsequent legislative bargaining." P. 103.

> a court overturning a statute on irrationality grounds may invade legislative prerogatives for public choice hardly at all. By contrast, a court misconstruing the legislature's statutes may often disempower it from implementing anything very close to the legislators' most preferred policy. [p. 105]

Maxims such as "construe statutes to avoid serious questions of constitutionality" are often, Mashaw suggests, more strongly countermajoritarian than substantive judicial review. Courts will, under Mashaw's normative application of public choice theory, have an active role in reviewing legislation for rationality, but they must construe legislative intent cautiously.[53]

The approach Mashaw proposes for judicial review of legislation is remarkably similar to the process by which modern courts generally review policymaking by administrative agencies: courts reluctantly interpret statutes, instead deferring to agency interpretations of law, but exercise rigorous rationality review with the possibility of reversal. Mashaw seems to suggest that modern democracies can learn from the growth of the administrative state by reflecting on how the traditional lawmaking body — the legislature — might react when subjected to judicial oversight similar to agencies. He uses public choice ideas as a mirror, forcing us to reflect alternative institutional restraints upon our traditional image of the legislature.

Mashaw's applications of public choice tools as a way of critiquing legislatures move the debate forward considerably. His critique depends upon a set of analytical tools outside of conventional public choice theory. Specifically, some of the insights of what has come to be known as "positive political theory"[54] — rational choice and game theoretic analysis of political institutions — allow him to transcend the dismal lessons of the orthodox greed and chaos research agendas. For example, McNollgast's research, which posits assumptions about the behavior of institutions rather than individuals, assists Mashaw in debunking conventional public choice arguments. Although well-accepted in the political science of institutions, there is little agreement as to whether contemporary public choice theory is sufficiently capacious to accommodate positive political theory as an analytical approach alongside the greed and chaos research agendas.[55] Public choice and positive political theory share a common subject matter, but public choice theory

53. In this sense, Mashaw's proposal to reinvigorate substantive rationality review of legislation for public regardingness differs from Jonathon Macey's argument that courts interpret statutes in a public-regarding way. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,* 86 COLUM. L. REV. 223 (1986).

54. *See* Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform,* 72 WASH. U. L.Q. 1 (1994).

55. *See* Daniel A. Farber & Phillip P. Frickey, *Forward: Positive Political Theory in the Nineties,* 80 GEO. L.J. 457, 458-63 (1992).

provides no methodological account of how assumptions about individual behaviors are linked to institutional behaviors; on the other hand, positive political theory often posits assumptions about institutions, such as the *legislature,* without necessarily reconciling these with findings about how individual behavior, such as that of the *legislator,* is aggregated into institutional phenomena. Nevertheless, Mashaw sees enough similarities between positive political theory and public choice that he is comfortable applying these tools side by side.[56]

B. *Public Choice and Legislative Incentives for Delegation*

Mashaw's deployment of public choice tools to evaluate myths associated with legislatures also allows him to provide a rationale for delegation to administrative agencies. His view contrasts remarkably the bleak visions of bureaucracy espoused by many other public choice theorists. According to the "greed" research agenda, at the core of the orthodox public choice explanation of legislative incentives for delegation

> [B]ureaus are conceptualized as being as susceptible to private interest influence as legislatures, and may assist the latter in obscuring the true nature of legislative action from the general public. By passing vague statutes that seem to be in the public interest, but then pressuring agencies to favor their supporters, legislators can have it both ways. They can take credit for good government while pandering to the special interests. Moreover, administrative institutions generate their own bureaucratic aims. They may function much like interest groups themselves by trading favors to powerful legislators (projects in the home district, help for a valued constituent) for aggrandizement of bureaucratic budgets or prerogatives. [p. 21]

Louis Jaffe and Theodore Lowi, writing in the 1960s, were early critics of delegation to agencies under broad legislative grants of power.[57] In the early 1980s, Peter Aranson, Ernest Gellhorn, and Glen Robinson gave these arguments grounding in the public choice literature.[58] And, in the late 1980s and early 1990s, this approach to criticizing delegation to administrative agencies was revived in the writings of David Schoenbrod.[59]

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56. *See* Mashaw, *Explaining Administrative Process, supra* note 16, at 280 (noting distinctive methods but concluding that public choice and positive political theory share "a core general presumption that political behavior is to be explained as the outcome of rational (and often strategic) action by relevantly situated individuals within some set of defined institutional boundaries").

57. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (1969).

58. *See* Aranson et al., *supra* note 18.

59. *See* SCHOENBROD, *supra* note 5.

These critics of delegation, who borrow heavily from public choice ideas, have inspired a significant defense of delegation, primarily among those Mashaw tends to view as "idealists."[60] Mashaw, no idealist, has also been an active voice in defending delegation, relying heavily on public choice tools. Public choice theory envisions the use of principal-agent models for examining the role of agencies. The "McNollgast hypothesis" asserts the following: electorally accountable officials must place the implementation of public policies in the hands of administrators who have their own designs, but they can still continue to control bureaucrats through legislatively imposed administrative process requirements.[61] Yet McNollgast argues that Congress faces two major obstacles in controlling agencies: (1) information asymmetry, and (2) the erosion of an original legislative coalition over time.[62]

Mashaw suggests that the McNollgast hypothesis should not undermine public choice arguments in favor of delegation. If it is assumed that legislators have some independent preferences, the McNollgast hypothesis can be decoupled from the notion that legislator preferences are a function of constituent or interest group preferences. This move, made possible by the technique of positive political theory, may be inconsistent with other public choice ideas, but it does allow the use of agency theory to survive by assuming that "[t]he legislators (principals) who vote for programs . . . prefer that administrators (agents) carry out their instructions as specified in the statute."[63]

Using this principal-agent approach, Mashaw presents an argument for broad delegation of political decisionmaking authority to administrative agencies. Critics of delegation have provided two main lines of argument: Lowi argued against delegation on authoritativeness grounds, asserting that statutes are the only legitimate

60. The "idealist" delegation vision, which Mashaw most closely associates with modern deliberative democrats, holds that administrative procedure "contributes . . . to the construction of an operationally effective and symbolically appropriate normative regime." P. 108. Mashaw — always searching for empirical grounding — does not have faith, however, in such idealist solutions. Instead, he suggests, the time is ripe for a realist revolution in administrative law.

61. *See* Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McCubbins et al., *Structure and Process*].

62. *See* McCubbins et al., *Structure and Process, supra* note 61, at 435-40.

63. Pp. 121-22. Thus, Mashaw concludes, in salvaging the principal-agent model, that "major insights into the structure and processes of federal administrative agencies as they actually operate are unlikely to flow from viewing agency structure and process primarily in terms of the monitoring and sanctioning problems that legislative controllers have with federal bureaucracies." P. 129.

vehicle for making law;[64] John Hart Ely[65] and Justice Rehnquist,[66] by contrast, argued against delegation on accountability grounds, positing that legislatures are institutionally more likely than bureaucrats to engage in accountable decisionmaking. The public choice argument against delegation articulated by Aranson, Gellhorn, and Robinson lends support to the latter view. In their view, public choice theory predicts that there are two circumstances in which legislators should be willing to confer broad authority on agencies: (1) if a policy stands to benefit one group while imposing substantial costs on another, in which case delegation to an agency allows legislators to claim credit and pass blame; or (2) if opposing groups are unable to agree, in which case delegation allows legislators to punt responsibility for the decision altogether. They conclude, however, that such delegation will not likely enhance welfare, but instead will produce "private benefits . . . at collective cost."[67]

Mashaw maintains that the prodelegation position looks at least as good on welfare and accountability grounds as do calls for reforms to statutory drafting made by critics of delegation. He argues that three problems plague Aranson, Gellhorn, and Robinson's claim that delegation to administrators systematically reduces welfare: (1) they equate democracy with legislative majoritarianism; (2) they treat the agency costs of delegation without considering the information and decision costs, which may be higher for a legislature than an administrative agency; and (3) they analyze logrolling without considering how agency changes the logrolling game (pp. 142-45).

Mashaw then attempts to present an affirmative case for delegation.[68] First, challenging the welfare reduction argument, Mashaw observes that delegation can help reduce the sum of decision, agency, and error costs (pp. 148-52). Second, against the political accountability argument, Mashaw contends that delegation can enhance the responsiveness of political decisions to the desires of the general electorate through accountability to the President, who is more responsive than the legislature to diversity in voter preferences and better able to avoid voting cycles.[69] Implicit in Mashaw's

64. *See* Lowi, *supra* note 57.

65. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

66. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

67. Aranson et al., *supra* note 18, at 63.

68. Mashaw first articulated the argument in public choice terms in a 1985 article. *See* Mashaw, *Prodelegation*, *supra* note 16.

69. *See* Pp. 152-56. Even if Congress were to adopt specific legislation, Mashaw observes, discretion by agencies would still be necessary. Mashaw creatively posits a "Law of Conservation of Administrative Discretion": because the amount of discretion in a system is always

prodelegation argument is the assumption that the Constitution does not require the legislature to enact all laws, but instead requires only that lawmaking be done by a representative institution, such as the legislature or President.[70]

Mashaw's prodelegation arguments — as well as his discussion of judicial review of legislation — should suggest that public choice ideas provide powerful ways of critiquing legislatures as well as administrative agencies. Although predominantly used to critique the institution of bureaucracy, public choice theory harbors no necessary alliance with antibureaucratic sentiments. As Mashaw illustrates, public choice ideas also provide some compelling arguments in favor of delegation of political decisionmaking authority to administrators, although this conclusion is qualified; Mashaw is careful to suggest that public choice does not provide any compelling answer to the question of whether delegation is welfare-enhancing or welfare-reducing.[71]

Yet, although public choice modeling may not provide a compelling formal answer to this question, public choice does provide some powerful tools for argument. Mashaw's criticisms of Aranson, Gellhorn, and Robinson are convincing, but his reluctance to engage the argument that delegation to administrative agencies can, in certain circumstances, enhance welfare proves disappointing. Mashaw argued in a previous article that "it makes sense to have the delegation device available for use when and if it would reduce the sum of decision, error, and agency costs."[72] In addition to the literature addressing the costs of congressional decisionmaking, which Mashaw discusses, there is a rich literature criticizing Congress's perceived legitimacy in the eyes of the public.[73] Moreover, as some civic republican scholars have suggested, dele-

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constant, squeezing discretion out of the system in one place merely causes it to migrate elsewhere. P. 154.

70. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 145-46 (1995). Redish attacks Mashaw's argument, suggesting that it is problematic as a matter of both constitutional law and political theory. *See id.* at 143-49. Of course, Redish's response, reinvigorating the nondelegation doctrine, has its own problems. One flaw with the nondelegation doctrine is that the judiciary is "institutionally incapable of creating and applying a delegation doctrine." Richard T. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi,* 36 AM. U. L. REV. 391, 393 (1987).

71. For example, Mashaw writes:

> Public choice can help us to better understand how certain choice procedures structure or allocate decisional powers. It can help us to see possibilities for strategic behavior and strategic equilibria that yield likely outcomes in particular decision processes having particular structures and stakes. But it cannot itself tell us anything about whether those outcomes will be welfare-enhancing or welfare-reducing.

P. 157.

72. Mashaw, *Prodelegation, supra* note 16, at 92.

73. *See, e.g.,* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS (1995).

gation to administrative agencies may enhance welfare.[74] Although public choice theory, on its own terms, may not suggest that delegation to bureaucrats is always welfare-enhancing, sophisticated application of public choice tools might allow development of theories explaining in which contexts delegation is most likely to enhance social welfare. As with his earlier discussions of rationality review and statutory interpretation, in discussing delegation to administrative agencies Mashaw has adopted a critical stance towards public choice theory, albeit one that draws on public choice tools, rather than an approach that uses public choice to construct a theory that explains, in more than a very sketchy sense, under what conditions delegation to administrative agencies is normatively desirable.

C. *Public Choice, the Timing of Judicial Review, and Separation of Powers*

Insights from public choice theory can also help evaluate the role of courts in reviewing agency action. Since the 1960s, the American administrative state has undergone a paradigm shift away from adjudication and toward rulemaking as the principal mechanism for agency action. A major difference between judicial review of policies made through case-by-case adjudicative proceedings and judicial review of rulemaking is the ability of parties to challenge rules prior to their enforcement in individualized cases. Beginning with the Supreme Court's 1967 decision in *Abbott Laboratories v. Gardner,*[75] which articulated the standards for preenforcement judicial review of administrative rules, courts have liberally permitted preenforcement review of final rules that mandate a substantive standard of conduct.

Over twenty years ago, Paul Verkuil predicted problems with this approach:

> In the past, when a rule was reviewable only after enforcement, considerable time could elapse before the rulemaking procedures and the factual basis for the rule were tested. As a result, review of the circumstances surrounding the rule's enactment was secondary and somewhat obscured by time; the main issue was the rule's application to the particular respondent before the court. But with a final order requirement tied more closely to notions of finality and ripeness, rulemaking review can take place almost instantly and the focus on the rulemaking process may be much sharper. In this sense, earlier review means closer review, which itself leads to a vigorous judicial scrutiny of the rulemaking model.[76]

74. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State,* 105 HARV. L. REV. 1511, 1543-54 (1992).

75. 387 U.S. 136 (1967).

76. Paul R. Verkuil, *Judicial Review of Informal Rulemaking,* 60 VA. L. REV. 185, 205 (1974).

In 1990, Mashaw and Harfst chronicled some of the adverse effects of judicial review on rulemaking at the NHTSA,[77] adding to the growing literature that laid the blame for ossification of agency rulemaking at the feet of the judiciary. Unlike others, who advocate easing the standard of review, Mashaw and Harfst suggest that courts refrain from reviewing a rule until after the agency has applied the rule against a private entity.[78]

Today's reformers, Mashaw observes, view rulemaking more as part of the problem than the solution. Those who criticize courts for ossifying agency rulemaking chronicle how judicial review has adversely affected agency rulemaking as an external constraint on agency decisions.[79] For Mashaw, "[g]ame theory dramatizes the power of external legal and political controls on the administrative process. More important, the standard understandings of 'the problem' besetting agency rulemaking look very different when approached from the strategic perspective game theory provides" (p. 160). Game theory places focus on *when* judicial review should be pursued, not, as others have suggested, on the standard or scope of review.[80]

Most writing in the ossification literature agrees that "the real impediment caused by judicial review is uncertainty" (p. 165). As Mashaw observes:

> Because the courts are relatively uninformed about what is important among the many issues thrown up by parties seeking review of a rule, and because they are technically and scientifically unsophisticated in analyzing the issues that they perceive to be critical to a rule's 'reasonableness,' the perception in the agencies is that anything can happen. This produces defensive rulemaking, if not abandonment of the rulemaking process. [p. 165]

The results may have been motivated by private interests pursuing various stratagems, such as delay. Focus on incentives for such behavior — incentives that might be built into the institutions of administrative governance — could prove insightful.

To illustrate how these incentives affect the behavior of litigants and courts, Mashaw develops a rulemaking review game. This game assumes that "to the extent that an opponent of rulemaking (regulatory or deregulatory) perceives the use of an external obsta-

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77. *See* MASHAW & HARFST, *supra* note 11.

78. *See id.* at 245-47.

79. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991). For a slightly different story, see Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763.

80. *See* McGarity, *supra* note 79, at 1453-54 (recommending replacement of "hard look" with a more deferential metaphor).

cle to rulemaking to have a higher expected value than failing to use it, that external constraint will be activated."[81] Under current law, rules by agencies like NHTSA or the Federal Energy Regulatory Commission are immediately appealable to a court of appeals. At the same time, there is typically a lead time, sometimes significant, before the rule becomes effective. Thus, following adoption of a rule, a firm faces a decision whether to begin immediately to work toward securing compliance or to appeal.

To simplify this game, Mashaw presents the choice faced by a private firm or interest group as compliance or noncompliance with the new rule. Initially, he assumes no penalties for noncompliance because the rule is not effective or an appeal stays enforcement. Given this assumption, firms do not view themselves as in a game with the agency; rather, they view their position vis-à-vis other competitors. Here the dominant strategy for all parties, Mashaw illustrates, is not to comply with the rule but to seek judicial review: "It would appear that with preenforcement review no manufacturer would ever comply prior to the deadline. Presumably they would always seek judicial review because suit at least delays, and may eliminate, the need to comply" (p. 168).

Mashaw then takes the analysis to the next level. The judicial review game presents a free-rider problem; it is in the interest of someone to sue, but each manufacturer will want to avoid bearing these costs itself. This can be solved in a variety of ways. In practice, it most commonly is solved by the formation of an industry association or some other interest group. Without such a solution, a new game may be played regarding who will sue. This game, Mashaw observes, does not produce a dominant strategy, but produces a classic "chicken" problem. Each player, while not itself suing, would like to bluff the other into suing. But, given that each is better off if it sues than it would be if no one sues, it might be rational for a player to chicken out and sue.[82]

The game changes again, Mashaw illustrates, if there is a penalty for noncompliance pending the determination of the validity of a rule. Here Mashaw maintains that his analysis teaches three lessons. First, "without a penalty for noncompliance the balance of the benefits or costs from litigating or complying will strongly favor litigation" (pp. 173-74). Second, the presence or absence of a penalty will not be a determinative predictor of challenges. Mashaw observes that,

81. P. 166. Mashaw speaks in terms of straightforward costs and benefits; he does not attempt to model exceptional preferences, such as the firm opposed to all government regulation or the good citizen. P. 167.

82. Of course, to maintain credibility for future bluffs, it may be possible that neither would sue. Nevertheless, as Mashaw illustrates, the probability of at least one suit is 0.91. P. 170. The same type of analysis applies to beneficiaries.

> even with a penalty that is greater than the sum of compliance costs and market share losses, an actor whose disbenefits from compliance were only slightly greater than [those faced by another actor] would still find it rational to bring suit or, what is the same thing, to fail to comply and resist enforcement by raising the potential validity of the rule as a defense. [p. 174]

Third, it suggests that a focus on the stringency or scope or standard of review as a source of the problem of ossification may be misguided. "Judicial stringency is but one factor bearing on the likelihood of success in appealing a rule and on the payoffs to appeal versus compliance. The timing of review and the conditions on its availability also shape that calculation, as does the level of compliance costs" (p. 174).

Thus, Mashaw's analysis leads him to recommend efforts to ease compliance burdens, as John Mendeloff has recommended in the Occupational Safety and Health Administration (OSHA) context.[83] Mashaw does not believe, however, that easing compliance burdens alone will solve the problem of too little rulemaking; it will also be necessary to eliminate preenforcement review. To begin, the lengthening of time periods and reduction of a penalty can help to reduce compliance costs. Further, echoing his previous observations with David Harfst, Mashaw writes:

> Time and again, National Highway Traffic Safety Administration regulations foundered on the shoals of practicability or reasonableness. Yet over time it became clear that many of the technological problems that convinced courts to remand rules to the agency could be solved. Moreover, they might have been solved much earlier had attempts at compliance preceded resort to the judiciary.[84]

Mashaw's argument in favor of eliminating preenforcement review is insightful and original. Nevertheless, there are some problems with the argument. Specifically, Mashaw may have underestimated some of the benefits associated with preenforcement review of rules by courts. As Mark Seidenfeld has argued:

> From the standpoint of social welfare, Mashaw's game theoretic analysis is incomplete. It fails to address when compliance with a rule might be detrimental rather than beneficial. It also fails to incorporate other indirect effects that delaying judicial review might have on the overall rulemaking process. If an agency adopts a rule that it cannot justify both legally and as a matter of policy, the regulatory system should avoid forcing compliance. To the extent that judicial review

83. *See* JOHN M. MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA 115-16 (1988).

84. P. 178. Mashaw does temper his recommendation: "While preenforcement review may have been particularly dysfunctional in the context of standard setting at the National Highway Traffic Safety Administration, it may be extremely important to permit preenforcement review elsewhere, for example, of EPA air quality standards." P. 180.

> filters out such bad rules from good ones, pre-enforcement review benefits society.[85]

While Seidenfeld does not reject the abolition of preenforcement review in all circumstances, he concludes that "the factors that go into the balance of whether pre-enforcement review of a rulemaking is warranted are too diverse to permit a simple answer that either pre-enforcement or post-enforcement review is always best."[86] Mashaw's confidence that public choice theory can compel reform here seems mysterious, as he believes it does not allow us to draw general welfare conclusions in the delegation context.

Finally, without any specific reforms in mind, Mashaw builds a political oversight game as a means of relating his various applications of public choice theory and addressing legislative veto of agency rulemaking. He observes that "[u]ncertainty results not from vague legal standards applied by relatively uninformed generalist judges, but from the risks inherent in interbranch competition for control over policy" (p. 181). Both executive and legislative oversight are subject to failures in controlling agency decisionmaking. Executive oversight, such as the Office of Information and Regulatory Affairs (OIRA) technocratic cost-benefit analysis requirements, has been described as overtly political. Congressional action has been more successful in forcing regulation than in reacting to agency policymaking. Mashaw paints a bleak picture:

> Political life resembles a theater of the absurd where general public demand is satisfied by programs designed to fail and thus to protect the "special interests" who trade politicians money for votes. Access, participation, fair procedures and rational analytic routines are all smoke and mirrors disguising the sordid business of politics as usual. What's more, the public often seems to believe the "blame the bureaucrats, not us" version of legislative responsibility that sound-bite journalism promotes. Nimbleness at credit claiming and blame avoidance, not the construction of sound policy processes, becomes the skill that ensures incumbency. [p. 185]

Mashaw's oversight game assumes that political institutions, like courts, are passive until called on to respond to some other person, firm, or interest group. So, as with courts, Mashaw's game considers the benefits, costs, and probability of success to institutions engaging in political oversight.[87]

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85. Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules,* 58 OHIO ST. L.J. 85, 97-98 (1997) (citations omitted).

86. *Id.* at 121. Thus, selective abolition of preenforcement review, according to Seidenfeld, should be made by Congress. *See id.* at 124.

87. Mashaw urges that calls for transparency should be considered carefully: "[t]ransparency lowers the 'agency costs' to organized interests," p. 191, i.e., those who already *have* access to the political process. Yet Mashaw is not, like McNollgast, embracing procedural reform as "another way of 'stacking the deck' for favored interests." P. 191. Instead, "[e]ncouraging procedural transparency may be the best we can do to limit political

Mashaw proceeds to model a separation of powers game in three dimensions, representing the President, Senate, and House of Representatives. From a normative perspective, Mashaw argues, the external environment of agency rulemaking should be structured to encourage agency policy choices that are welfare-enhancing for the institutions in the legislative-executive separation of power game (p. 193). But if an agency should choose a policy that lies closer to the President's preferences than to the House's or the Senate's, Congress could quash this choice if it had the authority to veto administrative rules. Without the legislative veto, Congress is forced to resort to other mechanisms or to rely on the judiciary to enforce the original bargain.

Of course, in the absence of effective judicial review or some other mechanism to deter agencies from choosing a policy that lies closer to the President's preference, the House and Senate can legislate to revoke the agency's policy choice. The agency's assertion of a choice closer to the President's preferences, however, redefines the status quo and the bargaining space.[88] As a result, "[t]he stakes involved in the constitutionality of the legislative veto may thus have been somewhat higher than they appeared at first blush" (p. 193). Mashaw concludes:

> Because policy choice in a bargaining situation is a function of both the preferences of the actors and the status quo point, in the face of presidential opposition Congress literally cannot get back to the policy space that it thought it and the president had defined in the preexisting statute. [p. 194]

Coming full circle, Mashaw posits that the legislative-executive separation of powers game may have given rise to the judicial review game and, ultimately, ossification of rulemaking. According to Mashaw, "[l]egal control is being employed to leverage political-institutional warfare about administrative policy in ways that disempower the policy process."[89]

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importuning and shore up administrative legitimacy, if not efficacy." P. 191. Transparency is at best a strategic design tool, p. 191, but one that can have unintended perverse consequences, *see* Rossi, *supra* note 34.

88. The Environmental Protection Agency's 1997 clean air rules, establishing stringent new standards for ozone and fine particulates, are a good illustration. *See* John H. Cushman, Jr., *Clinton Sharply Tightens Air Pollution Regulations Despite Concern over Costs,* N.Y. TIMES, June 26, 1997, at A1. Although the EPA and the Clinton administration adopted fairly stringent standards, critics set their sights on the Republican Congress. *See* Andrea Marks, *Losers in Smog Battle Try End-Run Attack,* CHRISTIAN SCI. MONITOR, Aug. 14, 1997, at 3. Yet despite public opposition, the introduction of bills, and the potential existence of a majority against the new rules in Congress, Congress has not garnered the support to reverse the EPA and the administration to date.

89. P. 196. By contrast, parliamentary systems "tie the fate of elected politicians to the efficacy of administrations," p. 198, effectively redefining the game.

III. Usable Knowledge and the Value of a Unifying Theory of the Administrative State

Although *Greed, Chaos & Governance* spends a significant amount of time exploring how public choice tools might provide insights to specific public law reforms, the book is as much an illustration of the power and limits of public choice ideas as it is a series of arguments for particular reforms.

Mashaw intends his applications of public choice to yield usable knowledge for institutional reformers, in contrast to both the idealism of those who embrace the elusive public interest and the pessimistic, potentially destructive recommendations often associated with public choice ideas. In this sense, Mashaw has much in common with Farber and Frickey, who eschew grand theory and stake out a middle ground in practical reason as a way of integrating public choice and public law. Yet, unlike Farber and Frickey, who provisionally adopt a neorepublican perspective, Mashaw is reluctant to embrace any single unifying perspective of governance outside of the public choice framework. Mashaw's cynicism about neorepublican ideas may be truer to public choice theory, but his realism — evidenced by a reluctance to adopt a unifying perspective outside of public choice — may come at a cost, albeit a cost that public choice method may require on its own terms.

For Mashaw, usable knowledge is a middle ground. The orthodox greed and chaos research agendas have successfully presented a unifying theme, but it is a dismal theme suggesting destruction or dismantling of the administrative state. By contrast, usable knowledge recognizes that public choice ideas can provide some assistance to institutional designers without supplying a grand vision of jaundiced optimism or rampant pessimism. Although public choice theory cannot provide truths, it can provide arguments and advice, so long as we do not demand unrealistically that it provide definite answers and are not misled naively by those who claim stubbornly that it does (p. 38). Public choice is a Comptean positive theory, specializing in description and prediction, much like physics. The fact that there is no unified public choice theory of phenomena such as voting and institutional behavior, much like there is no unifying theory in physics of how matter and energy behave, should not stand as an impediment to learning from public choice's insights (p. 44).

Mashaw's notion of usable knowledge serves a function similar to practical reason in Farber and Frickey's discussion of public choice. Farber and Frickey believe that grand theory is of limited value to law, a discipline that seeks primarily to resolve practical disputes or to make practical recommendations about institutions. Legal decisionmakers thus rely on practical reasoning, which "in-

volves an analogical and inductive method, resolving new problems by reasoning from well-established paradigmatic cases." [90] Although deductive reasoning, the primary method of public choice theory, will often yield plausible answers, "[m]ore often such . . . answer[s] will ascend from a combination of arguments, none of which standing alone would constitute a sufficient justification. Such 'supporting arguments' are 'rather like the legs of a chair and unlike the links of a chain.'"[91] Farber and Frickey believe that practical reason will permit the integration of public choice and public law, allowing constructive use of public choice insights.[92] Their approach, however, is not without its methodological problems. As Ed Rubin has suggested, the practical reasoning approach may be flawed when applied to foundational methods such as public choice, as it seemingly prejudges its subject matter by "rejecting its methodology as a premise of the analysis before that rejection is advanced or justified."[93]

In advancing their practical reason approach, Farber and Frickey adopt as a provisional unifying perspective the neo-Madisonian view of the political system often associated with modern intellectual republicanism.[94] According to Farber and Frickey, "[l]ike Madison, we believe that no theory of government can ignore the powerful forces of individual self-interest and the critical role of institutional design. It is equally one-sided, however, to lose sight of the role of civic virtue."[95] Farber and Frickey present several illustrations of how neorepublican theories of democratic governance can accommodate public choice arguments.[96]

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90. FARBER & FRICKEY, *supra* note 2, at 116.

91. Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment,* 34 UCLA L. REV. 1615, 1645 (1987) (quoting ROBERT SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 156 (1982)); *see also* William N. Eskridge, Jr. & Philip N. Frickey, *Statutory Interpretation as Practical Reasoning,* 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *Legal Pragmatism and the Constitution,* 72 MINN. L. REV. 1331 (1988).

92. For a defense of practical reason as a way of learning from the insights of law and economics generally, see Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement,* 84 GEO. L.J. 2071 (1996).

93. Edward L. Rubin, *Public Choice in Practice and Theory,* 81 CAL. L. REV. 1657, 1665 (1993) (reviewing FARBER & FRICKEY, *supra* note 2); *see also* Rubin, *supra* note 4, at 501 ("[U]nless public choice analysis is allowed to proceed from its basic premise — what a literary critic would call its *donné* — the strength of that analysis cannot be adequately assessed.").

94. *See* Seidenfeld, *supra* note 74; Cass R. Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV 29 (1985).

95. FARBER & FRICKEY, *supra* note 2, at 11.

96. Although Farber and Frickey see neorepublicanism as accommodating and organizing some public choice ideas, they reject the strong version of republicanism that would suggest that voters and legislators are always motivated by public spirit rather than self-interest. *See id.* at 45-46. Their vantage point, neorepublicanism, probably entails practical reasoning to the extent that modern republicanism requires consideration of various incommensurable concepts such as the individual and the collective selves. *See* Cass R. Sunstein, *Beyond The Republican Revival,* 97 YALE L.J. 1539, 1564-65 (1988).

Mashaw also seeks to domesticate public choice theory, but rather than look outside public choice, as do Farber and Frickey, he urges public choice "lite." Despite any surface similarity between usable knowledge and practical reason, the methods are distinct. Mashaw does not reject the compatibility of neorepublican political theory and some public choice ideas. He sees no necessary connection, however, between neorepublicanism and public choice. In his applications, he distances himself from those who would embrace neorepublicanism as the vantage point for evaluating public choice ideas.[97] Apart from the deductive method of public choice theory, defined broadly to include positive political theory, Mashaw does not explicitly embrace any singular intellectual perspective of administrative governance as a vantage point for evaluation, whether republicanism, pluralism, or any other theory. Thus, although Mashaw's previous case studies of the Social Security Administration and NHTSA are beautiful illustrations of a practical reasoning approach, *Greed, Chaos and Governance* deploys a method distinct from that of Farber and Frickey. Mashaw, wishing to give public choice arguments the most sympathetic assessment possible, embraces public choice tools as a common language and eschews any extra-public choice unifying perspective, carefully and realistically describing the different stories public choice has to tell about administrative governance. In this sense, Mashaw attempts to use public choice theory on its own terms, albeit with a healthy degree of academic cynicism or realism.

Nevertheless, Mashaw acknowledges that most public choice methodology, including his own realism, has normative consequences. As Mashaw suggests, writers such as Steven Kelman,[98] a neorepublican critic of public choice, and Geoffrey Brennan and James Buchanan,[99] venerable public choice advocates, have acknowledged that positive models can (and do) have normative implications. Although Buchanan and Brennan may disagree on substance with Kelman, all three agree that preferences are not wholly exogenous to politics; rather, they are in part a function of how people go about governing themselves. Public choice theory and its application to institutional design can and do influence the preferences of actors.[100]

97. For Mashaw, neorepublicanism is too idealistic to reconcile with most public choice arguments. Pp. 108, 111-18; *see also* Mashaw, *As If Republican*, *supra* note 16 (presenting a stronger case against republicanism).

98. *See* Steven Kelman, *"Public Choice" and Public Spirit*, PUB. INTEREST, Spring 1987, at 80, 93-94.

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

100. "[A]t the birth of political societies, it is the leaders of the republic who shape the institutions but . . . afterwards it is the institutions which shape the leaders of the republic."

Indeed, this is where public choice theory, as a method, raises the most serious difficulties for legal scholarship generally and public law in particular. Mashaw argues that Kelman's neorepublican critique of public choice theory — which alleges that public choice's "[c]ynical descriptive conclusions about behavior in government threaten to undermine the norm prescribing public spirit"[101] — is inadequate. Kelman suggests that if we design public institutions as if people were public-spirited rather than self-interested, then those citizens would emerge (p. 27). Yet Mashaw believes that the endogeneity of preferences adopted by neorepublicans, such as Kelman, simply substitutes one implausible and idealistic view of human nature with another (p. 27). Instead of adopting this outright rejection of public choice's first-order assumption, Mashaw borrows from Buchanan and Brennan's response, urging that "we design institutions to protect us from self-interested political action, while recognizing that such activity may shape our attitudes towards governance" (p. 26).

By eschewing any extra-public-choice-unifying perspective, Mashaw may be truer to public choice methodology than Farber and Frickey. His reluctance to embrace a unifying intellectual perspective of governance, however, broadens the range of knowledge that public choice will yield, while also limiting the ability to deem the knowledge usable. This, for example, probably precludes Mashaw from developing a more complete explanation for when delegation to administrative agencies is desirable. It also potentially weakens Mashaw's ability to further his main thesis — that public choice ideas can be salvaged from those who wish to dismantle government. Without a referent point, usability is a somewhat shallow normative concept. For example, Mashaw's argument in favor of rationality review must look outside public choice for normative insights as to when statutes are not public-regarding. While Mashaw's illustration of how public choice concepts can apply to institutional design is reasonable, lucid, and often convincing, his method fails to make explicit the criteria for deeming "usable" the knowledge public choice arguments yield. As a result, his various applications of public choice to institutional design, though clear and insightful in isolation, are tentative and seem somewhat fragmented when placed together in a book. All that seems to tie them together is their fidelity to public choice ideas, construed broadly to include the tools of positive political theory, a common theme of criticism of the legislature, and Mashaw's cynical realism. No normative framework or perspective organizes the various insights of

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JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 84 (M. Cranston trans., Penguin Books 1968) (1762) (citing the eighteenth-century French philosopher and jurist Montesquieu).

101. Kelman, *supra* note 98, at 93-94.

the book; in the parlance of some legal pragmatists, the beliefs Mashaw's book supports are not woven into a coherent web.[102]

For legal scholars, the application of public choice assumptions, method, and tools raises a special challenge, especially if the scholar is to understand these ideas and take them seriously. For those who wish to use public choice ideas to understand public law, adoption of a unifying intellectual perspective such as neorepublicanism makes it simpler and more practical to glean usable knowledge from these tools. The adoption of a unifying perspective also makes explicit the assumptions of the evaluator's method. A unifying perspective may certainly limit an evaluator's thesis to those who are convinced by the perspective, but it also can assist in articulating explicit criteria for rendering knowledge usable, as well as for deriving a normative baseline for evaluation of the political process.[103] So understood, a unifying perspective is not a synonym or furtive excuse for engaging in grand theory, but instead can bolster a pragmatic approach, such as Mashaw's, by allowing the integration of otherwise disparate interdisciplinary ideas — and the beliefs they support — into a coherent web.

Of course, Mashaw's realist reluctance to adopt an extra-public-choice-unifying perspective may be warranted. Understood on its own terms, public choice theory purports to be nothing more than a Comptean positive science, deploying assumptions about human behavior and an economic methodology to generate descriptive and predictive hypotheses, which can be tested empirically. Perhaps Mashaw, like many economists and political scientists who utilize public choice theory, is simply being true to the positivist method. Mashaw's bête noire, the dismal orthodoxy attributed to public choice, provides a clarion normative theme: government, particularly bureaucracy, is bad. Mashaw's realism, coupled with his fidelity to public choice method, challenges this theme but yields little more than fragmented lessons about public law. Perhaps this is all we can expect from public choice method, applied on its own terms: rampant pessimism or fragmented lessons. Mashaw's realism would leave us content taking the latter from public choice ideas.

Conclusion

For some, public choice theory has come to be associated with antigovernment ideology, wholesale critiques of judicial involvement in governance, cramped textualist interpretation of statutes,

102. *See* Farber, *supra* note 91, at 1336 ("[A]n interlocking web of belief, in which each belief is supported by many others rather than by a single foundational 'brick,' is inherently far sturdier than a tower.").

103. *See* Elhauge, *supra* note 45.

and anti-administrative agency positions. Mashaw's book teaches us that public choice theory has no necessary alliance with such positions. The book is notable for its careful, studied applications of public choice, especially its innovative criticisms of the legislature and its constructive approach towards understanding delegation to bureaucracy. An appreciation of bureaucracy as an institution in our system of democratic governance, as Mashaw urges, is necessary before we can "pursue the public interest by attempting to learn from those who sometimes seem to suggest that it could not possibly exist" (p. 209). *Greed, Chaos, & Governance* challenges us to bring public choice theory to bear on dialogue about public-spirited institutional reform. Hopefully, legal scholars will rise to this challenge, engaging public choice arguments, including Mashaw's, in constructive ways to help us understand the complexities of public law and to weave a coherent web of knowledge about the administrative state.