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Public Choice and the Judiciary: A Review of Jerry L. Mashaw's Creet, Chaos, and Governance

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Jerry Mashaw might have entitled his book *One and a Half Cheers for Public Choice*. Maybe just one cheer. Though the eye with which he looks at public choice theory may be jaundiced, he finds enough in it to justify a thoughtful consideration of many possible applications. It follows from his evident skepticism that the prescriptions public choice suggests to him are modest; moreover, they almost exclusively take the form of some adjustment of legal doctrine, rather than, for example, innovative political strategies. Still, his findings are original. He would toughen "rational basis" review, having courts invalidate at least the cruder "rent-seeking" statutes. And he infers from public choice theory some grounds for encouraging delegation to agencies. I will first summarize his opening explanation of public choice, then explore his skepticism, discuss several of his prescriptions, and finally discuss a large and perhaps suggestive omission.

Mashaw starts with a quick review of the core elements of public choice theory. The "chaos" of his title stems from Condorcet’s Paradox and its revival by Kenneth Arrow. With three or more parties, each with well-ordered preferences and confronting at least three policy choices, it is possible that no single position will emerge as the preferred choice of a majority. The proof is likely familiar to most...
readers and does not bear repeating.\(^1\) Mashaw points out that we rarely see the cycling of votes that the theory predicts. But this in itself is no ground for any confidence that the democratic system has worked, the paradox been benignly overcome. It may simply be that we have been rescued from instability by some device with questionable democratic credentials—a chair's control over the agenda, some imperfect system for reducing the choice to two (as in presidential elections), or logrolling.

Enter greed: interest groups. Putting aside feelings of good citizenship or a sheer delight in policy issues, ordinary voters who invest in information and lobbying on a particular policy issue will probably not recover their investments. Single-issue, "special" interest groups, by contrast, have ample incentive to inform themselves and to lobby politicians on issues affecting their membership. And such groups will be especially likely to form when their members are few, their interests homogeneous, and their organizations able to supply special benefits for the paying membership that constrain free-riding problems (such as access to discounted insurance). Thus firms (and their employees) seeking subsidies or protection from competition can be expected to do better than ordinary, dispersed citizens at bringing pressure to bear on political actors. Suppliers of goods or services that the government buys or induces others to buy (e.g., work for the government itself, pollution-control systems, or food that may be acquired with food stamps) will enjoy a similar advantage in their efforts to stimulate additional government purchases or compulsory inducements. Thus, in an administrative state with rules and norms that exclude few (if any) issues from government intervention, many government programs may exist almost entirely for the benefit of special interest groups. And even programs aimed at correcting a market failure may be perverted by interest-group rent-seeking, leaving the public worse off.

On the empirical question of whether public choice's characterizations of political behavior are sound, Mashaw offers a number of criticisms but is delphic as to how much weight he attaches to them. The criticisms are often most emphatic, but Mashaw plainly believes that many of the predicted pathologies in fact exist; otherwise the sections of the book proposing damage-limitation measures would make no sense. On the whole, his objections seem to say mainly that public choice doesn't explain everything. This is a tough criterion.

For example, in speaking of the public choice analysis of voter behavior, he says that voters contradict the theory's prediction by actually going to the polls. But this "refutation" works only by framing the public choice prediction in the most drastic form—that a citizen's self-regarding cost-benefit analysis will always be decisive and thus necessarily tilt against even taking the half-hour or so required to vote. Obviously for large (though declining) numbers of Americans, some aspect of voting—perhaps the expressive or sacramental element—is enough to get them to the polls. But Mashaw offers no evidence that many citizens arrive there well-informed, or turn up at their representatives' offices with cogent position papers arguing for the general weal as they see it.

As examples of legislation untainted by interest groups, Mashaw points to some reforms of pre-existing regulation, such as the removal of the Civil Aeronautics Board's price and entry controls on air transportation, and to enactment of environmental regulation. Again, the "refutation" of public choice theory works only by positing a rather extreme notion of public choice—one where every aspect of every governmental decision can be traced exclusively to special interest activity. But I know of no public choice theorist asserting such a position. And again, Mashaw himself acknowledges that even where market failures provide a theoretical justification for state intervention, the laws actually resulting—nominally from the effort to correct the market failure—may be hijacked for special interest purposes.

Yet Mashaw says little of this manifestation of public choice doctrine, described by Bruce Yandle as the "Baptist-bootlegger" coalition. The model is of alcohol restrictions, inspired by public-regarding concerns over alcoholism but shaped by narrow interest groups. The typical restriction does not restrict consumption or possession of alcohol, but merely its sale on Sunday or at late hours of the night. Yandle depicts the benefits for the various interest groups as follows:

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2 See id. at 35-36.
3 See id. at 33. Mashaw assumes that airline deregulation represents a triumph of public interest considerations. But the favorable consequences of a policy change cannot, alone, establish the absence of rent-seeking in its adoption. The likely dissipation of cartel rents as a result of competition in non-price aspects of service, plus the need for new routing flexibility as a result of sudden hikes in oil prices, may have altered industry incentives enough to make the change consistent with ordinary rent-seeking.
4 See id. at 37 (alluding to possibility that sulfur dioxide emissions regulation may have taken the form it did in 1977 because of protectionist lobbying by eastern high-sulfur coal interests).
Interestingly, regulations of the Sunday sale of booze tie together bootleggers, Baptists, and the legal operators of liquor stores. The bootleggers buy from the legal outlets on Saturday, sell at higher prices on Sunday, and the Baptists praise the effort to enforce the regulatory cartel. Meanwhile, the political suppliers of the regulation reap the support of all the groups, and the Internal Revenue Service works to prevent market entry by those who would produce alcoholic beverages on homemade stills.\(^5\)

Though temperance is the nominal goal of the regulation, the ability of narrow interest groups to shape the legislation means that the resulting legal change will advance the goal less, and perhaps at greater cost (per unit of abstinence achieved), than the original proponents must have hoped.

Even in such a seemingly public-regarding area as environmental regulation, where the existence of serious externalities suggests that state intervention may help, narrow interest groups seem often to play a critical role. Among the groups that have skewed the process are suppliers of environmental clean-up goods or services,\(^6\) subsets of a polluting industry seeking advantage over rivals within the industry,\(^7\)

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5 Bruce Yandle, The Political Limits of Environmental Regulation: Tracking the Unicorn 25 (1989).

6 See Regulation of Fuels and Fuel Additives: Renewable Oxygenate Requirement in Reformulated Gasoline, 59 Fed. Reg. 39,258, 39,262 (1994) (to be codified at 40 C.F.R. pt. 80) (justifying provision requiring use of specified minimum quantities of ethanol on ground that it would give the ethanol industry the market share it would have had if the statutory mandate had not aimed at reducing volatile organic compounds). The resulting rule was overturned in American Petroleum Institute v. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

7 Studies of changes in the prices of publicly traded textile companies, for example, suggest that adoption of cotton dust regulations benefited large firms, presumably because of higher unit costs of compliance for small ones. See Michael T. Maloney & Robert E. McCormick, A Positive Theory of Environmental Quality Regulation, 25 J.L. & Econ. 99 (1982). These results have been questioned. See John S. Hughes et al., The Economic Consequences of the OSHA Cotton Dust Standards: An Analysis of Stock Price Behavior, 29 J.L. & Econ. 29 (1986).

Similarly, incumbent producers naturally tend to prefer regulation that burdens new plants more than existing ones, and may affirmatively gain from differential legislation of this sort. See Maloney & McCormick, supra, at 101, 117–21. Of course achievement of a given standard is almost sure to be more costly if it requires retrofitting (as it normally would at an old plant), so there is a superficial economic justification for the different rules. The justification becomes fully plausible, however, only if the analysis completely disregards the possible use of pollution taxes or marketable pollution permits, both of which tend to achieve any given level of environmental cleanliness at the lowest cost and without drawing distinctions between old and new plants.
and regions seeking advantage over other regions.  

Moreover, formation of lobbying groups by environmentalists and others pursuing a general notion of public welfare is hardly proof that the “public interest” side is effectively represented. A person’s investment of effort in mastering the details of a government program, and in reasoning through its implications, is likely to be proportionate (everything else being equal) to the expected difference his intervention will make. Thus, one can cheerfully contribute a few dollars to an environmental group or other “cause” without a very painstaking study of its programs. So the members’ individual views—even if perfectly represented by the leadership—are unlikely to reflect penetrating analysis.

This same underinvestment further implies that the members of these groups will have a limited ability to monitor their leadership and staff. It would thus not be surprising if the latter “shirked” a bit, that is, to a degree pursued their own interests rather than the members’. That the members keep on contributing is no guarantee to the contrary; the same rational ignorance that gives rise to the initial problem limits the meaning of this apparent ratification.

What form might such shirking take? Harris and Milkis suggest that one possibility is reluctance to settle disputes, on the ground that settlement has little dramatic appeal, and thus weakens fund-raising. They quote a public interest lawyer:

8 The plainest instance is the Clean Air Act Amendments of 1977, whose “partial scrubbing” requirements at coal-burning utilities protected the market for high-sulfur Midwestern coal and imposed higher unit costs on electricity produced in the Sunbelt than in the politically better represented Rustbelt. See Bruce A. Ackerman & William T. Hassler, Clean Coal/Dirty Air (1981).


10 The problem is not unique to environmental organizations, but would apply to any similarly structured association with large numbers of members who individually have relatively small interests. See generally Robert Michels, Oligarchy, in The Sociology of Organizations: Basic Studies 37 (Oscar Grusky & George A. Miller eds., 1970) (stating what has become known as “Michels’s iron law of oligarchy”). Publicly held corporations potentially present the same problem, but the risk of shirking there is constrained by the market for corporate control, by which outsiders who perceive the possibility of a more lucrative use of the corporate assets can express their judgment in a form that can be tested in the market, i.e., a bid with a higher dollar value than the current market value of the stock. See Edgar v. MITE Corp., 457 U.S. 624, 633 (1982) (recognizing role of the market for corporate control). In addition, members of non-profit associations are less likely to agree on any readily measurable criterion of success.
Environmental groups thrive on conflict. It's a standard joke that the basic environmental group's fundraising letter begins, "Babies will die if you turn the page [and don't contribute]." The impact would be very different to say, "If you don't open this envelope, we won't be able to open negotiations with the other side." 11

In this instance, even if the approach tends to increase membership, it may well not represent the position the members would have taken if they had had an incentive to study the issue carefully.

Another theory of possible shirking (perhaps in part contradictory) is Michael Greve's argument that citizen enforcement suits against non-complying private parties have a low return in environmental enhancement but a high one in pecuniary pay-off for national organizations, especially where they are settled with a so-called "mitigation" or "credit" paid to the suing organization. 12 (One can imagine a reconciliation of this and the theory mentioned above: there may be an optimal litigation portfolio, consisting of advantageous pecuniary settlements, spiced with some dramatic non-pecuniary wins and losses.)

Further, leadership and staff may benefit from command-and-control approaches to regulation, as compared to pollution taxes or marketable pollution rights. Suppose that market-mimicking methods of pollution regulation are more likely to lead to a stable legislative equilibrium than command-and-control methods. This might be so because, under such methods, polluters would have market incentives to search for and to deploy pollution-reducing technology, just as they search for and deploy other technologies that improve products or reduce costs, so that environmental quality would grow steadily, and "naturally," just as do other parts of the economy. If this is so, then market-mimicking devices might be less appealing to leadership and staff because, compared to command-and-control methods, they would do less to create a market for the activities in which the leadership and staff have a comparative advantage—litigation and lobbying. Further, both litigation and lobbying, though typically not lucrative

11 Richard A. Harris & Sidney M. Milkis, The Politics of Regulatory Change: A Tale of Two Agencies 305 (1989); see also Keith Schneider, Big Environment Hits a Recession, N.Y. Times, Jan. 1, 1995, §F, at 4 ("[A] recent fundraising mailing from the National Audubon Society said the group could 'project with some accuracy the eventual end of the natural world as we know it.' 'That is no trees,' the letter said. 'No Wildlife.'").

for environmental staff,\(^{13}\) provide the excitement of participating in high-level policymaking and agenda-setting.\(^{14}\) Interestingly, a recent report suggests that the recycling movement has been more of a boon to the environmentalists who promote it—in stirring environmental angst and regulatory proliferation—than to the environment.\(^{15}\) Moreover, the market-mimicking devices make the nature of environmental trade-offs relatively explicit, and thus hard to square with the stark black-and-white struggle between good and evil that tends to broaden membership.

In short, the risks to nominally public-regarding legislation come from many directions.

Mashaw observes that someone convinced of public choice analysis might try "making government better," or might favor reforms "limiting the damage that public institutions can do or, if possible, dismantling them in favor of market solutions."\(^{16}\) His own responses seem to fall into the first and second categories, and support of the second surely reflects some endorsement of public choice insights. He staunchly resists any trace of the third set of remedies, but it is hard to see why. His most explicit explanation is the following: "We are too interconnected, too interdependent, and too skeptical of the power of markets and voluntary associations to control their own external effects, to believe again in the 'nightwatchman' state."\(^{17}\)

This seems inadequate. The idea that interconnectedness and interdependence somehow justify centralized political overriding of markets is unexplained; in fact, markets' abilities to create and integrate necessary information, and to make subtle marginal adjustments, are at their most valuable in complex production processes. (Compare computer production, or indeed modern health care, with one-crop agriculture or Stalinist goals such as maximizing tons of steel production.) As for the proper skepticism of markets and voluntary associations, no one supposes them to be perfect, so the question is

\(^{13}\) Litigation as a staff member may be a sound investment in human capital in pecuniary terms, however, if used as a base for participation in the tort litigation market. See infra text accompanying notes 59–76.

\(^{14}\) See, e.g., Jeremy Rabkin, Judicial Compulsions: How Public Law Distorts Public Policy (1989) (arguing that "public interest" groups are able by their litigation strategies to determine, or at least radically affect, agencies' regulatory agendas).

\(^{15}\) According to the current head of EPA, Carol Browner, "The litigation is essentially setting the priorities." Jeff Bailey & Timothy Noah, EPA Spending Is off Target, Study Says, WALL ST. J., May 24, 1993, at B1.


\(^{17}\) Id. at 31.
always one of degree: given imperfections on both sides, what government interventions have a serious prospect of bringing about a less imperfect resolution? And finally, the "nightwatchman" state and the current behemoth may not be the only choices; to reject the first is not necessarily to embrace the second.

Because of the unpersuasiveness (to me) of Mashaw's explicit rejection of serious cutbacks, I looked for passages elsewhere that might explain it. Two struck me as possible candidates—his observations on civic republicanism and his treatment of Gary Becker. In the end these sections likely fail as explanations, but consideration of them gives one a useful perspective on the book.

Mashaw suggests that "civic republicans," espousing a form of "civic virtue" that favors a large and very active state, are making a claim that is inherently unanswerable by public choice theorists. The latter, or even people who listen much to them, cannot become the sort of people for whom a large state, with its fingers in many pies, could effectively foster republican virtue by involving citizens in a wide range of collective, state-managed actions. "A continuous emphasis on designing public institutions and limiting public interventions to avoid the perils of self-interested behavior constructs a world in which the possibilities for nurturing the public spirit and extending its reach are sharply constrained. Civic republicanism will never have been given a trial."\textsuperscript{18}

But if public choice theorists are correct, the mega-state animated by republican virtue is simply unattainable, its model citizen no more plausible than the fabled "new Soviet man." And Mashaw, perhaps, agrees. He expresses extreme doubt that "strong forms of community" exist "in contexts even remotely like the governance of a modern nation-state,"\textsuperscript{19} observes the lack of "capacity for extended sympathy on a continuous basis beyond the family or perhaps the clan,"\textsuperscript{20} and says that "the sorry story of much of human history makes it extremely risky to rely on the public spirit as the lodestar of institutional design."\textsuperscript{21} Thus, Mashaw's nods to civic republicanism may well be just a case of giving the devil his due and not reflective of his ultimate judgment.

Another passage possibly explaining Mashaw's reluctance to push the implication of public choice far is his misreading (as I see it) of Gary Becker. Discussing Judge Easterbrook's suggestion that courts

\textsuperscript{18} \textit{Id.} at 27. \\
\textsuperscript{19} \textit{Id.} \\
\textsuperscript{20} \textit{Id.} \\
\textsuperscript{21} \textit{Id.}
should narrowly construe statutes embodying interest-group deals, he says that Easterbrook is "using a model that has been developed more rigorously by Gary Becker. And Becker's model predicts that such 'bargains' will enhance general welfare."²² Perhaps Mashaw imputes a rather benign view of the public choice to Becker and even embraces it himself.

It is true that Becker sees bargaining among interest groups as enabling them to accomplish their purposes more efficiently than otherwise—with less deadweight social loss.²³ He even argues, "Political policies that raise efficiency are more likely to be adopted than policies that lower efficiency."²⁴ But that broad statement cannot fairly be read as a contention that interest-group deal-making tends to produce utility-maximizing or wealth-maximizing government. Becker's point is far narrower. Given that government produces wealth transfers as well as corrections of market failures, interest-group bargaining helps it accomplish these with relative efficiency.²⁵ A group seeking subsidies can reduce political resistance among the subsidy suppliers (characteristically taxpayers or consumers) by proposing subsidy forms with less rather than more deadweight loss; as a result, interaction between subsidy consumers and suppliers creates a tendency toward selection of subsidies with less deadweight loss.

This analysis is hardly cause for cheer. First, if private wealth-transfers disguised as public-regarding legislation are among the functions of government, to say that bargaining enables these functions to be performed more efficiently does not give the resulting bargains much of a Good Housekeeping seal. It is little more reassuring than news that burglars have learned how to burgle without breaking windows. Nowhere does Becker argue that wealth transfers are a collectively wealth-enhancing or utility-enhancing government activity.²⁶ To the extent that limits on interest-group deals stifled the wealth-transferring activities altogether (or just confined their scope, as Judge Easterbrook suggested), Becker could consistently welcome the limits.

²² Id. at 88.
²⁴ Id. at 384.
²⁵ See id. at 396.
²⁶ In view of Becker's belief that government-induced wealth transfers characteristically move wealth from the less to the more wealthy, see, e.g., id. at 395, and the standard idea that the marginal utility of money is greater for the poor than the rich, we may safely rule out the possibility of his thinking that they tend to enhance general welfare.
Second, neither Becker nor Mashaw considers whether, within the range of imaginable wealth-transfer devices, the most efficient ones tend systematically to be less feasible politically. Suppose, for example, that sugar producers, one of the interest groups used by Becker as an example, seek subsidies. The most efficient subsidy might take the form of a one-time bounty to the owners of all land that had been deployed in sugar production in the past year. Such a scheme would involve no perverse incentives—except to the extent that hopes of a repeat performance might inspire excessive sugar-planting. But it would be hard to describe this scheme in any remotely plausible public-interest terms. The wealth-transfer purpose would be naked. So, for the subsidy to win political passage, it must be surrounded by elaborate schemes that will be said somehow to help sugar consumers by assuring future sugar production. The upshot will be a perverse tangle of affirmative incentives to grow sugar, offset by elaborate bureaucratic mechanisms to counteract the glut those incentives would normally produce.

In significant part this political constraint on more efficient transfers owes much to the press. The naked sugar bounty would provoke waves of television and newspaper coverage and denunciation. Ironically, because of the media’s quasi-monopoly in its watchdog role, it turns out that subsidies for the media themselves are among the few that can feasibly be supplied in more naked, more efficient forms. In the interest of enabling current licensees to broadcast in both analog and digital form as the industry and users convert to digital, the Federal Communications Commission is in the process of giving the licensees additional spectrum worth tens of billions of dollars.²⁷ Yet this has passed with virtually no adverse media comment,²⁸ an omission unthinkable for largesse on such a scale to any other industry.

Although one can imagine more efficient ways of effecting the transfer (Congress could auction off marketable rights in the spectrum and give the proceeds to the current licensees in proportion to the value of their existing spectrum), the relatively few strings attached to the grant probably make this one of our more efficient transfers.²⁹ Its rarity, and its location in an industry with the capacity to protect itself

²⁷ Although the Commission itself has placed no dollar value on the grant, Robert M. Pepper has offered general estimates based on auction prices and market values of television stations. Letter from Robert M. Pepper, Chief, Office of Plans and Policy to Senators Lieberman, Kerrey, Conrad, and Leahy (May 5, 1995).


²⁹ It is presumably no coincidence that media discussions of “campaign finance reform” rarely mention that restrictions on contributions and on funding of issue
from the glare of publicity, tends to support the intuition that there is a systemic inverse relation between transfer efficiency and political feasibility.\textsuperscript{30}

The misreading of Becker, however, probably also fails as the explanation for Mashaw's attitude toward any real retrenchment of government. The discussion appears only in the treatment of Judge Easterbrook's view of how public choice theory might inform statutory interpretation, and it is worded more as a claim to having caught Judge Easterbrook in a self-contradiction ("Gotcha!") than an affirmative embrace of a mangled vision of Becker. While a sounder reading of Becker might have marginally amplified Mashaw's acceptance of public choice, it would likely do little more.

Mashaw clearly believes that public choice has important insights into the political system; that belief informs his whole discussion of possible judicial responses. And the belief seems sound—at least the arguments canvassed above do not seriously weaken it. What remains a mystery is his reluctance to entertain the thought that the resulting defects call for a rethinking of government's role. Even apart from such rethinking, Mashaw confines himself largely to possible adjustments in judicial doctrine, with no suggestions of how political entrepreneurs might mobilize resistance to rent-seeking interest groups. Given Mashaw's resourcefulness, this is a pity.

One final point before leaving Mashaw's overview of public choice. Though he may tend to downplay the impact of interest groups, he stays with the mainstream in generally depicting that impact as invariably negative. If the other forces driving legislation were uniformly benign, this would, of course, be true—any effect of inter-

\textsuperscript{30} There may even be constitutional barriers to the more efficient wealth transfers. The "Kozinski paradox" is a label for the proposition that although rent-control laws giving the tenant a transferable interest in the premises are more efficient than the usual ones, which deprive the tenant of his benefit when he moves away, they may be legally more vulnerable. Traditional rent control locks tenants into property that is more valuable in others' hands. (Thus elderly couples in New York occupy the apartments in which they raised their children years ago, while young couples squeeze into the tiny apartments remaining.) But provisions that allow the tenant to sell his entitlement, by exposing the wealth-transfer aspects of rent-control, indeed by increasing the proportion of the fee simple transferred, are on that account more subject to attack as an unconstitutional taking. See Hall v. City of Santa Barbara, 833 F.2d 1270, 1278–81 (9th Cir. 1986); see also William A. Fischel, Regulatory Takings: Law, Economics, and Politics 314–15 (1995); Robert Nozick, Anarchy, State, and Utopia 271 (1974) (arguing that rent control with subletting permitted is viewed with hostility because it makes the partial expropriation of the owner explicit).
est groups would be to divert the stream of legislation from the true path. But laws injurious to the public welfare can arise from other sources, such as ideological fervor and demagoguery. As I mentioned, many people, perhaps typical voters, have little incentive to invest in information or thought about decisions they are unlikely to influence seriously. For unsound legislation that arises from these forces, interest group activity may be a necessary palliative.\textsuperscript{31} Mashaw nowhere acknowledges these other sources of pernicious regulation.

In his discussion of what even a qualified embrace of public choice might lead to, Mashaw’s most radical proposal is to put some iron into “rational basis” review, the type of judicial review normally given “economic” regulation that does not burden a specially protected right. As an example of its possible operation he takes a case that the plaintiffs presented to the Supreme Court (unsuccessfully) as a due process claim, \textit{New Motor Vehicle Board of California v. Orrin W. Fox Co.}\textsuperscript{32} California required board approval before an entrepreneur could locate a new dealership within the market area of any existing dealership. The filing of a simple objection by any existing dealer would trigger a hearing; until its conclusion and favorable verdict, the upstart was required to put his plans on hold.

Reframed in public choice terms, the legislation appears to be naked protectionism. The statute enables incumbent sellers, by the virtually costless filing of a protest, to substantially delay the appearance of a rival. One plaintiff’s attempt to open a competing franchise was delayed by 15 months, more than a model year, and the efforts of another were strangled altogether, when his lease expired during the statutorily engendered delay.\textsuperscript{33} The public interest justifications are, as Mashaw says, feeble. Though the Court described the statute as an effort “to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers,”\textsuperscript{34} it made no effort to show how the act advanced that goal, or how the threat of such abuse could possibly be perceived as realistic. Mashaw writes:

\begin{quote}
31 The rather awkward term “rent avoidance” has been coined for the activities of those who resist rent-seeking by others. See Gordon Tullock, \textit{Rent-Seeking}, in 4 The New Palgrave: A Dictionary of Economics 147 (John Eatwell et al. eds., 1994). This does not quite capture the role of interest group activity serving to blunt impulses that are genuinely populist (\textit{i.e.}, not the product of any narrow interest group) but are equally genuinely ill-considered.


33 See \textit{id.} at 123–24 n.26 (Stevens, J., dissenting).

34 \textit{Id.} at 101.
\end{quote}
How do you persuade potential franchisees to put up a hundred thousand dollars or more of their own money to join manufacturers in a plot to "overfranchise" an area to the detriment of the public and all franchise holders? What does the manufacturer say to induce this lemming-like behavior? "How would you like to get involved in some ruinous competition (in which you will probably be bankrupted) under the sponsorship of a manufacturer who uses multiple franchising to gouge the franchisees who survive?"\(^{35}\)

Ranged against this absurd public purpose were, as Mashaw points out, serious private interests. He rightly suggests that people do not randomly seek to become car dealers, but rather they turn to it on the basis of skills and prior experience fitting them to the enterprise, and that to thwart such self-realization merely in order to protect the profits of incumbent dealers is offensive to liberalism.\(^{36}\) In terms of both political economy and political morality, the case seems a no-brainer.

Does that make a case for judicial intervention? The tenured federal court is of course outside the rent-seeking loop that presumably brought this forth. But is it well qualified to identify the defects? Mashaw believes so, proposing that courts "breathe some life back into the requirement that legislation be 'nonarbitrary.'"\(^{37}\)

Mashaw's confidence in the judiciary seems to me unfounded. California's new car dealer delay statute does not appear much inferior to the Oklahoma ice plant regulation defended so famously and energetically by Justice Brandeis in \textit{New State Ice Co. v. Liebmann}.\(^{38}\) The regulation brought the business of ice manufacture under the control of the Oklahoma Corporations Commission and forbade entry without a commission license, which was to be denied if the existing facilities were "sufficient to meet the public needs."\(^{39}\) In his dissent, Brandeis marshaled an enormous array of data, but made almost no effort to supply an economic theory with which one could spin the data into a justification for state-protected monopoly. So far as it appears, most of the data show only that ice was really important, especially in view of the limited availability of mechanical refrigeration.

\(^{35}\) Mashaw, \textit{supra} note 1, at 58.

\(^{36}\) See id. I could not agree more that the Court was palpably blind to the way in which frustration of a business undertaking is also likely to constitute frustration of the sort of personal career development that in the occupational licensing area would elicit serious judicial consideration. \textit{See} Stephen F. Williams, \textit{Liberty and Property: The Problem of Government Benefits}, 12 J. Legal Stud. 3, 33–34 (1983).

\(^{37}\) Mashaw, \textit{supra} note 1, at 56.

\(^{38}\) 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

\(^{39}\) Id. at 272.
tion, and especially among the poor, but with no explanation of why these circumstances justified monopoly and, therefore, monopoly pricing. The more natural conclusion from evidence of "need" and of customers' poverty is surely a strengthened case for competitive pricing. Curiously, Brandeis emphasized that ice industry trade journals show the industry's "unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and in particular through the consolidation of plants, to protect markets and prices against competition of any character." I don't doubt it for a minute.

Brandeis did allude briefly to a theoretical basis for regulated monopoly—the idea that ice, under the circumstances then prevailing, was a natural monopoly. He said that competition tends to be destructive because ice plants "have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded." But Brandeis never asked whether in fact average costs systematically decline within the relevant range of production, the criterion that would be necessary for a prima facie case that a price-regulated monopoly might be more beneficial for consumers than would competition. And none of his many statistics seemed to go to this question. Further, two features of the opinion suggest that he had no serious interest in the natural monopoly issue. First, he asserted that ice plants can be constructed with "relative ease and cheapness," making it likely that capital costs were trivial (and that declining average costs in the relevant range of production were unlikely). Second, he displayed no interest whatsoever in whether the Oklahoma Corporations Commission had any program for limiting prices to cost, which at least would have given consumers a theoretical substitute for competition. After reading the opinion, one thinks how refreshing would be an alternative opinion saying simply, "If Oklahoma wishes to enrich incumbent ice dealers at the expense of consumers and potential competitors, the U.S. Constitution says nothing to prevent it."

If I have belabored the Brandeis opinion it is not out of disrespect for his intelligence. Quite the opposite—it is to make the point that if judges of such clearly superior intelligence can go so far astray in assessing the justifications of state intervention, it is foolhardy to

40 Id. at 293 (Brandeis, J., dissenting).
41 Id. at 292.
43 285 U.S. at 292 (Brandeis, J., dissenting).
look to courts as a serious remedy for the perversions that public choice doctrine tells us are likely.

Of course one might still argue the following in support of Mashaw's proposal: Although courts may be inept at the kind of economic assessment that his toughened rational basis review entails, and thus may strike down some laws that ought to be sustained, they will also strike down many that deserve to die. If the lessons of public choice are sound, on average the benefits will exceed the losses.

I am not convinced. First, although public choice suggests that many state interventions will reduce general welfare, it really has no way of predicting the ratio of sound to unsound laws—much less, more relevantly, that ratio among provisions whose validity would actually be litigated. Indeed, because interest groups can perform a healthy function in protecting minorities from majoritarian exploitation, a judge obsessed with the risk of corruption through interest group influence might end up throwing out quite a few wholesome pieces of legislation. Second, the argument's unspoken assumption of a one-way ratchet, operating only to prune the statute books and never to enlarge them, seems wrong. Tough rational basis analysis could be applied perfectly well to deregulatory measures. Third, I argued above that there is already a systemic relationship between inefficiency in wealth transfer arrangements and their political feasibility (at least for wealth transfers subject to public scrutiny). Tough rational basis review might well increase this tendency, leading blocs bent on securing legislated wealth transfers to try to hoodwink the judges with even more costly public-interest disguises.

Finally, the Mashaw proposal disregards the psychological impact on the judiciary and the polity. Judges are free not only of electoral responsibility to voters, but also of market responsibility—the discipline that customers, suppliers, and employees impose on businesses through their ability to exit, by reducing their purchases, cutting off the supply relationship, or quitting. Setting up judges as super-legislators, free from electoral and market responsibility, as well as from responsibility to any text, cannot be good for character or, indeed, for performance. Further, from the electorate's point of view, the increased risk that legislative products will be cast aside by life-tenured

44 See generally Saul Levmore, Just Compensation and Just Politics, 22 Conn. L. Rev. 285 (1990) (discussing interest group activity as a counterweight to confiscatory impulses).
guardians can only erode the motivation to become informed and active in constraining interest groups' rent-seeking.⁴⁵

Public choice has widely been taken to strengthen the case for rejuvenating (perhaps more accurately, reviving) the doctrine against delegation of legislative powers, now generally regarded as virtually defunct. Public choice's core insight here is that broad delegation is most likely in instances where legislators seek to win the gratitude of groups that will benefit from legislation without foregoing the support of those who will bear the costs. Delegation may appeal to legislators as a way of having and eating their cake.⁴⁶ If we may take this as public choice orthodoxy, Mashaw is an iconoclast.

In undercutting the idea that public choice militates towards constraining delegation, Mashaw argues that vague delegations tend to inhibit logrolling, a major device by which interest groups can get their way. Agencies, unlike legislators, cannot trade goodies across policy domains.⁴⁷ Indeed, he points out, the most classic of narrow interest group statutes—appropriations for rivers and harbors and for defense installations—tend to be mindnumbingly specific. And, to the extent that proponents of a strong anti-delegation rule rely on fiscal illusion—the idea that legislators are drawn toward proposals with obvious benefits but subtle costs—Mashaw argues that legislators can use specificity and complexity to hoodwink their constituents as easily as they can use vague delegations.⁴⁸

The logrolling point seems sound to me, though I'm unsure of its weight. But Mashaw seems to me rather casual about fiscal illusion. True, the classic traditional pork bills include so many items that it is hard for the press or public to focus much attention on any of them. But consider the basic structure of federal clean air legislation. First the Environmental Protection Agency sets ambient standards that are based on health without regard to cost. Then the states formulate plans to realize the ambient standards, subject, however, to EPA review.⁴⁹ Only then do firms incur the necessary compliance costs. The

⁴⁷ See Mashaw, supra note 1, at 144.
⁴⁸ See id. at 145, 147.
regulations, generating hundreds of billions in annual costs, dwarf the tidbits that make up traditional pork. Yet the process seems elegantly designed to enable members of Congress to make broad claims of environmental zeal, largely free from any involvement in the check to be picked up by consumers. It is hard to imagine direct regulation, no matter how enveloped in picky detail, that could cloud responsibility so effectively.

Of course, part of the problem is the citizenry's lack of economic sophistication. Politicians commonly decry "selfish companies" for opposing environmental regulation, suggesting that the politicians believe that voters think that firms' compliance costs stop with the firms and are not passed on to consumers. But the elaborate structure of clean air legislation, in which congressional delegation plays a role, surely helps to hide the ball. Mashaw seems to me overconfident in his belief that he has demolished the public choice case against undue legislative delegation.

Mashaw then turns to using public choice as an affirmative justification for broad delegations. His strongest point seems to me his linkage of broad delegations to timely responsiveness. As the public appetite for regulation waxes and wanes, or as new circumstances and evidence undermine the case for old regulatory strategies, agencies under Presidential direction can respond more nimbly than can Congress. Airline deregulation thus proceeded under the Carter administration's Civil Aeronautics Board under the aegis of Alfred Kahn, before Congress acted at all, and the Interstate Commerce Commission radically altered trucking regulation, relying only in part on statutory change. Without broad delegations, together with judicial deference to fluctuating agency readings of their mandates, these changes would, at best, have taken a good deal longer.

50 See Office of Information and Regulatory Affairs, Office of Management & Budget, Report to Congress On the Costs and Benefits of Federal Regulations 29 (Sept. 30, 1997). The report does not reflect original research but adopts summaries of previous agency cost findings.

51 To be sure, firms are "selfish," and presumably fear that some of their rents will be destroyed by the transition to a post-regulation equilibrium in which firms enjoy normal profits and prices embody all costs. But one suspects that the authors of these political slogans do not expect their listeners to be drawing such fine distinctions. Indeed, the tendency of the “selfish firms” to defend against regulatory stringency by claims of job loss (a similarly transitional phenomenon) suggests that they too discount the public awareness of price impacts and despair of mobilizing opposition on that ground.

52 See Mashaw, supra note 1, at 149–53. For an example of judicial recognition of the need for broad delegation to adapt to changing industry circumstances, see Orscheln Bros. Truck Lines, Inc. v. Zenith Electric Corp., 899 F.2d 642 (7th Cir. 1990).
Happily, a reviewer need not decide whether Mashaw is ultimately right. But anyone who thinks that public choice analysis makes a slam-dunk case for greater limits on legislative delegation certainly had better check him out.

Apart from its possible implications for rational basis review and for delegation doctrine, public choice may have lessons for statutory interpretation. Mashaw as always advances interesting critiques of the various public choice-based theories, but here he is himself somewhat inconclusive. His strongest endorsement of any view is the observation that "one might easily agree with some weak form of [Jonathan] Macey's interpretive thesis, 'When in doubt, nudge statutes in the direction of some public interest goal.'" While the idea is on its face appealing, and may do no more than state an inevitable truth, it may, when combined with the great range of judges' views on just what constitutes the public interest, be just a recipe for disparate and vacillating outcomes, raising the costs and reducing the benefits of private-sector planning efforts.

In one area he draws from public choice a harder-edged suggestion for statutory interpretation—a rejection of the maxim favoring interpretations that avoid difficult constitutional questions. His argument runs essentially as follows: A constitutional invalidation returns the players in the legislative game (President, Senate, House) to the status quo ante, which was sufficiently irritating to all to produce action—the new statute. After invalidation, the preexisting irritant will spring up anew, and the players will be motivated to adopt a statute that addresses the problem as well as the Constitution permits. By contrast, if the court's statutory interpretation (by hypothesis somewhat artificial) makes one player content, there won't be enough discontent to generate a new statute. As a result, an interpretation made in the name of accommodating legislative preference, yet one that by hypothesis deviates from that preference, will in reality be "uncorrectable."

The argument strikes me as powerful—where the conditions stated by Mashaw hold. The most important of these is the idea that the constitutional defect is one that can be overcome with modest sub-

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MASHAW, supra note 1, at 92.

See id. at 105.
stantive adjustment. Where that is true, invalidation will likely lead to reenactment without the unconstitutional flyspeck. (On the other hand, if the needed adjustment is modest and the Court's guesswork at all apt, won't the conventional doctrine usually lead to the same outcome?) But where the possible infirmity is more serious, legislative inertia and the need to work out a quite different compromise may well doom reenactment. Under those circumstances, the somewhat strained interpretation may give the political branches a good second-best—a solution close to what they would have agreed on if alerted to the constitutional hazard—and almost certainly closer to that goal than no legislation at all.

Mashaw does not address what may be the least intrusive judicial use of public choice (as well as of broader ideas of the interaction of law and economics)—simply the characterization of what is going on. Courts operate through the written opinion—explaining, justifying, arguing, characterizing, and cajoling. Their explanatory talk sometimes acquires a life of its own, influencing the resolution of other issues. Thus, after the D.C. Circuit found, without citation to empirical data, that ownership of radio and TV licensees by minorities tended to increase diversity of content, that judicial discovery formed some of the support for congressional findings to the same effect, which in turn emerged as establishing the point for purposes of constitutional adjudication. Because of this afterlife of judicial assertions, it seems courts should be careful how they describe the way the world works—and not take legislative purpose claims as holy writ.

When confronted with a statute covered with thick greasy interest group fingerprints, there is no judicial obligation to take the statute's formal statement of its purpose as exhausting the subject of its fore-

55 See TV 9, Inc. v. F.C.C., 495 F.2d 929, 937–38 (D.C. Cir. 1973); see also Garrett v. F.C.C., 513 F.2d 1056, 1063 (D.C. Cir. 1975) (repeating assertion).
58 In Chicago Board of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 741 (7th Cir. 1987) (Posner, J., concurring, joined by Easterbrook, J.), for example, the court explicitly recognizes that an ordinance reducing the rights and remedies of landlords in residential leases will have predictable negative effects on tenants (e.g., increases in rent exceeding the value to the tenants of the extra rights) and on housing supply (because the provision will generate higher costs per unit of value afforded, the market-clearing quantity will decline), despite the ordinance's proclaimed purpose of promoting the quality of housing.
seeable effects. While not a perfect science, microeconomics has achieved some basic understandings. Price controls, for example, will generally curtail the quantity supplied and increase the quantity demanded. They thus generate shortages and consequent needs for administrative allocation. Usually identifiable classes of actors will benefit from the administrative allocation scheme. In talking about such a statute, surely judges need not simply restate the pablum ladled out by the preamble.

A typically unfair move of book reviewers is to criticize the author for failing to write a different book. But I hope not to be guilty of that when I call attention to what strikes me as a startling gap in a book that discusses rent-seeking activity and other public choice issues very broadly, with frequent allusions to real-world examples. The gap is important because the subject omitted—the possibility that much of current tort law may be an example of rent-seeking activity—draws in question Mashaw’s tendency to regard courts primarily as solutions, never as problems. Yet, although some legislatures have evidently been persuaded—inflected in part by lobbying, to be sure—that their states’ civil justice systems had become defective (perhaps as the product of interest group rent-seeking), and have enacted reforms, several courts have struck the changes down on creative constitutional grounds.59

Paul Rubin and Martin Bailey have made a powerful case that the bar enjoys considerable advantages as an interest group. The closed bar in thirty-three states gives lawyers a group an unusual power to prevent free-riding.60 And the homogeneity of the plaintiffs’ bar, coupled with the absence of any powerful incentive in the defense bar to resist,61 suggests the probability of dominance by the plaintiffs’ bar. Mashaw’s omission cannot be on the view that the tort enterprise is


negligible in size. Tort costs reached $152 billion in 1994, or 2.2% of GNP, up from 0.6% of GNP in 1950.\textsuperscript{62} Over the period 1950–85 tort costs grew at an average rate of 12% annually, compared with a 7.9% growth rate in nominal GNP.\textsuperscript{63} As a percentage of GNP, this gave the United States a tort system two-and-a-half times more expensive than the average of most major foreign industrialized nations.\textsuperscript{64}

In fact, quite apart from sheer scale, tort law poses an interesting case for application of public choice theory. Mancur Olson, one of the founders of the field, stresses the distinction between parties with an "encompassing interest" in a society's productive functioning and parties with a narrower interest. More colorfully, he distinguishes between the incentives facing a roving bandit with no fixed or exclusive operating terrain, and those facing a stationary bandit holding exclusive sway over an area. The latter, no matter how greedy, has far more incentive to be careful about his rapacity's effects on productivity. If he tries to take everything, people will make almost nothing, and his take will fall. The roving bandit, because his take alone will have little impact on overall productivity, has no such restraining incentive.\textsuperscript{65}

\textsuperscript{63} See id. at 3. Numbers for lawyers and portion of the GNP flowing to lawyers reflect the same pattern. And expenditures on legal fees reached 1.47% of gross domestic product in 1992, up from .523% in 1960; the number of lawyers reached 861,000 in 1994, or .66% of the labor force. See Steven Shavell, The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System, 26 J. Legal Stud. 575 nn.1-2 (1997).

The growth rate tailed off in the 1990s. The cost in constant dollars grew in the '90s at an annual rate of only 0.7% (thus falling as a percent of GNP), after constant-dollar growth rates in the prior four decades ranging from 4.1% to 9.5%. See Tillinghast, supra note 62, at 12–13.

\textsuperscript{64} See Tillinghast, supra note 62, at 14, 16. Tillinghast studied Denmark, Japan, Australia, Canada, France, United Kingdom, Switzerland, Spain, Germany, Italy and Belgium. After the United States, the country in the survey with the highest percentage of GNP flowing to tort costs was Belgium, with 1.4%; the lowest two were Australia and Japan, at 0.4% and 0.5%, respectively. The tort system cannot be assessed simply by reference to gross cost, of course. For a discussion of net cost, see infra text accompanying notes 69–75.

\textsuperscript{65} See generally Mancur Olson, The Devolution of Power in Post-Communist Societies: Therapies for Corruption, Fragmentation and Economic Retardation, in Russia's Stormy Path to Freedom 9–42 (Robert Sidelsky ed., 1995). Besides what we might call the spatial dimension of an actor's interest in an economy (wide interests versus narrow ones), Olson points also to a temporal dimension—the difference between actors with a short-term view, such as a dictator who perceives a high risk of overthrow and little possibility of passing his power to descendants, and rulers with a long time horizon. Id. at 22–23. Because a lasting democracy requires that even opponents of the incumbent have the ability to earn a living while out of office, it also requires substan-
In the terms of this heuristic device, the individual tort lawyer is a roving bandit. The operations of a single lawyer, even in a lifetime, are unlikely to cut heavily into the supply of deep pockets. Although Rubin and Bailey hypothesize the bar working collectively (and thus an entity with greater incentive to consider the aggregate impact of the system on the supply of deep pockets), even in the aggregate the legal profession seems no more broadly encompassing than the conventional special interest group.

Further, the bar is organized primarily state-by-state, though accompanied, to be sure, by national organizations, including the nominally all-encompassing American Bar Association and more frankly partisan groups such as the American Trial Lawyers Association (for plaintiffs' counsel) and Lawyers for Civil Justice (for defense counsel). In areas such as products liability this localism cuts back any tendency for the interest to be broadly encompassing. Consider the costs and benefits for a state contemplating an aggressive approach toward redistribution by products liability law. Litigation will yield benefits for in-state counsel (on both sides) and for a plaintiff who resides in, or has some other close tie to, the state. Its costs, by contrast, will typically be inflicted on a national company; only rarely will there be a fully offsetting negative impact on in-state employees, management, or shareholders. Moreover, a stringent state tort law is not likely to be reflected in higher in-state prices because consumers' ability to substitute out-of-state purchases, as well as their mobility and their flexible rights to choice of forum, will make it unprofitable for a national firm to tie prices in specific states to their legal environment. Thus, particularly for such matters as products' liability, the state-by-state character of the key interest group marks it still more as a roving than a stationary bandit.

Tort law further represents an opportunity to test public choice theorists' ideas about legislative committees, albeit in a special form. One of their intuitions is that because of self-selection such commit-

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See Christopher Clague, Philip Keefer, Stephen Knack & Mancur Olson, *Property and Contract Rights in Autocracies and Democracies*, 1 J. Econ. Growth 243, 244-45 (1996). Thus, the authors argue, in a democracy the very transience of power is associated with such rights and with an independent judiciary—an institution in which those who make decisions do not share in the losses and gains of any party to a dispute, and in which knowledge of law and a reputation for fairness increase the chances for advancement. *Id.* at 245-46.

66 William Niskanen has proposed a federal choice-of-law rule as a solution, requiring states to apply the law of the state in which the majority or plurality of the defendant's employees worked. See William Niskanen, *Do Not Federalize Tort Law*, Regulation, No. 4, 1995, at 34.
tees tend to become representative of the pertinent interest groups—legislative agriculture committees being staffed with friends of the farm bloc, defense committees with friends of the defense industry, and so forth.\textsuperscript{67} While the committee represents the interest group's shock troops, as it were, their impact is to some degree muted by the legislature as a whole, which has a more encompassing interest in the welfare of the state.

Combining this with the Bailey and Rubin analysis, one might view state judiciaries as surrogates for a special legislative committee on the state of the law of primary interest to lawyers—but with the quirk that instead of being subject to veto by the legislature as a whole, the committee can reverse the legislature—vetoing acts by invoking the Constitution.\textsuperscript{68}

Of course the tort industry performs a useful, public-regarding service in forcing actors to bear the costs that their activities impose on others. By internalizing these otherwise externalized costs, it theoretically provides sound incentives to actors to take precautions. Tort may also have some favorable risk-distribution effects.\textsuperscript{69} Yet it grossly oversimplifies to picture the tort system as one where private self-interest is well harnessed to general advantage. Because there is only a fuzzy connection between the private incentives to litigate and the social costs and benefits, decisions by actors within the tort system themselves have external costs.\textsuperscript{70} Privately, a suit (or defense) is worthwhile if the expected gain (the pay-out) exceeds the party's expected litigation costs. But what is perceived by the plaintiff as gain—the transfer of the recovery to him—is as a social matter largely a nullity, A's gain

\textsuperscript{67} See William N. Eskridge, Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va. L. Rev. 275, 293 (1988); see also Mashaw, supra note 1, at 100.

\textsuperscript{68} See supra text accompanying note 59.

\textsuperscript{69} The prospect of any favorable risk distribution effect seems remote, at least as compared to alternative means to the same end. With first-party insurance, the obvious alternative device, the contract can reduce transaction costs by providing for more or less automatic pay-outs and can, to a degree, control for moral hazard. Thus, the area where the insurance feature of the tort system fills any genuine niche appears small. Further, high-income consumers will likely receive relatively high pay-outs in product liability litigation because their income losses are higher, yet manufacturers cannot practicably charge high-income purchasers more to account for the greater value of the quasi-insurance policy that tort law ties to the purchase. Thus there is a redistribution from the less well-off to the more well-off, which, given standard assumptions of the declining marginal utility of income, suggests a welfare loss. See generally George L. Priest, The Current Insurance Crisis and American Tort Law, 96 Yale L.J. 1521 (1987).

\textsuperscript{70} See generally Shavell, supra note 63.
being offset by B's loss.\footnote{71} The direct social cost comprises the litigation costs, on both sides, plus the cost of the publicly-provided services of the court system. Except for modest infrastructure needs, the direct social cost, then, consists almost entirely of high-quality intellectual resources that could be redeployed in highly productive endeavors. The social benefit consists of the value of the enhanced incentives, plus whatever improvement in risk-distribution may be achieved. The result can be the generation of excessive (or, conceivably, inadequate) litigation, depending on the scale of the externalized benefits (deterrence impacts) and the externalized costs.

As the social costs run high as a proportion of the total (more than half),\footnote{72} the risk that litigation will be over-supplied seems high for any tort where the incremental deterrent effect of liability is small. That appears true for two of the largest classes, automobile accidents and products liability. For auto accidents, the driver's regard for his own safety is surely a powerful incentive, bolstered by criminal liability for extreme negligence.\footnote{73} And for product liability, a firm's ordinary interest in a reputation for safe and healthy products will provide—at least if adverse information can readily circulate—a powerful incentive independent of liability.\footnote{74} In fact, there appears to be little correlation between litigation volume and safety improvements.\footnote{75}

Thus, tort law presents an appealing case for use of public choice analysis. The substantive rules entangle public-regarding and interest-group effects. And the institutions interact with unusual complexity, with rules typically originating with the judiciary, subject to legislative amendment, subject in turn to the risk of judicial set-aside in the name of the state constitution.

I linger on Mashaw's omission of tort law because the omission seems to reflect an underlying notion that judges are naturally part of

\footnote{71} It is “largely” a nullity, rather than a complete nullity, because there is some possibility, however remote, that it will accomplish favorable risk redistribution effects. See supra note 69.

\footnote{72} Tillinghast estimates that 54% of total tort costs are expenses rather than transfers (16% to claimants' attorneys' fees, 14% to defense costs, and 24% to defense administrative costs). TILLINGHAST, supra note 62, at 8. Of the 46% constituting transfers, 24% is for awards for economic loss and 22% for awards for pain and suffering. Id.

\footnote{73} See Shavell, supra note 63, at 589.

\footnote{74} See id. at 590-91.

\footnote{75} See George L. Priest, Products Liability Law and the Accident Rate, in LIABILITY: PERSPECTIVES AND POLICY 184-222 (Robert E. Litan & Clifford Winston eds., 1988). But see THE LIABILITY MAZE 12-13 (Peter W. Huber & Robert E. Litan eds., 1991) (noting some authors' view that liability may have substantial indirect effects on safety via publicity); id. at 225 (noting that basis for this view is entirely subjective).
the solution rather than part of the problem. To be sure, the prime actors in the tort scenario are state judges, who lack the tenure protection of their federal counterparts, and, indeed, are often elected. But one wonders whether tenure can be seen as a compelling basis for confidence in the handiwork of judges. It assures a kind of independence, to be sure, but with concomitant risks of arrogance. The premise of democracy is that generally the downside risks from decisionmakers' independence exceed the likely benefits, at least unless the scope in which they can deploy their independence is sharply curtailed, as by norms of close adherence to a constitutional text. As the rest of this review suggests, my doubts about regarding judges as part of the solution leave me skeptical of Mashavian solutions based on confidence in judges' performance.

By Mashaw's account, public choice provides little theoretical support for judicial interventions with any promise to radically improve the workings of American democracy. My own view is in most respects even more skeptical. But this shared doubt is no cause for alarm. To say that judges are not much of a solution is simply to recognize that in a healthy pluralistic society, the natural role of judges is limited. Their essential activities are the evenhanded enforcement of contract and property rights and the criminal law—activities that seem unglamorous but whose necessity is daily made clear by societies all over the globe that do without, and do badly. Mashaw in *Greed, Chaos, and Governance* with great finesse delineates many of the false trails that public choice analysis may lay for judges who think they can straighten society out. If there are grand remedies, I suspect they are political. As has proven the case in New Zealand, a politician even in a country in an apparently advanced stage of *Demosclerosis* may succeed by taking on swarms of interest groups at one time, being able thereby to offer really large benefits to the public at large—benefits worth the ordinary citizen's attention and self-education. Such a mass assault also means that persons who lost as members of one interest group would receive implied compensation for their losses through the common gain. Only those who had formerly hit the jackpot as rent-seekers would be net losers. Mashaw does not address that


story—a pity, because application of his intellect to it would surely be fruitful. In the meantime, the current book serves a useful goal in lighting up pitfalls for anyone proposing public choice as a source of answers for judges.