The Public Choice Threat

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I. **The Basic Interdisciplinary Encounter**

Twenty-five years ago law and economics was an infant movement, marginal and unthreatening. Its pioneers had mixed success in the academies and in the law reviews. Slowly, the tools of economics entered the mainstream of such fields as antitrust law, contract law, corporate law, and tort law. In each area, economics threatened existing views and scholars. Eventually, a kind of unarticulated truce evolved. The economists concentrated their energies on a few areas of law with but occasional expeditions into the areas that had been implicitly designated as out of bounds. Meanwhile, other legal academics, or at least those willing to look beyond legal doctrines to other disciplines, added the Coase Theorem, the Prisoner’s Dilemma, and a few other law-and-economics tools to their list of useful equipment.

Each of these two groups adapted further to one another by becoming more sensitive to the other’s criticisms. Economists learned to be careful about jumping from positive to normative claims, though in time their critics would come to insist that such separation was impossible. And most non-economists honed their skills at dismissing (even positive) economic arguments from their own work by noting the weaknesses inherent in the simplifying assumptions of economic models. Legal academics excel at pointing to the weaknesses in approaches they do not take. These non-economists are remarkably conversant about transactions costs, wealth effects, and the contentless character of utility maximization but much less so about such things as deadweight loss, information-forcing rules, and capital structure irrelevance theorems.

This truce was reinforced, and law and economics became more secure, as law schools began to hire economists who were educated in

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law and who were, therefore, themselves interested in legal doctrines and adjudicated results. These lawyer-economists were well positioned to inject economic thinking into the hallways of the major law schools.

Public Choice (hereafter relegated to lower case status), one of the labels attached to work that explores political institutions and outcomes while armed with an assumption of selfish and rational actors, is in many ways a field in, or perhaps a cousin of, economics. Public choice and economic theorists share a taste for simple models that promise to illuminate apparent puzzles. In principle, these theorists like testable hypotheses, though such testing is difficult and rarely shakes previously held intuitions.

Unlike law and economics, which has entered a mature phase, public choice is an infant movement in law. It is on the verge of growing pains—more in the sense of what it is inflicting than suffering. In this Review, I will suggest that it is the least threatening aspects of public choice that have thus far made their way into the legal academy. But a more aggressive—and interesting—perspective is on its way in the form of work about the ways in which constitutional and other legal rules can be understood as reflecting public choice insights. The functions of many legal rules will be understood differently when viewed through the lens of public choice. At the same time, and for reasons discussed presently, this new perspective is unlikely to be wildly popular.

For the purpose of this Review, I think of public choice as having four branches. There is work on self-interested individual actors, on organized interest groups, on aggregation problems (Arrow’s Theorem and the like), and on the impact (and occasionally the function) of various constitutional or institutional arrangements. These four branches overlap, especially on close inspection, but the categorization can be useful. All of these branches, or approaches, are of great potential interest to lawyers, though only two of these four will be familiar to most readers of law reviews.

1 For the most part, work has focused on voters and politicians, with occasional attention to the question of who supports and organizes interest groups.

2 As most readers of this Review know, aggregation problems refer to situations in which it is difficult or even impossible to reach a group decision without running afoul of some reasonable characteristic that such a decision ought to possess.

3 The role of interest groups is much discussed in legal materials, especially with respect to questions about such things as campaign finance, statutory interpretation, and regulated industries. Legal scholars have also shown interest in assessing the likely impact of various institutional arrangements or adjustments such as the line-item veto, term limits, and the independence of the executive and judiciary. These are regular topics in public choice, but so are things like multiple-party versus two-party systems and various exotic voting systems, even though it is unusual for a country to change its practices with regard to such fundamental institutions in response to intellectual currents or criticism.

Constitutional lawyers have recently displayed some interest in comparative constitutional
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The books under review here, Robert Cooter's *The Strategic Constitution* and Dennis Mueller’s *Constitutional Democracy*, introduce or consider arguments and findings drawn from all four of these segments of the public choice literature. They do so by focusing on constitutional arrangements, a category that is never (nor never need be) carefully defined, but that includes many of the ground rules of democratic governments.

Part II describes these books and comments on their strategies. Part III discusses the mixed success of public choice theory in legal circles; some tools are universally appreciated while others are greeted with hostility or simply avoided. I aim to explain the mixed reception while suggesting what the future might bring. In doing so, I react not only to these two books but also to the accompanying Reviews by Don Herzog and, less directly, by Roger Myerson.

II. CONSTITUTIONS FOR RATIONAL ACTORS

These books are unlike anything that has preceded them. They play with the tools of public choice in the land of constitutional law. Both books, but especially Cooter’s, rely heavily on the tools of mainstream economics. These books move around the landscape of democracy, offering conjectures and models here and there. These are not works centered on Supreme Court cases. They are about the role and content of real and imagined constitutions. They focus on the rules that democratic societies might agree upon, and they explore the consequences of alternative rules; Cooter works from basic principles while Mueller prefers to draw on the extant public choice literature.

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Law, even with respect to institutional arrangements that are fairly fixed in any one country. See, for example, Bruce Ackerman, *The New Separation of Powers*, 113 Harv L Rev 633 (2000) (drawing on experience of other countries to question the institution of an independently elected president); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L J 1225 (1999) (examining how comparative constitutional law might assist in interpreting parts of the American Constitution). Lawyers are much less familiar with rational choice approaches to (self-interested) voters and politicians, although there is a small literature on the question of what exactly it is that motivates judges. See, for example, Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sc Ct Econ Rev 1 (1993) (analogizing behavior of judges to voting in political elections). Lawyers know even less about the vast literature on aggregation problems. There are a few law review articles in this area, but the overwhelming majority of law students, judges, and lawyers would be unable to identify Arrow's Impossibility Theorem or (even) Condorcet's Jury Theorem. See Mueller p 138 (discussing the idea that if the average citizen knows the right answer to a question with a probability of (even just barely) greater than one-half, then a large-scale referendum will generate the right answer with a probability approaching one). This unfamiliarity with the idea of a voting paradox, and its threat to majority decisionmaking in some settings, and with the conditions under which majority rule is especially defensible is an indictment of undergraduate education, but it is a condition that is rarely remedied in law schools.

Cooter's book is styled as something of an introductory textbook (Cooter p xix), but the Mueller book can also serve in this capacity. In this Review, I think about these books as introducing the tools of public choice to readers who know something (or must learn something) about a constitution. Each follows the classic strategy of introductory texts; these are surveys consisting of numerous applications rather than exhaustive explorations. Each appears to follow the strategy of moving through many topics, using examples to convey the scope of the field, the author's methodology (which is grounded in rational choice rather than constitutional law), and the range of the tools.

Mueller's book is written as if to answer questions from a sophisticated citizen entrusted to be a delegate to a constitutional convention in an emerging state. Why have government? Why have representatives? What about a federation of geographic entities? What should unelected judges do? Our delegate needs to think about these questions on her way to the constitutional convention. Most undergraduate and graduate law students are obviously not on their way to constitutional conventions, but the drama or device is reasonably useful. Readers can surely learn a good deal by identifying with this hardworking delegate.

One serious problem with this clever device is that it dooms the normative ambition of the volume (except perhaps for those few readers who really are participating in a constitutional convention). It must be the case that some constitutional decisions implicate others. For instance, the degree and manner of representation in a legislature has something to do with what can and should be decided through instruments of direct democracy. The presence of an executive veto, and especially a line-item veto, might have something to do with the wisdom of a balanced-budget provision or with the substance of campaign finance restrictions. The ability to secede might be a function of the rules regarding immigration, representation (in the sense of whether voters in a given region can block national legislation or not), and equal protection (as, for example, whether the region can be taxed uniquely). This sort of list goes on and on.

Functional rules and institutions, ranging from mere doctrines to constitutional provisions, are often linked to one another, in obvious or interesting ways. A legal system is more than the sum of its parts. For the most part, Mueller's hypothetical delegate receives self-contained lessons on constitutional topics with little explicit connection among them. Most real readers are, of course, more interested in thinking about these topics contextually. Moreover, public choice the-

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6 And this seems like a fair tactic. Neither book makes any attempt to teach constitutional law (comparative or otherwise) to those who are already familiar with public choice.
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ory is likely to make substantial inroads into mainstream constitutional law precisely by revealing connections among constitutional decisions. These potential connections are likely to be of greater interest to lawyers than to pure public choice theorists.

At times, Mueller's manual condescends so much to our delegate, that the impatient, skeptical reader will think that what is being said must surely amount to a series of false assumptions that will add up to an unfair conclusion later on. Thus, the delegate reads that crime and poverty are serious problems (even? only?) in advanced democracies; that local control of schools might sometimes be good; and that villagers can be better off if they are allowed to trade.7 But this same reader must be equipped to learn (and care about) May's theorem and to distinguish bimodal from multi-modal distributions of voters.8 Our rookie delegate would find it impossible to rely on this book as a manual, but it offers useful reading in the form of an eclectic mixture of simple models and admonitions alongside complex material and normative leaps.

For the more likely reader, neither novice nor delegate, the book is a reference tool. In this role it often provocative and useful. It might also be a good tool for a skilled teacher who can fill in the gaps with introductory and contextual material. Unfortunately, the book is sure either to annoy or threaten the audience that most concerns me here, those students, lawyers, and academics who have maintained their part of the truce between economists and other law school residents. This is an audience that has come to accept the insights and methods of law and economics in such areas as contracts and commercial law. It may in fact now be ready to modify the old truce in order to incorporate similar methods in other fields, far from the reservation to which law and economics had implicitly been sent. The time may be ripe for greater use of rational choice tools in constitutional law, but it will take a large volume of interesting work on public choice and constitutional law or an inspired textbook on the subject to transform the study of constitutional law in this direction.9

The design and effect of Cooter's The Strategic Constitution is very different, and it will appeal to a different set of users. The intended audience is a class of advanced undergraduates or law students, and many classes would indeed do well with this provocative book. There is also the possibility that the book will find an audience

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7 The crime example is found in Mueller at pp 4, 21; the education example at p 5; and the trade example at pp 226–27.
8 See Mueller pp 159 (discussing May's Theorem on axiomatic composition of simple majority rule), 130–32 (discussing equilibrium in party competition).
9 Alternatively, a few startling insights may do the job. The characteristics of these (as yet unknown) insights are discussed below in Part III.B.1.
among academics in law or in related fields who are not yet conversant with the literature this book draws on. It is a quirky book. This is because it reflects the very quality of law teaching that is the hallmark of great law schools (and yet so at odds with teaching in most other disciplines). It tries to be interesting rather than linear. It aims to set the reader thinking.

A successful introductory textbook, and surely a path-breaking one, manages to put the author’s mark on a subject as it surveys a field and introduces basic tools in a manner that is, well, controversial even as it equips the reader to explore other work in the field. Thus, an economics textbook must teach about utility maximization, marginal cost analysis, and deadweight loss, while also suggesting that tastes may be endogenous, that rationality is a contested concept, that perfect competition may be unlikely, and that it may be impossible to assess the real costs and benefits of monopolies. The great textbooks do this well, with tangents and sidebars introducing additional tools and provocative applications along the way. Cooter’s *The Strategic Constitution* succeeds in motivating the reader with pithy and provocative questions and applications. Indeed, the questions it asks provide something of a model for casebook writers. To take but two examples virtually at random, this book introduces the mystery of voter participation and then asks the student how she would (rationally) vote—or cast a blank ballot—in an election for an animal control officer if, once in the voting booth, the voter realizes that she knows nothing about any of the candidates (Cooter p 23). And after introducing rent-seeking, the reader is asked to compare a manufacturer seeking a tariff on imports with the Salvation Army’s lobbying for subsidies for the homeless (Cooter p 72).

But introductory textbooks in such subjects as economics and (even) physics have an easier task than one that tries to infuse constitutional law with social science, if only because it is easier to teach where there are some basic starting points that build confidence in the discipline. If the teacher or author can refer to some activity that takes place in a vacuum of sorts, then it is feasible to offer the student straightforward examples that serve to develop important tools. Assumptions can then be relaxed in a manner that makes the starter set seem all the more remarkable.

Not so in public choice. The obvious place to begin is with voting, an activity familiar to all readers and, in any event, central to constitutional democracies. Following the classic textbook pattern, a book on public choice and constitutions would begin with voting and use that subject to demonstrate the value of the rational actor assumption. This is, after all, akin to an economics text beginning with a consumer who is choosing between two goods in order to introduce the idea of utility
maximization and then downward sloping demand curves. In the case of physics, the comparable strategy may be to start out with billiard balls in order to develop laws of motion. But economics texts can work with utility-maximizing individuals, and physics books can have balls rolling around with no concern for friction, far more easily than can a public choice text deploy its rational voters. This is because virtually every reader is aware of the puzzle of why many people vote when not compelled to do so by law. The behavior we observe on election days contradicts, if that is the right word, the first important step a public choice text will want to take.

This problem might be avoided in a number of ways, but there is no avoiding it for readers who find it difficult to proceed without an understanding of this puzzling feature of public life. One such reader is Don Herzog, whose delicious Review accompanies this one. I think it fair to say that Professor Herzog can not quite trust (or should I say accept or cite or recommend) an author who writes as if the world can be explained with a demonstrably inadequate tool. It may in fact be impossible to win over such a determined and skilled reader, in which case those of us who think we find public choice useful and interesting should perhaps simply be grateful that there are a limited number of readers with Professor Herzog's talents. Alternatively, these readers might be turned if they were sufficiently impressed with the tools we offered. I return to this possibility below.

Public choice has other problems as well (in addition to those annoying voters and non-voters). Economics and physics have no trouble offering numerous and remarkably useful applications for each of their oversimplified models. In economics, for instance, one derives demand curves and then points to evidence that when the price of oil rises, people generally buy less oil. Even when there are exceptions—and these are rare if nonexistent—the exceptions virtually prove the rule, because the exceptions can be categorized and relegated to their own nice sidebars. It is through these applications, general and exceptional, that a discipline gains influence. Economics and physics have achieved great influence in neighboring disciplines as well as in political and popular culture, and they have done so in large part because generations of students, numbering in the millions, have seen the power of new tools offered in college courses and introductory texts in these fields. These tools have explained phenomena that otherwise seemed mysterious or counterintuitive.

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11 I should note that Herzog (to his credit) would not be satisfied with the conventional truce, under which economists stay in the fields assigned to them. As his examples reveal, he would find the borders to be too fictional.
12 The modern standing of physics probably has a good deal to do with the awe inspired by
Public choice has but one insight that has captured the general imagination, and it is sufficiently intuitive that the field receives no credit for it. Put differently, imaginations were captured before public choice theory came along. I refer, of course, to the role of interest groups. It is common for academics, presidential candidates, and journalists to explain pieces of legislation, ranging from tax laws to budget items and even to regulatory strategies, with a "public choice" story. Politicians and journalists call these "special interest" stories, while academics call them public choice stories, but in either case the gist of each tale is an ex post intuition, sometimes backed by evidence of financial contributions and the like, that some organized interest group prevailed over a sensible, efficient, or fair alternative. This may be because the interest group drafted the legislation or contributed to the right campaign, or perhaps because some pivotal politicians sought to appeal to the group's members or disbursement agents. In these stories, well situated or well endowed parties gain at the expense of dispersed, unaware losers. This is what is meant by a public choice (or special interest) story, and these stories fly fast and thick in contemporary, elite law schools—much as they do in the print media.

To be fair, public choice theory does offer contributions to this storytelling enterprise. There is interesting work on the question of why some interest groups arise and organize, while others do not. Much of this remains mysterious, but I think it fair to say that those who are familiar with the modern literature spin better special interest legislation stories than those who think about politics without the benefit of the modern literature. In particular, the idea that majority rule, as opposed to a unanimity (or contract-like) requirement, creates opportunities for the imposition of "external costs," and in turn for law and especially constitutions to reduce these opportunities for inefficient government projects, is something to be credited to modern public choice theory. Still, the idea of over-achieving factions, not to mention anti-majoritarian legislation, is as old as government itself and these are concepts that have been widely known and discussed from the time of the Federalist Papers. If a public choice specialist

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13 The work begins with Mancur Olson, *The Logic of Collective Action* (Harvard 1965), but there have been significant criticisms and improvements.


15 Interest group stories are as old as the Bible, but inasmuch as *The Federalist Papers* fa-
were to claim that the ability of organized interest groups to affect legislation is an important insight of the discipline, readers would correctly agree that this was an important insight, but they would scoff at the idea that modern rational choice theorists had anything to do with discovering and popularizing this claim.

In short, these books face some difficulties in getting started. One branch of public choice faces the problem of readers' experiences with voting behavior (not to mention with politicians). Another branch, pertaining to organized interest groups, is such an easy-sell that public choice gets little credit for it.

The question of why people vote (or do not) is, as I have indicated, the obvious place to begin making the case for rational choice theory. But as a strategic and pedagogic matter, it is probably an unwise starting point. No physics book would begin with the question of where the reader will be standing or sitting after three minutes of reading. The reader's movements may well conform to physical principles, but we need to know so much about the reader's starting position, tastes, psychological makeup, and so forth that we do no fault physics (or psychology) for its inability to predict this "simple" thing. But there is no need to begin an introductory book with a task that is beyond the capacity of the discipline. Starting with two billiard balls, or a planet orbiting in space, is a much better way to motivate readers with respect to the work of physicists. Similarly, these books on public choice might have done better beginning on another branch of the discipline with a simple voting paradox, where some group chooses \(a\) over \(b\), \(b\) over \(c\), but \(c\) over \(a\), in order to suggest the idea that a constitutional rule might prevent stalemate or cycling or that a constitution might empower, or reduce the power, of a particular agenda-setter or "dictator" who can influence the order or manner in which our group chooses among \(a\), \(b\), and \(c\).\(^6\)

Starting points aside, these books do nicely reveal that public choice offers much more than interest group stories and ruminations about self-interested politicians. Ironically, these works can be faulted for paying insufficient attention to interest groups and, more importantly, to the possibility that some constitutional rules are superior because they better control rent-seeking behavior than do alternative

\(^6\) As most readers of this Review know, where there is intransitivity of the kind mentioned in the text, voting will cycle until some procedural device brings decisionmaking to a conclusion. The stopping point depends on this device or on the order in which the options were considered by voters. With full information about voters' preferences, the party who sets these rules can control the process and determine the outcome.
rules. Thus, these books cover such topics as direct democracy, delegation to administrative agencies, government taking of property, presidential versus parliamentary systems, along with many others.

Each of these questions of constitutional design could be influenced by the expected impact on interest group activity, but as it happens that is not normally the strategy of either of these books. Instead, the Cooter book generally offers free-standing essays, almost Socratic in nature, examining rational choice considerations. The Mueller book does so as well, although its chapters devote more attention to the findings of the technical public choice literature. As I have already hinted, the Cooter book is meant to be provocative while the Mueller book describes the state of the art. I would refer to the Mueller book when puzzling over some question with a public choice angle, but I would rather that a student I cared about used the Cooter volume in his or her introductory class.

Setting aside the question of whether the way to inspire confidence in the tools of public choice is to begin with aggregation problems, rather than mysteries of participation or (fairly well known) over-achieving interest groups, it is plain that there has been a need for teaching materials that develop connections between aggregation problems and collective action problems, on the one hand, and choices among constitutional rules on the other. These books fill this niche, albeit for different audiences. When these sorts of analytic connections enter the mainstream of constitutional law discourse, we will know that public choice has arrived in law. It will revolutionize the study of constitutional law when its stories are no longer simply "just so" tales about organized interests securing friendly legislative provisions but also expeditions into the relationships between constitutional rules and the fundamental problems associated with aggregating preferences or summing choices in a sensible way—if such a way exists.

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17. Rent seeking refers to the resources wasted in attempts to secure monopoly power and other advantages through political intervention. Even if such an advantage is itself regarded as a mere wealth transfer, some fraction of the resources expended in gaining such advantage and in attempting to prevent other parties from doing so are likely to meet any definition of inefficient waste.


19. Anyone who has met Don Herzog can see why I wish that my favorite students could have him as their teacher. The prospect of Herzog teaching Cooter’s public choice book would be too good to be true.

20. The Mueller book is especially good at surveying (what I have called) the fourth branch of public choice. It engages in several comparisons in order to inform the reader of the apparent effects of different voting arrangements and representation schemes. It examines such things as the effect of a separately elected executive, proportional representation, representation by districts, and so forth. See Mueller pp 101–51, 252. I do not focus on these questions because, although they are of great interest to our hypothetical delegate and to anyone with an intellectual interest in political systems, they are of limited interest to students of an existing system of constitutional law inasmuch as such fundamental rules are unlikely to be changed by judges or even
In some of their chapters, these books succeed in developing just such connections. A good example is the question of secession. Mueller offers an excellent discussion of the subject, and advocates constitutional provisions allowing secession (Mueller pp 330–34). Secession is not an easy question for a budding federation or indeed for any polity. On the one hand, preferences (by which I mean more than mere tastes) across regions may diverge so dramatically that there is much to be gained by separating that which was once joined. On the other hand, a region may try to secede because it finds itself subsidizing other regions in ways that were not anticipated at the time of the original bargain, or country formation. In this case, the motive is often redistributional rather than one of (what we might dare call) political efficiency. In some sense, the popular principle of self-determination suggests that secession ought to be an available option unless one has tremendous confidence in the ability of a central authority or its courts to decide when the majority is treating a minority group fairly and democratically. In practice these are difficult matters to evaluate. It is, for example, easy to see why many residents of Quebec regard themselves as ill-treated in the Canadian federation even as the majority of non-French-speaking Canadians see themselves as unfairly exploited by the threat of Quebec’s secession.

The Quebec example is not unique in suggesting that a democracy might do well to agree on its rules regarding secession long before a real case arises. The idea is that it is difficult to think clearly and neutrally about the terms of secession, if any, once one knows the actual players and one’s own relationship to the question. It is not just that better-organized interest groups will not yet know their stake in the question but also that all participants and decisionmakers can be biased when aware of the identities of parties to a dispute.

This is, of course, a fundamental problem of constitution-making. Much as we often prefer judges to rule only on actual cases, in order to ensure that adversaries will take the matter seriously and in order to control a party’s ability to manipulate the order in which issues are considered and decided, so too we might like legislatures and consti-

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21 Cooter (pp 141–42) also offers some comments on secession.

22 Secession is a sufficiently difficult problem without adding in the question of fundamental differences, within a population, that are not connected to geographic location. Ethnic groups that think of self-determination and secession are often geographically compact, but there are interesting questions to be explored about the possibility of secession without familiar looking boundaries. Mueller p 331.

tution writers to consider real controversies. On the other hand, there is the consideration just noted, that difficult questions are sometimes best considered with no foreknowledge of the winners and losers from one decision or another. In turn, this raises the question of the appropriate subject matter for constitutions. Why put some things in a constitution while leaving other things to legislatures and judges? Some readers will wish that this question were more fully addressed in these books.

An obvious answer is that constitutions might provide protections against political majorities (as well as powerful agenda-setters and interest groups) in the form of individual and group rights. Some of these rights are fairly straightforward and, indeed, there is a fair amount of convergence across legal and political systems. These rights are likely to have many explanations, rationalizations, and justifications, but public choice can do some work here. Freedom of expression, and especially political speech, is one obvious example. Compensation where the state takes an individual’s property may be another. The Cooter book devotes a large fraction of its pages to these matters (Cooter pp 241–357), but much of the discussion has little to do with the tools of public choice. I suspect that we will soon see much more good work on individual rights from a public choice perspective.

Both books might have engaged in more comparative constitutional analysis of individual rights and perhaps in some attempts to link constitutional structures with various (individual) protections. But this is no criticism. In another Review in this issue, Roger Myerson bemoans some of that which is missing from these books. His focus is on the exclusion of some important developments in the literature. From this perspective, public choice is a lively, developing field, and the role of a book on public choice and constitutional law should be to tell lawyers (as well as delegates to constitutional conventions) about empirical evidence for a social choice explanation of standing doctrine).

24 Students of public choice will recognize a familiar dichotomy between politics as a method of aggregating preferences and politics as a means of protecting citizens from the excesses of powerful politicians. Conventional constitutional law has devoted much attention to the latter, or “liberal,” conception of politics. Public choice will surely bring more attention to the “populist,” or aggregation, angle, but it has something to add to the liberal conception as well. Thus, a reasonable argument for judicial activism—a staple of conventional liberal constitutional law—can be drawn from the populist conception of public choice. Legislative decisions seem much less sacred when their passage is understood to be the product of procedural manipulation or other devices rather than (seemingly coherent) majority decisionmaking. With rare exceptions, constitutional lawyers have not exploited the public choice literature in this manner, although they would surely find this part of public choice to be cordial rather than threatening, save for some arguments that judicial review is no more removed from interest groups and aggregation problems than is legislative decisionmaking.

all the important developments so that they might use them in thinking about law.

My own reaction is somewhat different. I see these books (and especially Cooter's, if only because it is more accessible to novices) as aiming to motivate lawyers and students to think more about public choice and constitutional law. Public choice theorists have hardly exhausted the connections between public choice and legal rules. In many areas they know little about these rules. Much as a book about game theory and the law succeeds by showing that a set of tools not previously known to most lawyers offers many insights into law, so too these books about public choice and the law succeed by suggesting the ubiquity of public choice problems and insights in law. Law students do not need obscure and technical results on game theory or public choice. Armed with a few basic tools, they can advance on their own—and often in directions not anticipated by economists.

III. THE FUTURE OF PUBLIC CHOICE IN CONSTITUTIONAL LAW

A. From Interest Groups to Aggregation Problems

In law schools, the most recognized branch of public choice is that which deals with interest groups. Political scientists will be surprised to learn that, as far as most law professors are concerned, a “public choice” argument conveys no confidence at all in rational choice or in any political ideology (or even methodology). In one law faculty workshop after another, a participant will suggest or ask for a “public choice story.” But this means nothing more that what a special interest explanation connotes to a journalist or to a modestly informed voter. It draws somewhat on another branch of public choice, because interest groups might most easily influence outcomes where politicians are self-interested, but that aspect of public choice is, as we have seen, not much of a poster child for the discipline. Mere special interest stories shake some aspects of conventional legal analysis—but these stories offer little in the way of powerful, novel explanations that might spur the combined study of law and public choice.


27 Meanwhile, those of us who think about law from a public choice perspective will continue to be consumers of the sort of work that Professor Myerson does himself and recommends to us.

28 Even where the “problem” of special interests has been seen as upsetting conventional legal wisdom, this branch of public choice has not brought about any bold new thinking. I refer to the impact of thinking about special interests on statutory interpretation. Conventional, optimistic wisdom might have been that judges defer to legislatures and then do their best to fill in the gaps where there is ambiguity. A more conservative approach was to look only within the four corners of the written statute. Public choice theory has brought new attention to the role of interest groups and to the possibility that the conventions of statutory interpretation should be
It is easy to see why this focus on special interests, though somewhat anemic, is popular. It is, after all, probably correct. Interest group expenditures and campaign budgets suggest something of a market in political influence. But the special interest notion and jargon is also terribly convenient and nonthreatening, and I think this explains in part why it is this aspect of public choice, and almost this alone, that has thus far entered the lexicon of law. When public choice is understood to mean musings about the power of interest groups, it empowers virtually every observer to carry on with business as usual. Everyone can complain about special interests not to their liking, even while exalting the groups they identify with, or favor, as engaging in civic republicanism, offsetting evil special interests, and so forth. Much as citizens and politicians engage in this game, complaining about some interest groups while worshiping others as heroic, so too legal academics different where judges intuit that the legislation in question was (overly) responsive to special interests rather than to majoritarian sentiment. But what should judges do with this contemporary version of the Carolene Products idea? See United States v Carolene Products Co, 304 US 144, 152-53 n 4 (1938) (noting that legislation that tends to hinder the protection of minorities calls for a more searching judicial inquiry). One view is to avoid gap filling, and even to create judicial drag where dispersed majorities seem to be losing to organized minorities, in order to force legislatures to be more open about what they are doing—with the hope that special interests will have less success in the legislatures when there is more candor, or at least explicit language. Compare Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum L Rev 223 (1986) (arguing that judges should interpret statutes based on what the statute actually says, not on a bargain the judge believes was struck between the legislature and an interest group), with William N. Eskridge, Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va L Rev 275 (1988) (suggesting that courts consider the size and power of interest groups benefited and burdened by a statute, and if appropriate, construe the statute narrowly). Another view is that judges should enforce apparent legislative (and interest group) bargains either because one never knows the full extent of logrolling, so that apparently antimajoritarian or inefficient legislation may be integral to accomplishing much that is good, or because enforcing "contracts" may in the long run encourage legislative accountability. See Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv J L & Pub Pol 61 (1994); Frank H. Easterbrook, Statutes' Domains, 50 U Chi L Rev 533 (1983). Then there is the somewhat orthogonal view that the entire question of gap filling is beside the point because there is no single legislative intent to discern. See Kenneth A. Shepsle, Congress is a "They," Not an "It": Legislative Intent as Oxymoron, 12 Intl Rev L & Econ 239 (1992) (relying on Arrow's Theorem to argue that searching for legislative intent is trying to make sense out of nonsense). Finally, there is the possibility, developed in Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L J 31 (1991), that the very premise of the question is misguided because interest groups may do no worse in courts than in legislatures—and we may be unable to assess in a neutral way where interest groups have done harm. In the end, then, all this sophisticated work has not produced a consensus as to how to proceed in the face of apparent interest group success. Public choice offers, I think, a much better understanding of the question, but it will not gain adherents because of its insights in this regard, simply because it appears unable to change previously held intuitions on the matter. I should add that some of this work on the meaning of legislative intent does employ public choice tools that have not yet made their way into mainstream legal thought. There is more here than could possibly have been understood a generation ago. But inasmuch as there is not yet a robust, counterintuitive conclusion to offer judges, this is not a topic likely to cause a dramatic infusion of public choice theory into law.
find it convenient to tell public choice stories about legislation they do not like.

Indeed, these stories have become something of a safety net for positive theories of all stripes. The law-and-economics loyalist who touts the efficiency of the law, or at least of the common law, can explain away apparent anomalies by blaming those inefficient rules on over-achieving interest groups who corrupt politics and markets. Similarly, one who sees law as a means of ameliorating the harshness of the market, if only through its power to redistribute in favor of the poor, can continue to call for redistributive legal intervention while explaining failed redistribution policies as the product of special interest influences in favor of wealthy, entrenched interests. These groups, and many more, can all profess the view that more law (of a kind) is socially desirable if only we redouble our efforts to identify and suppress special interest influences on lawmaking. In sum, everyone finds something to like about interest group stories. Academics seem to like certifying the intellectual seriousness of these stories with references to the “new” field of public choice, and neither conventional wisdom nor developed human capital in law is threatened.

I suggested in Part II that public choice might do better in law by building not from the principle of rational actors who do or do not vote but rather from the principle that multiple actors who do vote and who have varying preferences over several options face a famous problem in reaching a group decision. The question of what constitutions (and panels of judges and committees and so forth) might do in the face of the Arrovian problem is a central question for public choice in law. The question of what constitutions might do in the face of differentially organized participants (and interest groups) is another interesting question, of course, though I suspect that it will yield fewer remarkable insights in the near future. Both of these questions are difficult in the sense that they call for more than a single answer and they defy simple modeling. They are the sort of inquiries likely to appeal to critics who have little patience for simplifying, unrealistic assumptions.

Had Mueller and Cooter devoted yet more attention to the ways in which constitutional provisions can be understood as reactions to interest group problems and, more importantly, aggregation problems, I suspect that Professor Herzog would have liked their works better, and I now turn to the question of why this might be so. Put differently, and setting interest groups aside, the question is whether it is more profitable intellectually to begin with a simple model of self-interested, rational actors and work from there or, instead, to begin with the more complex problem of incoherence in aggregating a group’s sentiments. Why is it sometimes better to start with a hard
problem and show how the world is organized (or could be organized) in its shadow, than to start with a simplifying claim? At the risk of useless generalization, we might say that scientists and social scientists generally tackle problems by beginning with simple models, while lawyers often prefer to analyze complex problems with all their layers in place. In any event, a striking difference between theorists who work in public choice and those who labor in constitutional law is that the former work with simple models as a way of casting light on complex arrangements (or so they hope) while the latter prefer to juggle multiple doctrines, cases, values, and considerations all at once. It may be that my own intuition about linking constitutional law to public choice by using that segment of public choice that deals with aggregation problems derives from a sense that lawyers will appreciate the ambiguity, richness, and complexity of incoherence problems and the reactions they might generate much more than they do simple models abstracted from reality.

One reason a (Herzog-like) reader interested in constitutions might be more attracted to ideas about interest groups and aggregation problems than to simplified rational choice models featuring self-interested actors (narrowly defined) is that simplification can mean distraction. Readers who do not immediately favor the benefits of tractability may find it impossible to suspend belief. At every step in the analysis, they will be impatient with the unrealistic assumptions used at the outset. This is, of course, a battle fought everywhere in science and social science. Great advances have been made with a kind of division of labor, with each specialist making assumptions that permit focus on a single approach or variable. In the natural sciences, skeptics can often be brought around with empirical evidence. But in the social sciences this is more difficult, and it is often the case that each social science (or each school within a particular social science) speaks only to its preexisting adherents.

In the case of economics, or rational choice in general, simplification generates criticism both about all that is left out of models and about the assumptions incorporated in that which any model addresses. The model builder must constantly meet this criticism by insisting that the work is positive and not normative. “I am not saying what tax system the country should use,” says our reasonably careful economist, “only that if firms maximize profits and if inputs are priced in such-and-such manner and if workers choose between work and

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29 An alternative version of this observation is that lawyers are good at insisting on distinctions or similarities depending on which side of an argument they are asked to take. Comparing a simple model with the real world often seems like a kind of game for lawyers. One side on the real world issue likes the model’s implications while the other insists that the model reaches its conclusion precisely by being different from the real world.
leisure in the way suggested by Professor $X$ and if . . . then a tax on capital will lead to $Z$.” After a few years in the business, there is a natural tendency for the qualifications to sound like bad music. Our social scientist stops singing the refrains and soon, perhaps, is fairly convinced that as far as real world policy is concerned there is “proof” that one tax is better than the other. Careful readers who are outsiders to the discipline are shocked by the “carelessness” of whatever piece of work they stumble across. Moreover, these readers are likely to have some personal experience that is contrary to the assumption about trading off work for leisure or perhaps they have observed firm behavior that appears not to conform to the profit-maximization assumption. These readers have, in a sense, caught only the middle of the concert; this perspective gives them a fresh view but they are unlikely to like what they hear.

Economists themselves react to this problem of unrealistic and numerous assumptions by building more models. They might have firms maximizing market share subject to some profitability constraint. They might step up their mathematics and have their firms search in small steps in every direction in the quest for higher profits. None of these steps is likely to win back the frustrated audience.

Public choice happens to be at an earlier stage of development than public finance or other branches of economics. Many of its models work, for example, with the assumption that politicians care only about reelection. With time we can expect more subtlety. The same can be said for many other assumptions that drive the emerging literature in public choice—but annoy critics, many of whom come from other parts of the political science landscape and who see public choice as something of a threat. It is a threat because it offers a different view of the world. It is a threat because it is not easy to join in as much as the enterprise requires some skills in mathematics or economics or both. It is a threat because it simplifies where others have thrived on complexity. It is a threat because it offers simple, unifying models where others have invested in institutional details that are more valuable if rules have more to do with local history and culture and are not predicted by fairly universal functional or “rational” explanations.

Public choice is plainly capable of transforming law school courses in legislation and administrative law, and altering other courses as well, but it is constitutional law that it most threatens. It suggests that constitutional law might (at least partly) be separated from the jurisdiction’s own particular history. It also injects a modest amount of economics and mathematics in that part of law that has attracted brilliant philosophers and lawyers who often have visceral reactions against economics and, need it be said, some math anxiety. It
does however bring good news to the field. It offers to globalize constitutional law even more. After all, if constitutions are seen as means of coping with aggregation problems and interest groups, then there are lessons to be learned across legal systems even as there may be less to be learned from local history or case distinctions.

I have emphasized the potential of public choice to combine with, or to invade, constitutional law by painting a picture of constitutions as arrangements entered into in order to control interest groups and in order to cope with the difficulty (and impossibility) of aggregating preferences (about policies and virtually anything else governments can influence). Constitutions are, of course, more than aggregation machines with alarms to protect against special interests. Constitutions might provide for the protection of individual rights against majorities. Public choice might have something to say on this matter. More generally, a public choice approach to constitutional law might emphasize or even begin with the case for majority rule and then explore functional reasons for the occasional substitution of (otherwise inferior) supermajority rules of one kind or another. A group seeking to arrive at the "right" answer to a question would in many situations do well to abide by its simple majority, but this raises the question of when to prefer such rules as bicameral approval of legislation, (anti-majoritarian) executive vetoes, (supermajoritarian) criminal juries and some civil juries, (supermajoritarian though unicameral) treaty ratification and so forth. Some of these exceptions to simple majority rule have neat public choice explanations (as do some civil liberty protections) while others do not—or do not yet. The point is that these are the sorts of contributions public choice theory might bring to the study of constitutions. These are the things that the Mueller and Cooter books begin to explore, and these are contributions that will be lost, I fear, if we insist either on understanding first why some people vote or why some politicians appear to be altruistic people or on the pointlessness of anything but very thick descriptions of human behavior and political life.

B. The Puzzle of the Mixed Reception Accorded Rational Choice Tools

1. Counterintuitivity, simplicity, ubiquity, and practicality.

The threatening aspect of public choice and the problems associated with working up from simple models (that are themselves befud-
dling or distracting) point to an interesting puzzle. Why does rational choice have any success among readers who prefer thick descriptions of human behavior? Consider, for example, Professor Herzog’s concession that the Prisoner’s Dilemma, an entry point into game theory, is a useful and important tool in every intellectual’s portfolio. Rational choice adherents find basic game theory attractive and of a piece with the rest of their tools. The basic model sometimes produces stable solutions, sometimes produces dominant and intuitively appealing strategies, and sometimes generates startling results—but with obvious applications.

The Prisoner’s Dilemma is one such model, or game, that startles the novice but then seems to appear everywhere. It is a model that seems useful because it is plausible. I suppose its value would drop if repeated attempts at empirical verification failed. If, for example, non-communicating parties rarely exhibited a collective action problem, we might lose faith in the Prisoner’s Dilemma. But it seems more likely that most users will find the model appropriate in some settings but not in others. When it “fails,” most of us readily look for other explanations, agree that the parties have found a way to cooperate, and so forth. This sort of thinking leads to the incorporation of additional tools or analytic moves, including the value of repeat play, explicit contracting, social norms, and so forth. Even rational choice adherents seem capable of thick descriptions.

But note that the Prisoner’s Dilemma assumes rational actors who act on the expected value of their payoffs. Why then is this tool attractive to rigorous thinkers like Herzog and to virtually every law professor who proudly refers to the Prisoner’s Dilemma when discovering a collective action problem of the kind illustrated by the familiar 2x2 box? If we dismiss much of rational choice theory because it cannot explain why some people usually vote, then why should we be impressed by a tool that suggests that some people in particular situations act selfishly, or even rationally, so that they fail to cooperate? Note the apparent normative implication of this failure to cooperate; parties will be made better off by legal rules that promote cooperation or prevent the Dilemma from arising in the first place. Is this appeal of the Prisoner’s Dilemma (and a number of other popular rational choice tools) not in some sense inconsistent with the general hostility, or perhaps impatience, with rational choice and much of law and economics?

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33 Unsurprisingly, a Lexis search of law reviews with “Prisoner’s Dilemma” and virtually any term associated with public law (such as “constitution” or “criminal”) generates a large variety and number of hits. The same can not be said for searches of “Arrow” or “voting paradox” with these public law terms.
One reaction to this puzzle is that it is not so much that critics of rational choice are inconsistent as that public choice theorists have been unconvincing. Game theory was "marketed" much better than public choice. I first encountered the Prisoner's Dilemma in an introductory economics course. A simple numerical example suggested that this model "explained" why prosecutors might like to separate co-defendants before bargaining for their confessions. A second application portrayed two prominent retailers deciding whether to collude or defect in an implicit price-fixing scheme. The example offered an introduction to risk aversion (with maximin strategies) as well as basic game theory. The very next example was about a security guard making his (this was in the 1970s after all) rounds, and we were able to "understand" the genius of a strategy that incorporated some randomizing element and weighting of options. The lesson emphasized the practicality and ubiquity of our new model. Practicality because of the seemingly real applications of the theory put forward. And ubiquity because these examples were numerous and diverse. The major attraction was, of course, the counterintuitive character of the model's insight. Finally, it was elegantly simple: all one needed to know about strategic behavior by prosecutors, retailers, and security guards was absorbed in one class period! Counterintuitivity, simplicity, ubiquity, and practicality combined to create a memorable and provocative learning experience. In retrospect, these positive tools had normative impact, but the point here is not to defend the imperialist tendency of some social science but rather to explain why everyone seems to love some game theory even as public choice is often met with hostility.

Law students today often meet the Prisoner's Dilemma when they learn about the responses of shareholders who face (or expect to face) a tender offer. If the offer is for less than one-hundred percent of the target company's stock, the target's shareholders may sense, as it were, that the acquirer would be willing to pay more than it presently offers. Many target shareholders may fear that non-sellers will be worse off (perhaps because they will later be frozen out at a lower price) if a majority accepts the offer. If so, these target shareholders will individually rush to accept the first offer that comes their way even though they would do better to act cooperatively and reject it. Again, the divide-and-conquer, or Prisoner's Dilemma, story has applications that conform to some real world observations. Shareholders may want to delegate authority to a central agent (despite the dangers that creates) or, perhaps, support fair-price provisions, requiring that the acquirer pay the second set of shareholders the same price paid to the first tendering group.
These examples have counterintuitivity, or a kind of "Eureka!" quality in common. They are enormous fun to teach to novices. The student is at first surprised by the counterintuitive idea. The startled reaction is followed by a thrill. And once the tool is absorbed, the insight it offers seems ubiquitous, and even simple (in the sense of elegant). It is also practical; it suggests courses of action for shareholders (or acquirers) and prosecutors and security guards, rather than mere ex post explanations of puzzling phenomena. The same can be said about marginal cost analysis, gravitational force, and other remarkable things that most of us need to be taught in order to discover. We tend to appreciate and remember models that offer counterintuitivity, ubiquity, simplicity, and practicality.

Public choice fails in this regard. The branch of public choice that emphasizes self-interested, rational voters and politicians is simple and elegant enough but it is hardly counterintuitive. It is obvious that one’s vote is unlikely to affect outcomes and equally obvious that if everyone else acted upon that observation, then a single voter would dictate the result. The topic thus lacks the “Eureka!” quality. Moreover, it is ubiquitous only in its failure to describe behavior we can observe all around us.

The emphasis in public choice on interest groups is a bit more captivating because it satisfies not only the simplicity and practicality requirements but also, at least after a fashion, that of ubiquity. Unfortunately, it fails to offer much that is nonobvious. Public choice has added value on the subject of interest group strategies and influence, but the critical and simple initial step—the advantage an organized group can obtain over more numerous, dispersed interests—has been known for a long time without the help of models and journal articles. Planetary orbits, marginal-cost pricing, and the Coasian idea of bargaining around legal entitlements are the sorts of insights that transform the thinking (even) of non-specialists; these advances are not only simple, ubiquitous, and practical, but (unlike the idea of potent organized interest groups) they are also counterintuitive.

It is possible that this is too pessimistic a view of interest group analysis. The important counterintuitive insight may be not that groups can defeat unorganized majorities but rather that smaller groups may be more powerful than larger groups because of the superior ability of the smaller ones to overcome collective action problems. If this is true, it is not simple; small groups of several hundred or several thousand farmers, or manufacturers, for example, should face as serious a collective action problem as much larger groups. The organ-

34 It is perhaps remarkable that there are any novices remaining. But many first-year and even advanced law students appear to be meeting the Prisoner's Dilemma for the first time.
izing and political success of some of these small groups is therefore puzzling or at least complicated. There is also a problem with ubiquity. There are many examples of small-group success but, of course, many examples of small groups that fail to organize or that do organize but lose out to dispersed voters or larger organized groups (such as senior citizens or gun owners) that defy expectations and organize successfully. A few exceptions might prove the rule, but in this area the exceptions are so numerous as to threaten the original insights.

I have already suggested that public choice might thrive (in law and elsewhere) as more attention is paid to a third branch of public choice: Arrow's Theorem and other problems of aggregation. Here, as with game theory, there are simple as well as complex problems, models, and conclusions, but the basic voting paradox certainly satisfies the simplicity, ubiquity, and nonobviousness requirements. What has been missing, I think, is practicality. If this is so, then it is a bit ironic because the practicality attribute is really nothing less than the suggestion that these tools, despite all the talk about positive theory and value-neutral descriptions, take hold where there is perceived to be normative bite. The Prisoner's Dilemma and related games impart a message of action, as we have seen. Somewhat similarly, the Coase Theorem has the very practical effect of teaching law students how to bargain around legal rules and entitlements.

In contrast, voting paradoxes and Arrow's Theorem fail this requirement of practicality. A basic aggregation paradox is simple enough, and certainly counterintuitive. There is some disagreement as to ubiquity, but this is because of institutional constraints on the introduction of new options that can divide majorities or create unstable, cycling majorities. Where there are no constraints on the range of options that a group can consider, ubiquity (of instability) is no problem, so to speak. The problem with practicality is, of course, that there is no solution to the problem of incoherent or arbitrary aggregation in democratic decisionmaking. This is the first lesson of this branch of public choice.

I suppose that there are small practical lessons to be learned. If one's fellow voters do not know about voting paradoxes, then it is often easy to manipulate a committee or other decisionmaking body by introducing new motions of the right sort and at the right time. And if one observes a committee or court or legislature exhibiting a kind of

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35 The free-rider problem does not disappear when there are a few thousand farmers rather than many millions of consumers. It is difficult to produce examples where the incremental benefit from participation is so great that a farmer will "rationally" contribute to a cause that advances this group's interests. Once we introduce some sociology or norms theory to explain the success of such a small group, we have lost simplicity—and the same tools might then suggest that millions of consumers should also overcome their free-rider instincts.
inconsistency, then one lesson of public choice is that there is no point complaining about the inconsistency, for it may be inevitable. Simil-
arily there may be no point in searching for legislative intent. But these are small lessons; the last two are more academic than prag-
matic. The really practical thing, which would make public choice a
smashing success, would be to solve the problem posed by the voting
paradox, but through public choice theory we know it to be insoluble.
I fear that this impracticality explains the failure of this branch of
public choice to grow and spread.

But this brings us to what I have labeled as the fourth piece of
public choice, the impact of various constitutional and institutional ar-
rangements. With public choice insights, we can ascribe new meaning
to constitutional rules. For example, where there are unstable majori-
ties and, therefore, where procedure determines outcome, we can view
constitutional rules as reducing the advantage of a dictatorial agenda
setter. Even Arrow's Impossibility Theorem can in this way satisfy
the practicality criterion. Similarly, a nice way to think about two-party
systems is that these political parties often limit the number of options
or political candidates competing for support in any one election. If so,
the institutional (or constitutional) arrangement is able to suppress or
camouflage the presence of cycling majorities. And this may serve
some useful social purpose (or not). These illustrations suggest that
the price of practicality may be simplicity. I like these practical argu-
ments, but their complexity suggests that it is unlikely that this branch
of public choice will ever dominate constitutional law or ever spread
much into mainstream thought outside of rational choice and legal
circles. American constitutional law, at least, may so value normative
punch-lines as to make public choice an unlikely invader.

2. Public choice and legal intrusiveness.

A very different explanation for the rousing success of some ra-
tional choice tools, like the Prisoner's Dilemma, and the more limited
success and controversy associated with public choice (except for spe-
cial interest stories which are, as already discussed, a bit too obvious)
returns us to the theme that rational choice tools succeed where they
are less threatening to other approaches. Basic game theory, like sto-
ries about the power of special interests, is not threatening, except

36 See Frank H. Easterbrook, Ways of Criticizing the Court, 95 Harv L Rev 802 (1982) (ar-
guing that Arrow's Theorem suggests it is pointless to criticize the court for collective inconsis-
tency over time).
37 See Shepsle, 12 Intl Rev L & Econ at 249 (cited in note 28).
38 See, for example, Saul Levmore, Bicameralism: When are Two Decisions Better Than
One?, 12 Intl Rev L & Econ 145 (1992). The topic is developed somewhat differently in Mueller
pp 192-206, and in Cooter pp 185-89.
perhaps to a small band of libertarian intellectuals who bristle at suggestions of market failures. Game theory accommodates other tools and disciplines and in some cases it even creates more space for them by suggesting the need for explanations of (occasional) cooperative behavior. Thus, the Prisoner’s Dilemma suggests a reason why atomistic actors might favor intervention by a central, coercive authority and this empowers academics who advance normative arguments regarding fairness and redistribution policies. It is hard to escape the impression that some critics complain about the assumptions and methods of rational choice when that discipline is pointing to the value of free markets and the like. When the same tools suggest the presence of market failures, and therefore hint that government intervention might improve things, there is a tendency to value these tools. Many libertarians and public choice theorists can be similarly faulted for questioning models that produce implications at odds with their world views. Professor Herzog may be right that economists are opportunistic about invoking externalities, but their critics may be just as opportunistic about invoking rationality.

Public choice may be threatening (in some quarters) for a variety of reasons. Aggregation problems cast aspersions on seemingly democratic decisionmaking. Simple models, with narrowly self-interested voters and politicians, minimize, though mostly by implication, the roles played by deliberation, altruism, education, legal reasoning, and philosophical values.

The threatening quality of public choice has a great deal to do with the thin line between positive and normative work. Economists generally advance the idea that they are only telling us about consequences. They provide the tools to inform us about likely results. “Decide for yourself whether rent control laws are good or bad; I am only informing you that with such laws in place, landlords will invest less in housing and prospective tenants may well be worse off.” Without effort, one can slide from this sort of positive work to normative conclusions, and it is perhaps easy to forget the assumptions that go into the work and the many things that it once held constant or set aside. An extreme but important claim of economics is that if we have X (perfect competition and so forth), then we will have a Pareto efficient result. The argument or model incorporates free markets, cost minimization, utility maximization, and all that. Social critics, not to mention most people who seek to make the world a better place, find them-

39 Thus, law and economics scholars (with a few exceptions) have been noticeably disinclined to put much stock in the Prisoner’s Dilemma approach to poison pills in corporate law.
41 See id at 899–900 (observing that rational choice theorists underestimate the leakage between positive and normative domains).
selves in the position of needing to attack the assumptions of the free market economists. Again, it is perhaps to be expected that social critics will be attracted to those economic tools suggesting that markets are imperfect. The Prisoner's Dilemma is but one such tool.

Public choice is very different from most of economics in this regard. If we allow the basic assumptions and think of the world as it is portrayed by the favorite models found in public choice, we have before us not some happy state of affairs as provided by perfect-competition economics, but instead an awfully dismal place. It is a world with self-interested politicians who create huge agency problems; these problems are difficult to solve because the principals, or citizens, are themselves self-interested and suffer from collective action problems; and whether or not these principals delegate authority to agents, they are likely to find it (perhaps inevitably) impossible to aggregate their preferences or choices in a coherent manner. Meanwhile, because nominal majorities or their agents can impose external costs on other interests, there are losses from rent-seeking. In short order, then, we find ourselves with self-interested actors imposing costs on one another, and with no theoretical claim that there is a happy ending. In markets, these self-interested actors might unleash themselves and do good, but here they unleash wasteful activity and are presumed at every turn of the road to create problems rather than invisible-hand solutions.

At first blush, one might think that social critics, or thick describ- ers, would be attracted to this sort of world view. After all, it suggests that there is ample room for intervention by legislatures, judges, and intellectuals who have a moral center. Put differently, if part of the attraction of the Prisoner's Dilemma is that it suggests a problem with unfettered atomistic behavior, and therefore makes room for interventions of the kind that tempt many intellectuals, then public choice should be similarly attractive, for it too suggests the presence of problems in a world where self-interested individuals behave rationally.

But the problem is that public choice itself suggests that the cure may be worse than the disease. Public choice is about failures in the political sphere. It insists that legislative or other political intervention may make things worse rather than better. If there is a market failure, there is no reason to believe that new political agreements or legislative rulemaking will improve things. Moreover, judicial intervention also suffers in the analysis. Judges are appointed and confirmed by

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42 Part of the dismal story is that majorities and their agents are thus empowered because it is impossible to specify in advance just where delegated authority should be valid. Or perhaps interest groups push for more delegated authority because they can best capture the agents.
politicians, and they listen to arguments that are presented by advocates who are funded by interest groups. Finally, the coherence problems that plague legislatures and voters also infect panels of judges, so that a great deal of judicial decisionmaking is likely to be the product of procedural rules or other things that might be understood best when seen through the lens offered by public choice. All this gives our thick describers (and I am sometimes one of these) little cause to celebrate.

None of this is to suggest that there is a winner here. The fact that "intervention" may be difficult to defend does not address the question of how we arrived at the present state of affairs. Intervention is itself a loaded word, inasmuch as it privileges the past. The point here is simply that public choice is threatening where something like game theory is not. Public choice (like the Prisoner's Dilemma) empowers the intellectual case for deliberation followed by practical action when it points to collective action problems—but then (unlike the Prisoner’s Dilemma) it weakens the same case by revealing that the very same problems plague the possible solutions.

**SUMMARY**

I have advanced two very different ways of explaining the popularity of some tools of rational choice alongside the isolated existence of those normally associated with public choice. I am most convinced by the claim (advanced here) that none of the four branches of public choice (as I have arbitrarily arranged them) satisfies the four apparent requirements for stunning intellectual success: simplicity, ubiquity, counterintuitivity, and practicality. For the student of constitutional law, the best parts of the Cooter and Mueller volumes are those that explore the ways in which constitutional arrangements can be understood as reflecting the realities of public choice. These are important connections, though unfortunately too complex to expect immense popular acceptance. This explanation for the relative isolation of public choice does not, however, explain the hostility to it. The threatening quality of public choice may (unfortunately) have much to do with that phenomenon.

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43 Elhauge, 101 Yale L J at 80–83 (cited in note 28). I think there are many reasons to expect interest groups to be more potent in the halls of legislatures than in the courts, but the point here is simply that public choice is threatening to the notion that elected or appointed officials, including judges, should rush to fix market failures.