

# Articles

## Does Interest Group Theory Justify More Intrusive Judicial Review?

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## INTRODUCTION

The last few decades have seen an outpouring of literature by economists and political scientists modelling, describing, and analyzing interest group influence over governmental decisionmaking.<sup>1</sup> According to this literature, the government cannot be trusted to regulate in the public interest. Legislators are disproportionately influenced by organized interest groups and thus enact legislation enabling those groups to exact economic rents from others. Agencies tend to be captured by the firms they regulate and thus promulgate regulations to benefit those firms even though the regulations are inefficient and exploit consumers.

This literature purports to do far more than critique seemingly bad results. It offers an account of the *mechanisms* by which small groups with few votes can accomplish what seems paradoxical in a democratic system: a systematic bias in lawmaking that benefits small groups at the expense of large groups with more votes. In particular, the literature explains that the political system allows the exploitation of large diffusely interested majorities because they are less able to police free riding in political effort than smaller, intensely interested groups. Modern interest group theory thus offers a compelling explanation for something we all know is true: our democratic system regularly produces some results that appear contrary to the interests of the general public.

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1. See *infra* Section I.A.

In the wake of this literature, a wave of articles by legal scholars in various areas of law has argued that interest group theory justifies changing judicial review to make it less deferential to political outcomes. The list of scholars making this argument is long and impressive, including Erwin Chemerinsky, Frank Easterbrook, Richard Epstein, William Eskridge, Jonathan Macey, Jerry Mashaw, Gary Minda, William Page, Martin Shapiro, Bernard Siegan, Cass Sunstein, and John Wiley.<sup>2</sup> Similarly impressive are the range and significance of the legal proposals they advocate. If adopted, their proposals would produce major changes in constitutional review, antitrust law, and statutory interpretation.<sup>3</sup>

My purpose here is to examine whether these proposals are justified. In particular, I want to address the question whether, if accurate, interest group theory justifies more intrusive judicial review. As I use the term, more intrusive judicial review encompasses not only stricter substantive review but also more aggressive statutory interpretation. Further, my inquiry encompasses proposals for more intrusive judicial review whether such heightened review would apply in the general run of cases or only in cases where interest group influence seems excessive.

In tackling such a broad topic, it is important to stress at the outset the limits of my inquiry. My focus is solely on whether interest group theory demonstrates that the proposed changes would be desirable. I do not address whether the relevant legal authority permits, or even requires, judges to change their review as proposed.<sup>4</sup> Nor do I consider whether more intrusive judicial review might be justified on grounds other than interest group theory.<sup>5</sup> Further, my analysis is limited to proposals that would make the *general* stance of the judiciary more intrusive in the ways described above. This Article thus does not address (at least not directly) whether interest group theory justifies selectively changing *which aspects* of the political process the judiciary accords deference.<sup>6</sup> Nor does it address proposals to alter the political process itself

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2. See *infra* Section I.B.

3. See *id.*

4. For those who believe that certain of the proposals could not lawfully be implemented by judicial decision, this Article could be read as addressing the question whether the necessary statutory or constitutional amendments are advisable.

5. An extension of my analysis does, however, seem in order concerning the argument that a different branch of public choice literature—decision theory—justifies more intrusive judicial review. I address this issue in Part V.

6. I do not, for example, address whether judges should pay more attention to statutory language and less to legislative history or agency interpretations (or vice versa) on the ground that interest groups have more (or less) influence on the latter. Nor do I examine whether judges should narrow Congress' Commerce Clause authority and strengthen the Tenth Amendment protection of state regulatory authority (or vice versa) on the ground that interest groups have more (or less) influence on the federal government than on state governments. These proposals differ from the ones considered in this piece in that they mainly shift lawmaking power from one part of the political process to another, rather than from the political process to the litigation process.

I do, however, note that there is considerable dispute about which aspects of the political process are more susceptible to interest group influence. For the dispute about whether agencies are more susceptible

by, for example, limiting campaign contributions,<sup>7</sup> creating authority for line item vetoes,<sup>8</sup> enacting a balanced budget amendment,<sup>9</sup> or reforming the procedural and committee rules of legislatures.<sup>10</sup>

What I do address are the proposals for more intrusive judicial review, the initial appeal of which seems to follow readily from interest group theory's description of the political process. If the political process does not reflect the will of the people, why should the judiciary defer to it? However, closer examination reveals that these proposals are misguided for three general sets of reasons.

First, any defects in the political process identified by interest group theory depend on implicit normative baselines and thus do not stand independent of substantive conclusions about the merits of particular political outcomes. Accordingly, expansions of judicial review cannot meaningfully be limited by requiring threshold findings of excessive interest group influence. Further, the use of interest group theory to condemn the political process reflects normative views that are contestable and may not reflect the views of the polity.

Second, even if interest group theory succeeds in demonstrating defects in the political process, that would not justify the leap to the conclusion that more intrusive judicial review would improve lawmaking. The litigation process cannot be treated as exogenous to interest group theory because that process is also subject to forms of interest group influence that would be exacerbated if judicial review became more intrusive. More generally, when one makes the necessary comparative assessment, interest group theory does not establish (as it must to justify more intrusive judicial review) that the litigation process is, overall, less defective than the political process.

Finally, despite some arguments that more intrusive judicial review is desirable because it would increase the transaction costs of interest group capture, more intrusive judicial review would have several adverse effects on

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than legislatures, compare William Page, *Interest Groups, Antitrust, and State Regulation*, 1987 DUKE L.J. 618, 632-37 (agencies more susceptible) with Jerry Mashaw, *Prodelegation*, 1 J.L. ECON. & ORGANIZATION 81, 95-96 (1985) (agencies less susceptible) and John Wiley, *A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer*, 61 S. CAL. L. REV. 1327, 1331-33 (1988) (stressing ways in which agencies less susceptible). For opposing views on whether the federal government is more or less susceptible than the states, compare RICHARD POSNER, *THE FEDERAL COURTS* 173 (1985) (states more susceptible because their smaller size makes transaction costs of capture lower) with RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 504 (3d ed. 1986) [hereinafter POSNER, *ECONOMIC ANALYSIS*] (states less susceptible because their smaller size makes it easier for those exploited by capture to exit) and PETER H. ARANSON, *AMERICAN GOVERNMENT* 621 (1981) (drawing similar conclusion). See generally Jonathan Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271-90 (1990) (using interest group theory to predict whether lawmaking will occur at the federal or state level).

7. See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 912-14 (1987).

8. See Glen Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403 (1988).

9. See JAMES M. BUCHANAN & RICHARD E. WAGNER, *DEMOCRACY IN DEFICIT* 6-8, 130 (1977).

10. See Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 345-46 n.20 (1988) (collecting sources).

the transaction costs of legal change. It would sometimes decrease, instead of increase, the transaction costs of promulgating laws favoring interest groups. Moreover, where it did increase transaction costs, this effect could perversely encourage interest group activity, increase the relative advantage of organized interest groups, and retard the promulgation of laws that benefit the general public.

After describing interest group theory and the legal proposals to change judicial review in Part I, this Article addresses each of these points in turn in Parts II to IV. Part V then extends the analysis to address the claim that decision theory, the other branch of modern economic literature on public choice, also justifies more intrusive judicial review.

## I. INTEREST GROUP THEORY AND THE PROPOSALS TO CHANGE JUDICIAL REVIEW

### A. *Interest Group Theory*

The defining theme of the interest group theory of lawmaking is its rejection of the presumption that the government endeavors to further the public interest. Rather, under interest group theory, all the participants in the political process act to further their self-interest.<sup>11</sup> Legislators seek to maximize their chances of reelection. Voters and interest groups seek to maximize their own well-being at the expense of others. Moreover, regulation is a commodity, subject to supply and demand like any other commodity. Voters and interest groups demand the regulatory results that benefit them, and legislators and agencies supply regulatory results to the highest bidder.<sup>12</sup> The results need not further the public interest.

Indeed, fundamental distortions in the political process may lead to systematic divergences from the public interest. Most economic models focus on "demand side" distortions. Under these models, interest groups influence the political process (and thus exhibit "demand" for legislation) in a variety of ways: by voting or mobilizing voters; by undertaking volunteer work for political candidates; by paying lawmakers in the form of bribes, speaking fees, supportive advertising, campaign contributions, or offers of future employment; by pressuring political officials to support or oppose the appointment, promo-

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11. See, e.g., DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5-6, 13-17 (1974); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212-14 (1976); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3-13 (1971). A disputed issue is whether agencies act to further their own interests or the interests of their overseeing legislators. See Peter Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 51-52 (1982). In either case, they remain susceptible to the kinds of influence described in the following textual paragraphs.

12. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975); Peltzman, *supra* note 11, at 212-14.

tion, removal, or budget of regulators; and by influencing the information that reaches legislators, regulators, and the voting public.<sup>13</sup>

All this activity requires resources of time or money. More generally, significant resources must also be expended to surmount the severe information costs of group political action.<sup>14</sup> A group must monitor legislatures and agencies both to determine when the group should participate and to ascertain how the legislator or regulator has acted. Groups must also incur the costs of evaluating the positive and negative consequences of governmental actions for group members. Finally, a group must bear the costs of communicating this information to its voting members, and those voters must bear the costs of absorbing the information and acting upon it.

An interest group's willingness to expend resources of time and money is thus an important determinant of its political influence. This might not seem troubling: if one assumes that skewed distributions of leisure time and money do not excessively distort a group's willingness to expend time and money, then such a willingness could be taken as an appropriate proxy for the degree of a group's interest. The result would be a political process that better balanced conflicting interests (and better curbed majoritarian exploitation) than one which simply favored the group having a larger membership. This appears to have been the premise of earlier political theory that emphasized the value of pluralism.<sup>15</sup>

However, all groups face a collective action problem that may make a willingness to expend resources an inaccurate proxy for the degree of group interest. The problem occurs because laws tend to confer benefits on groups of persons whether or not those persons contribute to the enactment (or retention) of the law. Consequently, even if the total benefits the law would confer on the group exceed the petitioning costs of seeking (or opposing) the relevant legal change, group members acting rationally but individually may refuse to incur those petitioning costs.<sup>16</sup> No individual member may be willing to incur all the costs of petitioning activities that would confer net benefits on the group because each member receives only part of the group benefits. Further, each member may be unwilling to volunteer her share of petitioning costs both because her failure to contribute will not exclude her from the benefits of successful group efforts and because any individual contribution would have

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13. See MAYHEW, *supra* note 11, at 39-41; Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 372, 392 (1983); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation*, 86 COLUM. L. REV. 223, 230-31 (1986); Page, *supra* note 6, at 636 & n.110; Peltzman, *supra* note 11, at 213-14; Stigler, *supra* note 11, at 12.

14. See Peltzman, *supra* note 11, at 213; Stigler, *supra* note 11, at 11-12.

15. For some sample pluralist works, see ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* (1967); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); CHARLES E. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* (1965); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* (1953).

16. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 2, 11-16 (2d ed. 1971).

little effect on the probability of group success.<sup>17</sup> Individual members thus have an incentive to take a free ride on the efforts of others.<sup>18</sup>

The result is that individual decisionmaking may not lead to group action even though each individual member would be better off if it did. A group may be able to overcome such free-riding problems if it can reach a collective agreement to share costs and to monitor and punish members' failures to contribute.<sup>19</sup> However, such collective efforts to police free riding will themselves require resources, which may be difficult to raise because of free-riding problems.<sup>20</sup> Further, where cost assessments are based on members' individual benefits, collective cost-sharing efforts will also be plagued by each member's incentive to understate her share of the benefits of group action.

These collective action problems mean that every group is likely to invest less in petitioning efforts than would be necessary to maximize the group's net gains from petitioning.<sup>21</sup> But small groups with concentrated (high per capita) interests in lawmaking will come closer to their optimal level of petitioning than large groups with diffuse (low per capita) interests.<sup>22</sup> The reason is that

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17. As the above discussion suggests, the foregone contributions can include the failure to vote or to read about issues.

18. Although this is usually termed the free rider problem, George Stigler has more accurately dubbed it the "cheap rider" problem since the group member who does not participate does incur some costs. George J. Stigler, *Free Riders and Collective Action*, 5 BELL. J. MGMT. SCI. 359, 359-60 (1974). Nonparticipation marginally decreases the probability and magnitude of group success and may, to the extent members have somewhat varying preferences, result in group action less favorable to that member than would have resulted had she participated. *Id.* at 359-62. The point remains, however, that these costs of riding on the efforts of others can be sufficiently cheap that individual members will not participate despite the clear collective benefit of group participation.

19. Typical punishments include legal penalties, social sanctions, the threat of violence, and the denial of noncollective benefits that the group would otherwise confer on individual members. OLSON, *supra* note 16, at 13, 61-63, 68-76; Becker, *supra* note 13, at 377 (collecting later sources).

20. Olson predicts that large diffuse groups can succeed in such collective efforts only if they obtain the resources necessary to police free riding as a byproduct of providing some other service. OLSON, *supra* note 16, at 3, 132-59. Some object that this requires that the subsidizing service be provided at supra-competitive prices, which could be undercut by any competitor that provides the service but does not police free riding. *E.g.*, RUSSELL HARDIN, COLLECTIVE ACTION 33-34 (1982). But, Olson argues, sometimes such competition will not pose a problem because the group has market power or enjoys a market advantage conferred by governmental action because of the group's petitioning efforts. *See* OLSON, *supra* note 16, at 133 n.2. Because preserving such legal market advantages requires maintaining the group's political clout, such groups have an ongoing incentive to invest resources to curb free riding.

21. OLSON, *supra* note 16, at 27-28, 34-35.

22. *Id.* at 28, 32-33, 35-36; Peltzman, *supra* note 11, at 212-13; *see also* DENNIS MUELLER, PUBLIC CHOICE II, at 310 (1989) (reviewing experimental literature on free riding in prisoners' dilemma situations). "Large" and "small" do not refer to the size of a group's economic assets nor to the number of individuals the group represents, but rather to how many independent members the groups have. A "small" group has few independent members; a "large" group has many. An interest group comprising a few corporations would thus be considered small even though each member corporation has large assets and represents the interests of numerous shareholders or workers. The key is that each corporation has a hierarchical structure that allows it to act internally without coordinating independent behavior.

For clarity and emphasis, the discussion in the text contrasts large groups with members who are uniformly diffusely interested and small groups with intensely interested members. However, obviously some large groups may have a few members with very high per capita interests in group action. Such groups will be likely to engage in more petitioning than large, uniformly diffuse groups, and perhaps in more petitioning than smaller groups with less intense per capita interests. *See* HARDIN, *supra* note 20, at 40-42. A group's willingness to devote resources to collective action will thus turn not only on group size and on average

large diffuse groups face greater collective action obstacles to group petitioning in three respects.

First, for any given level of aggregate group benefits, large diffuse groups are more susceptible to free rider problems because the benefits from seeking or opposing a particular legal change must be spread over a larger number of beneficiaries.<sup>23</sup> Smaller groups are more likely to have one member who enjoys such a large share of group benefits that the member has an independent motive to expend at least some resources on unilaterally seeking or opposing legal change.<sup>24</sup> Even if no such single member exists, smaller groups are also more likely to have members who are sufficiently large in relation to the size of the group that their failure to contribute resources will be noticed by the other members. Because other members who notice a failure to contribute may respond by withdrawing their own sizeable contributions, the members in such groups have an interdependent motive to expend resources rather than hoping to free ride on the expenditures of others.<sup>25</sup> Moreover, the larger and more diffuse the group, the stronger any incentive to free ride is likely to be.<sup>26</sup> Thus, small intense groups trying to curb free riding will generally be able to do so with smaller penalties and less frequent detection than large diffuse groups.

Second, given a particular incentive to free ride, a larger group will have a tougher time organizing collective efforts to overcome free riding. Having a large number of members makes it more difficult and costly to identify members, reach collective cost-sharing agreements,<sup>27</sup> and monitor and punish free riding. In small groups, free riding will be easier to detect because it has

intensity but on the distribution of intensity throughout the group. *See id.* at 68, 72-73; OLSON, *supra* note 16, at 45.

23. *See* MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 31-34 (1982).

24. *See* OLSON, *supra* note 16, at 22, 33-34, 48-50. Groups that have a member with such an independent motive are termed "privileged groups." *Id.* at 33-34. Even privileged groups will, if they have more than one member, engage in less petitioning than would be optimal for the group. The reasons are twofold. First, because even a very large member shares some portion of the benefits of group action, the member will not take all actions that confer group benefits net of costs. *See id.* at 3, 27-28, 34-35. Second, the large member may sometimes fail to take action even when her share of the benefit exceeds the costs because of breakdowns in bargaining over sharing the costs of action. *See id.* at 50 n.70; OLSON, *supra* note 23, at 33.

25. *See generally* HARDIN, *supra* note 20, at 13, 193-95 (noting that cooperative strategy in iterated prisoner's dilemma becomes implausible if the number of players is large); MUELLER, *supra* note 22, at 310 & n.4 (reviewing experimental literature that concludes free riding is less likely when players are informed about others' contributions). This interdependent motive to contribute resources, which is similar to the motive of firms in an oligopolistic market not to cut prices, characterizes what Olson terms "intermediate groups." OLSON, *supra* note 16, at 43-46. Intermediate groups are not as likely to expend resources pursuing collective goods as are privileged groups, but are more likely to expend such resources than larger "latent" groups. *Id.* at 43-46, 48, 50. Whereas members of intermediate groups might be enticed to expend resources by the prospect of a collective benefit, a latent group can by definition induce members to contribute only by threatening coercion or the denial of some noncollective benefit. *See id.* at 48, 50-51.

26. Size and diffuseness increase the severity of the incentive to free ride by increasing the divergence between (1) the costs the individual would incur by helping the group and (2) the share of the increase in expected collective benefits an individual would derive from *her* efforts. The lower the divergence, the lower the expected penalty necessary to deter free riding.

27. *See* OLSON, *supra* note 16, at 46-48.



a proportionally larger effect. Small groups also generally have lower organizational costs, and their members are more likely to have ongoing personal contact, making monitoring easier and making social sanctions, in particular, more effective.<sup>28</sup>

Finally, for any given level of per capita benefit to group members from a legal change, a larger group will likely face a smaller opposition that is more motivated because it suffers greater per capita costs. Hence, large groups are not just less effective in their own right; they also generally face more effective opposition than small groups.<sup>29</sup> Assume, for example, the issue is a redistributive tax that does not increase or decrease total wealth. If the tax confers a \$100 per capita benefit on 80% of the population, then it must inflict at least a \$400 per capita cost on the remaining 20%. In contrast, if the tax confers a \$100 per capita benefit on 20% of the population, it need impose only a \$25 per capita cost on the remaining 80%. The 20% group suffering a \$400 per capita cost will be smaller and more intensely interested—and thus a more effective opposition—than the 80% group suffering a \$25 per capita cost.

Large diffusely interested groups will thus tend to be underrepresented. They will have a harder time collecting the resources necessary to monitor and evaluate developing issues, make campaign contributions, present information to voters or officials, and keep group members informed. Their members may also rationally decide that their diffuse interests are not worth the effort of reading and writing about, or voting on, the issues. Indeed, their collective action difficulties may be so great that they fail to invest any resources in pursuing collectively beneficial legal change.<sup>30</sup> Smaller groups with intensely interested members, while facing collective action problems themselves, are likely to invest more resources in influencing the government and are thus more likely to secure favorable governmental action.<sup>31</sup>

To be sure, enlarging the size of a group does have some advantages that tend to offset the disadvantages of increased size: (1) more votes,<sup>32</sup> (2) some economies of scale,<sup>33</sup> and (3) perhaps more total resources.<sup>34</sup> The confluence of these advantages and disadvantages may not benefit small groups per se. Rather, it may benefit those small to medium-sized groups that enjoy optimal combinations of free-riding avoidance, weak opposition, voting power,

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28. See *id.* at 62-63; OLSON, *supra* note 23, at 23-24.

29. See Peltzman, *supra* note 11, at 213; Stigler, *supra* note 11, at 12; see also Becker, *supra* note 13, at 384-85 & n.11 (arguing that small groups are also advantaged because lower per capita costs they impose create less real inefficiency).

30. OLSON, *supra* note 16, at 165-67.

31. *Id.* at 127-28.

32. See Peltzman, *supra* note 11, at 214; Stigler, *supra* note 11, at 13.

33. See OLSON, *supra* note 16, at 47; Becker, *supra* note 13, at 380; Peltzman, *supra* note 11, at 213; Stigler, *supra* note 11, at 12.

34. See HARDIN, *supra* note 20, at 45; Richard Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 349 (1974).

resources, and economies of scale.<sup>35</sup> This refines one's understanding of the problem but renders it no less disturbing. Medium-sized groups with organizational advantages will still have a disturbing ability to exercise disproportionate influence. They can use that power to exploit not only groups that are too large to be cohesive but also groups that are cohesive but too small to have significant resources, scale economies, or voting power. Exploitation of the latter groups is no less disturbing than exploitation of the former. After all, one might think of "the general public" as the collection of all groups too small (such as the typical family) or too large (such as consumers) to form effective interest groups.

The results are little better when one considers the supply side. Considering the supply side does help explain one thing: how very large diffuse groups sometimes manage to overcome free-riding problems. Political leaders, theorists argue, can act as "entrepreneurs" who organize large groups.<sup>36</sup> But such political entrepreneurs must overcome the same information problems facing self-starting groups: it will be harder to get diffusely interested persons to pay attention. This will generally make it easier to build political support by appealing to groups whose members have high per capita interests in govern-

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35. See ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY 42-44 (1981); Becker, *supra* note 13, at 380, 395. See generally Peltzman, *supra* note 11, at 212 (describing interest group theory as "ultimately a theory of the optimum size of effective political coalitions"). Other factors can also influence the likelihood of a group being well organized. For example, groups whose members are widely spread geographically generally face higher organizational costs and are less well organized than groups concentrated in a small geographic region. See MUELLER, *supra* note 22, at 239. Some groups may also enjoy an advantage because they have already incurred the startup costs of lobbying as a byproduct of performing some other function. See Robert D. Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575, 590 (1982).

36. HARDIN, *supra* note 20, at 35-37; KAY L. SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 84-85 (1986); James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 370-71 (James Q. Wilson ed., 1980). A quite distinct recent theory is that politician-entrepreneurs do not just build political support by supplying certain groups with rent-creating regulations but also extract rents from groups by threatening regulation or taxation that will harm those groups unless they pay off the politician in votes, campaign contributions, or other monetary payments. See Fred S. McChesney, *Regulation, Taxes, and Political Extortion*, in REGULATION AND THE REAGAN ERA 223 (Roger E. Meiners & Bruce Yandle eds., 1989) [hereinafter McChesney, *Regulation, Taxes*]; Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987) [hereinafter McChesney, *Rent Extraction*]. Although intriguing, McChesney's theory has no clear connection to the interest group argument for expanding judicial review. Unlike interest group theory, McChesney's extraction theory would suggest that organized groups are likely to be the most abused, since they are best able to collect the payoffs. See Fred S. McChesney, *Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation*, 20 J. LEGAL STUD. 73, 84-89 (1991). Further, the threats normally are not carried out, see McChesney, *Rent Extraction*, *supra*, at 109, and may take the form of either threats to impose laws that harm target groups or threats to remove laws that benefit target groups, see McChesney, *Regulation, Taxes*, *supra*, at 228-29; McChesney, *Rent Extraction*, *supra*, at 105. Because the laws threatened to be imposed or removed might be desirable or undesirable (under whatever standards the judges will employ), and because the removal of laws is hard to review, expanding judicial review will not always be relevant. Expanded judicial review might reduce the credibility of threats to impose laws that judges will regard as undesirable, see McChesney, *Regulation, Taxes*, *supra*, at 230; McChesney, *Rent Extraction*, *supra*, at 109, but it would not affect (and under some proposals might enhance) threats to impose legal changes that judges would approve. Moreover, expanded judicial review would seem to create a new opportunity for other persons to extract rents by threatening to bring litigation seeking legal changes that judges will regard as desirable but which harm target groups.

mental action than by attempting to stir the rationally apathetic general public.<sup>37</sup> The supply side theory thus adds nuance to the explanation of how groups become organized, but does not contradict the theory that certain interest groups will exercise disproportionate influence.<sup>38</sup>

Moreover, the structure of the supply side creates some additional problems. First, supply structure creates the problem of issue bundling.<sup>39</sup> Voting normally requires a choice among a limited set of candidates, each of whom offers a package of positions. Thus, even a perfectly informed voter can often do no better than to choose between candidates based on the issues that intensely interest the voter, even though a candidate's positions on other issues harm the voter in more diffuse ways.<sup>40</sup> To the extent this happens, the diffuse interests can be systematically underrepresented even if voters face no collective action problem in informing themselves and taking the time to vote.<sup>41</sup>

Second, territorial representation furthers "pork barrel" politics. Each representative has an incentive to support legislation favoring her district.<sup>42</sup> The concentrated benefits to that district's constituents will be larger and easier to communicate than the diffuse costs inflicted on other districts. It will also be relatively easy for a district representative to claim credit for legislation conferring localized benefits: who else could have been behind it? It will be harder for any single legislator to claim—or be tagged with—responsibility for legislation when its benefits or costs are spread throughout all districts.<sup>43</sup> In effect, each district will be an interest group that, compared to the group encompassing all other districts, is relatively small and intensely interested in its own local projects.

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37. See ARANSON, *supra* note 6, at 234-36; MAYHEW, *supra* note 11, at 137; James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 3, 19-20 (James D. Gwartney & Richard E. Wagner eds., 1988).

38. See OLSON, *supra* note 16, at 176-78 (concluding that entrepreneurial argument does not undermine his general theory); Tollison, *supra* note 35, at 594 (concluding that supply side forces will not eliminate rent seeking by interest groups).

39. See Gwartney & Wagner, *supra* note 37, at 10, 19; Tollison, *supra* note 35, at 594.

40. Where parties compete on the relevant issues, this can be regarded as a form of implicit logrolling, where each citizen trades her vote on the issues of diffuse interest for the votes of others on issues of intense interest to her. See ALBERT BRETON, *THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT* 155-57 (1974); MUELLER, *supra* note 22, at 183. From a utilitarian perspective, logrolling can be beneficial or harmful depending on the externalities imposed on nontraders. See *id.* at 83.

41. Such single-issue voting is even more likely given actual information costs. See generally Roger D. Congleton, *Information, Special Interests, and Single-Issue Voting*, 69 PUB. CHOICE 39 (1991). Another problem with issue bundling is that it means elections send very unclear signals about what legislators should be supplying. Candidates and elected officials know whether they won or lost but cannot discern from the election alone which issues led to that result. Consequently, a group that can communicate the preferences of its voting members to candidates and elected officials might enjoy an influence greater than the votes they can actually deliver. Because interest groups with intensely interested members are better able to fund such communications, this gives them another advantage.

42. See MAYHEW, *supra* note 11, at 53-56; OLSON, *supra* note 23, at 51-52.

43. See MAYHEW, *supra* note 11, at 59-60.

Third, committee structure can exacerbate interest group influence.<sup>44</sup> Committee membership rarely represents a cross-section of the legislature. Instead, legislators tend to self-select into those committees in which their supporters have the greatest stakes. Legislators elected by farmers, for example, join agricultural committees. Because, compared to other legislators, committee members have more influence over legislation germane to their committees, the committee structure can help an interest group with political dominance in a single district extend its influence across the entire state or nation encompassed by the legislature.

Fourth, legislative oversight of agencies means that, to some extent, unelected regulators are accountable to the legislature,<sup>45</sup> and are thus indirectly influenced by the interest groups that influence legislators.<sup>46</sup> Indeed, because the oversight committee will likely consist of those legislators supported by the relevant special interest groups, the agency may be influenced more disproportionately than the legislature as a whole.<sup>47</sup> Further, delegating authority to agencies may, in some instances, exacerbate interest group problems by helping legislators avoid the public perception that the legislators are responsible for the regulatory costs.<sup>48</sup>

As a result, certain groups enjoy organizational advantages that enable them to exercise "disproportionate" influence on politicians and regulators and thus secure laws favoring their interests even when those laws injure large groups with diffuse interests (e.g., the general public) and impose a net loss on society.<sup>49</sup> This means that many statutes and regulations are enacted (or defeated) not to benefit the general public, but to help a special interest group exact economic rents from the larger society.

To be sure, the literature also suggests that "capture" by one group will never be complete.<sup>50</sup> Interest groups always face some opposition, even if relatively underrepresented, and efforts to garner income through increased

44. See Jonathan Macey, *Public Choice*, 74 CORNELL L. REV. 53, 55-56 (1988); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice*, 74 VA. L. REV. 373, 386-87 (1988). See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. (forthcoming November 1991) (reviewing and critiquing literature on whether committee structure exacerbates interest group influence).

45. See, e.g., Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORGANIZATION 243 (1987); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress*, 96 J. POL. ECON. 132 (1988).

46. See Bruce L. Benson & M.L. Greenhut, *Special Interests, Bureaucrats, and Antitrust in ANTITRUST AND REGULATION* 53, 74-76 (Ronald E. Grieson ed., 1986).

47. See Gwartney & Wagner, *supra* note 37, at 16. Thus, even if, as William Eskridge argues, the preferences of the full legislature constrain committees in enacting statutes, see Eskridge, *Overriding the Courts*, *supra* note 44, committees may still exercise disproportionate political influence through their oversight of agencies.

48. See Aranson et al., *supra* note 11, at 55-62; Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy*, 61 S. CAL. L. REV. 1293, 1305-09 (1988) (collecting and describing literature).

49. See OLSON, *supra* note 16, at 27-28; Stigler, *supra* note 11, at 3, 10-13; Wilson, *supra* note 36, at 369-70.

50. MUELLER, *supra* note 22, at 236-38; Becker, *supra* note 13, at 372-73; Spitzer, *supra* note 48, at 1304-05 (collecting and describing literature).

political pressure face declining marginal benefits and rising marginal costs.<sup>51</sup> Consequently, interest group theory predicts that regulations will reflect compromises through which regulatory benefits are distributed among various groups depending on the marginal returns the groups can offer the legislators or regulators.<sup>52</sup>

Nonetheless, the disproportionate influence of well-organized interest groups is disturbing. It suggests that legal change is likely to harm the general public when the benefits of the change are concentrated and the costs are diffuse.<sup>53</sup> Similarly, it suggests that opposition to legal change (or to implementation of a change) is likely to harm the general public when the change confers diffuse benefits and concentrated costs.<sup>54</sup> Not only do the regulatory outcomes in such situations seem suspect, but the "rent-seeking" activity encouraged by the political system seems socially wasteful.<sup>55</sup>

Of course, this picture of the political process is hardly uncontroversial. Others have argued that interest group theory offers a simplistic and often inaccurate account of the political process. These scholars convincingly demonstrate that noneconomic factors such as altruism and ideology play at least some role in political participation and decisionmaking, and that the preferences of regulators and the general public sometimes prevail over the preferences of interest groups.<sup>56</sup> Their analysis thus suggests that interest group theory, even if qualified to account for "incomplete" capture, cannot offer a complete theory of regulation. Still, these scholars do not disprove the point that the economic benefits and costs of political organization play a strong role and that special interest groups often take advantage of these economic factors to exercise disproportionate political influence.<sup>57</sup>

In any event, I do not wish to enter the empirical debate about the extent to which economic versus noneconomic factors play a role in political decision-

51. MCCORMICK & TOLLISON, *supra* note 35, at 33-34; Becker, *supra* note 13, at 378-79, 395; Spitzer, *supra* note 48, at 1305 n.61.

52. MUELLER, *supra* note 22, at 236; Spitzer, *supra* note 48, at 1305.

53. MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS 99-102 (1981); SCHLOZMAN & TIERNEY, *supra* note 36, at 84; Wilson, *supra* note 36, at 369-70.

54. As should be evident from the foregoing analysis, interest group theory applies to efforts to block as well as efforts to secure government action. See Peter L. Kahn, *The Politics of Unregulation*, 75 CORNELL L. REV. 280, 284-85, 291-92, 312 (1990). Indeed, the leading empirical study suggests that interest groups are particularly effective in blocking government action. See SCHLOZMAN & TIERNEY, *supra* note 36, at 314-15, 395-96, 398.

55. See MUELLER, *supra* note 22, at 229-35; Gwartney & Wagner, *supra* note 37, at 22-23; Tollison, *supra* note 35, at 576-83.

56. See Farber & Frickey, *supra* note 7, at 887-90, 893-901; Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 88 & n.56 (1990); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 214-23 (1988); Edward L. Rubin, *Beyond Public Choice*, 66 N.Y.U. L. REV. 1, 2 & n.3, 12-45 (1991).

57. Farber and Frickey explicitly note that their critique does not imply that such factors are unimportant, only that they are not the sole determinants of government action. See Farber & Frickey, *supra* note 7, at 900-01.

making.<sup>58</sup> My purpose is rather to address the normative question whether, assuming one accepts its empirical claims, interest group theory justifies more intrusive judicial review. For that purpose, I assume that to a substantial extent interest group theory accurately describes the political process.

### B. *The Proposals to Change Judicial Review*

Not surprisingly, the critique of the democratic political system offered by interest group theory has been used by many legal scholars to argue for more intrusive judicial review.<sup>59</sup> One camp of prominent scholars employs interest group theory to justify heightened constitutional scrutiny. Erwin Chemerinsky argues that the susceptibility of the politically accountable branches to interest group pressure undermines the case for deferential constitutional review.<sup>60</sup> Richard Epstein advocates far-reaching substantive judicial review under the Takings and Contract Clauses to curb rent seeking.<sup>61</sup> Jerry Mashaw uses interest group theory to support his argument that the Supreme Court should invalidate some "private-regarding" legislation.<sup>62</sup> Martin Shapiro argues that, at least in the First Amendment area, the Court should not defer to a political process driven by interest group politics but rather should advance the cause of the groups the political process underrepresents.<sup>63</sup> Bernard Siegan believes that interest group theory helps justify a return to *Lochner*-era substantive due process review of economic regulation.<sup>64</sup> Finally, Cass Sunstein argues that more rigorous constitutional scrutiny is needed to invalidate legislation that rewards the raw political power of interest groups.<sup>65</sup>

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58. Those interested in that question may wish to consult Mashaw's thoughtful analysis of Farber and Frickey's claims. See Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 141-50 (1989).

59. In addition to relying on the need to restrain interest groups, many of these scholars also support their proposals with various other legal, historical, and theoretical arguments that I do not describe because such arguments are beyond the scope of this Article. I examine their proposals only to the extent they rely on interest group theory as an independent affirmative justification for the change in judicial review; the proposals might well be justifiable on other grounds.

60. See Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46-47, 78, 80-81 (1989).

61. See RICHARD A. EPSTEIN, TAKINGS (1985) [hereinafter EPSTEIN, TAKINGS]; Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 705-17 (1984). Since, under Epstein's theory, "[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state," EPSTEIN, TAKINGS, *supra*, at 95, the judicial review he advocates reaches much farther than its basis in the takings and contract clauses might suggest.

62. See Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 874-75 (1980); Mashaw, *supra* note 58, at 146 n.66.

63. See MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 2, 17-25, 31-40 (1966).

64. See BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 265-303 (1980).

65. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*]; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter Sunstein, *Naked Preferences*].

Others argue that antitrust law provides the appropriate vehicle for judicial policing of interest group capture. Some urge creating such a vehicle by reformulating the antitrust immunity currently accorded "state action." John Wiley, for example, would have judges subject any state and local regulation that resulted from producer capture to antitrust efficiency review.<sup>66</sup> Frank Easterbrook appears to agree.<sup>67</sup> William Page advocates rooting out interest group capture by subjecting state and local regulation to an antitrust "hard look" doctrine, which would invalidate inefficient regulations unless the state legislature clearly articulated its desire to be anticompetitive.<sup>68</sup> Some advocate other changes in federal antitrust review that would deter interest group capture not only of state and local governments, but of the federal government as well. Gary Minda, for example, advocates curbing interest group influence by restricting the immunity from antitrust liability that is currently accorded efforts to petition the government for anticompetitive regulation.<sup>69</sup> He also advocates that courts police interest group capture of federal laws by liberally invoking the presumption against implied exceptions to antitrust law and even by invalidating federal statutes that are the result of producer capture and conflict with federal antitrust policy.<sup>70</sup>

Finally, some argue that judges should employ the tools of statutory interpretation to render interest group capture more difficult or less effective. Frank Easterbrook and Cass Sunstein advocate narrowly construing statutes that represent interest group transfers.<sup>71</sup> Jonathan Macey argues that, because judges cannot determine whether a statute benefits the public interest or a special interest group, courts should narrowly construe all statutes in derogation of the common law.<sup>72</sup> William Eskridge has sketched out the most nuanced

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66. See John S. Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 743-44 (1986).

67. See Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 51-54 (1984).

68. See William H. Page, *Antitrust, Federalism, and the Regulatory Process*, 61 B.U. L. REV. 1099, 1109-15, 1122-25 (1981).

69. See Gary Minda, *Interest Groups, Political Freedom, and Antitrust*, 41 HASTINGS L.J. 905, 935-37, 945-52, 1013-28 (1990).

70. See *id.* at 1020. Minda does not explain how the federal antitrust statutes could possibly provide courts with authority to invalidate other, subsequently enacted, federal statutes.

71. See Easterbrook, *supra* note 67, at 15-18; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471, 486 (1989).

72. See Macey, *supra* note 13, at 228 n.29, 252; see also Mashaw, *supra* note 58, at 134-35 (judges with interest group theory view should narrowly construe statutes). Macey also argues that interpreting statutes according to their stated purpose will limit interest group capture. See Macey, *supra*, at 227, 238, 250-56. This argument, first sketched out by Richard Posner, see Richard Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 286 (1982), seems unobjectionable because it relies only on the proposition that such interpretation alleviates the information cost problems of politics by forcing interest groups and politicians to publicize any nefarious purpose a "captured" statute has. Others have, however, read Macey as embracing a far more active stance: empowering courts to interpret statutes according to whatever purpose the *judge* believes is public regarding. See Mashaw, *supra* note 58, at 153-56. To the extent the latter interpretation of Macey's argument is correct, the objections I lay out in Parts II to IV apply.

approach. He supports, albeit tentatively, narrowly interpreting statutes when the benefits are concentrated and the costs distributed, and broadly interpreting statutes when the benefits are distributed and the costs are concentrated.<sup>73</sup>

These various proposals have many dissimilarities but share one unifying feature: they would expand the lawmaking power of the judiciary. This feature is most evident in the proposals to expand constitutional and antitrust review, for those proposals would expand the set of cases where judges could strike down laws on substantive grounds. But the same is also true for the proposals advocating aggressive statutory interpretation. Construing statutes broadly or narrowly gives judges the authority to expand the reach of some statutes and to partially negate the reach of others. Further, narrowly construing any statute effectively transfers power to the judicially managed common law process which provides much of the background regulation.

True, the legislature may override statutory constructions it dislikes. But it is also true that the nation may override constitutional or antitrust decisions it dislikes. In all these cases, there are obstacles to overriding the courts. In the constitutional case, a supermajority of the Congress and the states must approve a constitutional amendment.<sup>74</sup> In the antitrust case, a bill must be approved by both houses of Congress and signed by the President (or passed by a supermajority over a veto) when there are many other bills competing for attention on a crowded agenda. And, in the statutory construction case, the obstacle is much the same as in the antitrust case except that action from the state legislature and executive will suffice to overturn judicial interpretations of state statutes. Clearly, the obstacles to overriding statutory construction are lower than the obstacles to overriding other judicial decisions, but that merely demonstrates that the power to interpret the Constitution and antitrust laws confers a greater degree of potential lawmaking authority than the generic power to interpret statutes.<sup>75</sup> Moreover, even when the legislature does override a court's statutory construction, such legislative action takes time and, in the meantime, the judicial construction is binding law.

Accordingly, the discussion that follows denies the relevance of a distinction implicit in much of the literature: a distinction which asserts that, even if

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73. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 279, 298-99, 303-09, 324-25 (1988).

74. See *infra* note 289. Although the obstacles are relatively high, the Eleventh, Fourteenth, Sixteenth, and Twenty-sixth Amendments all managed to overcome them to override Supreme Court decisions. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 776 & n.128 (1991).

75. For a public choice description of the difference in the lawmaking authority that courts can exercise in statutory versus constitutional cases, see *infra* text accompanying notes 287-90. Antitrust review also confers greater potential lawmaking power than does statutory interpretation in that under the antitrust proposals courts could employ antitrust review to invalidate, rather than just narrow, a range of state statutes and regulations and could punish interest group activity producing anticompetitive federal or state law. Moreover, in exercising the power of statutory interpretation, federal courts could sometimes be overridden by state legislatures as well as Congress and would have to defer to state court interpretations of state statutes and regulations.



interest group theory does not justify more rigorous constitutional scrutiny, it does justify expanded antitrust review or more aggressive statutory interpretation.<sup>76</sup> In my view, such distinctions are, for the purposes of the present discussion, unwarranted.<sup>77</sup> More aggressive statutory interpretation and expanded antitrust review are, to be sure, milder enlargements of judicial lawmaking power than making constitutional review more rigorous. But if interest group theory provides no reason to think a major transfer of lawmaking power from the political process to the litigation process would be an improvement, then it provides no reason to think a minor transfer would be an improvement either. The encroachment on the political process may be less offensive, but that does not make it unoffensive or desirable. Conversely, if one thought the minor transfer implicit in more aggressive statutory interpretation (or expanded antitrust review) *were* an improvement, then it would seem that the more major transfer of expanding constitutional review would also be desirable. Indeed, more of a good thing would seem even better. The fact that judges' statutory interpretation or antitrust decisions can be overruled by the legislature hardly seems an argument for preferring such review to intrusive constitutional review if one accepts the premise (necessary to justify more aggressive statutory construction or expanded antitrust review) that judges make better decisions than legislatures.

Although it seems clear to me that the various proposals exhort judges to defer less than they do now, one might object that what I have described is not an expansion of judicial lawmaking power because judges must already make law in interpreting the ubiquitous ambiguity of statutes and the Constitution.<sup>78</sup> But if that is so, there is no reason to invoke interest group theory as an independent justification for an expansive judicial lawmaking power. In any event, it is decidedly not my intent to develop here a general theory of constitu-

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76. See, e.g., Wiley, *supra* note 66, at 779.

77. They may of course be warranted if the question is whether judges have the legal authority to adopt the proposals.

78. See, e.g., Chemerinsky, *supra* note 60, at 90-96, 99-102; Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887-88, 890-96, 927-50 (1986). From an opposite perspective, one might object that narrowing statutory construction is not an expansion of judicial lawmaking authority because, given the ubiquitous ambiguity of statutes, anything other than narrow statutory construction involves judicial lawmaking. But since the proposals call for narrowing only *some* statutes, generally based on interest group criteria, the proposals contemplate constructions more narrow than would be suggested by a fair reading of the statute. This, coupled with the fact that the proposals would have judges select which statutes to narrow, implies an expansion of judicial lawmaking power.

Moreover, even if what were at issue was a proposal to have judges read all statutes narrowly, my response would parallel the response in the text. If one accepts the underlying interpretive theory, the argument for this proposal does not require interest group theory and is not aided by it; if one is not persuaded by the underlying interpretive theory, then one should not be misled by interest group theory into adopting the proposal. For example, if one instead believes that judges can accurately assess legislative meanings beyond the most narrow reading of statutory language, then narrowing statutory construction denies the implementation of some of this legislative meaning and constitutes an expansion of judicial lawmaking power that must be justified on some other grounds. This Article argues that interest group theory does not provide those grounds.

tional or statutory interpretation.<sup>79</sup> Rather, I propose to make the more limited point that interest group theory provides no persuasive grounds to alter whatever conclusions one would otherwise reach about judicial lawmaking authority. If you believe that statutes and the Constitution grant judges authority only to implement the specific intentions of those who promulgated the law, or only to exercise a tightly bounded interstitial lawmaking power, interest group theory should not persuade you to approve of more intrusive judicial review. If you believe that statutes and the Constitution confer relatively broad judicial lawmaking authority, interest group theory should neither make you more confident about that belief nor persuade you to expand that authority even more broadly. Further, under any view, interest group theory should not persuade you that judges should change how they exercise their lawmaking power by, for example, searching for evidence of interest group influence rather than giving weight to whatever other sources or substantive values you believe should guide judicial lawmaking.

## II. INTEREST GROUP THEORY CANNOT DEMONSTRATE PROCESS DEFECTS INDEPENDENT OF NORMATIVE CONCLUSIONS ABOUT THE OUTCOMES

To avoid possible misunderstanding, I wish to make plain that the following discussion is a critique not of interest group theory but of the efforts to use interest group theory to justify more intrusive judicial review. As a purely positive theory, interest group analysis is extremely helpful in predicting how much political influence different groups are likely to possess. It thus provides each of us with a powerful tool for analyzing how our political process could produce results we *individually* regard as normatively undesirable. The problem comes with the claim that the analysis should be implemented to make *collective* decisions (through judges) to strike down the results of another collective decisionmaking process.

The central conceptual problem is that conclusions that interest groups have “captured” regulators or exercised “disproportionate” influence depend implicitly on what I will call baseline views of what degree of influence is appropriate for that group. As Section A demonstrates, such baselines in turn reflect normative views about governmental policy that are often problematic or controversial. More important, this dependence on normative baselines means that interest group theory provides us with no reason to condemn (or approve) the operation of the political process that stands independent of our condemnation (or approval) of the results of that political process.

As Section B discusses, this analysis has two initial implications for the effort to use interest group theory to justify more intrusive judicial review. First,

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79. Those interested in my theory about the scope of judicial lawmaking power granted by the antitrust laws are invited to see Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991).

it means that no effective limitation on intrusive judicial review can be imposed by requiring a threshold finding of disproportionate interest group influence. Any review that seems warranted should take the form of applying the underlying normative standard directly to the political outcome. Second, it means that condemning the political process because of interest group influence is indistinguishable from condemning the political process for producing outcomes the condemner dislikes on independent normative grounds. The condemnation of the political process draws any persuasiveness it has from the underlying normative theory rather than from interest group theory.

More generally, as both these implications suggest, interest group theory can be seriously misleading unless one recognizes and identifies the nature of the implicit normative baseline. Unawareness that an implicit baseline exists can mislead one into believing that value-neutral defects in the political process justify expanding judicial review. Unawareness of the content of that implicit baseline can mislead one into applying normative standards different from the standards one would otherwise apply.

#### A. *The Dependence on a Normative Baseline*

As described by interest group theory, there is nothing distinctive about the methods used by special interest groups to influence governmental action.<sup>80</sup> They are the same methods employed by anyone petitioning the government, and if the methods were the distinctive problem, prohibiting those methods would appear to be a more attractive reform than changing judicial review. Rather, the central insight of interest group theory is that small concentrated groups will exhibit a greater willingness than large diffuse groups to spend time and money on *whatever* methods of influencing the government are available. For that reason, altering political procedure and penalizing disfavored methods of political influence can never fully offset the disproportionate influence of special interest groups. Herein lies much of the attraction of changing judicial review. But the commonality of methods also means that we cannot hope to identify improper interest group influence by the political methods those groups use.

What interest group theory does identify are the factors that make certain groups more willing than others to expend resources on petitioning for governmental action. However, identifying those factors cannot alone demonstrate which groups' petitioning efforts are *normatively* disproportionate. Such a normative conclusion is only possible if we have some baseline for determining what level of petitioning effort is normatively proportional to each group's interest. Interest group theory does not itself provide such a normative baseline. Rather,

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80. Nor is there anything distinctive about the motive behind interest group activity, since the theory assumes all participants act out of self-interest. See *supra* note 11 and accompanying text.

implicit normative baselines are adopted, usually without any discussion, when analysts draw normative implications from the degree of political influence predicted by interest group theory.

Often, the starting point for the implicit baseline is that a group's influence should be proportional to the number of individuals represented by the group. For example, when Mancur Olson talks of the "disproportionate power" of small groups with intensely interested members,<sup>81</sup> he means that they will often have more political influence than the "large groups . . . normally supposed to prevail in a democracy."<sup>82</sup> But while one might expect large groups to prevail in a democracy, there are no grounds for concluding, as a general matter, that the majority always should prevail over the minority, particularly when the majority's per person interest is lukewarm and the minority's per person interest is intense. Rather, under any plausible measure of social desirability, it will in some instances be desirable for the intensely interested minority to win.

To illustrate, suppose that a racist majority in a particular community would derive a diffuse sense of satisfaction by venting their prejudice through the enactment of legislation that oppresses a racial minority. The racial minority, however, is smaller and more intensely interested in avoiding the oppressive legislation than the majority is in passing it. These factors, it turns out, enable the racial minority to organize more effectively than the racial majority.<sup>83</sup> Because of this organizational advantage, the minority prevents the legislation from being enacted. Under ordinary normative standards of racial justice, this seems entirely desirable. Here, it seems, the small intensely interested group should win because its interest "outweighs" the diffuse (and presumably illegitimate) interest of the majority. But this conclusion follows only because we have a normative policy view supporting the conclusion that the majority's political preference does not deserve any more influence than it has achieved.

In other situations, the normative baseline will be less clear. Take, for example, the issue of affirmative action. Again assume that, because of its group structure, the racial minority enjoys more political success than the majority. The members of the racial minority are intensely interested in affirmative action whereas the majority's members have a weaker per capita interest in avoiding the costs of affirmative action.<sup>84</sup> Because of this, the racial minori-

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81. OLSON, *supra* note 16, at 127.

82. *Id.* at 128; see also MUELLER, *supra* note 22, at 205 ("[E]galitarianism inherent in the slogan 'one man, one vote' is distorted when interest groups act as intermediaries between candidates and citizens.").

83. As Bruce Ackerman has pointed out, discrete and insular minorities should be more, rather than less, equipped to police free rider problems in organizing political effort. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723-31 (1985). One should emphasize, however, that Ackerman does not draw from this the conclusion that minorities do not deserve special constitutional protection, but rather that the justification for special constitutional protection rests on substantive grounds rather than on a group's discreteness or insularity. See *id.* at 737-46.

84. If one assumes that the benefits of affirmative action accrue only to the minority and that its costs accrue only to the majority, this will follow by definition because the costs will be spread among more

ty succeeds in getting the government to adopt an affirmative action program. Does this prove that the affirmative action program represents the rent-seeking product of interest group politics? So some might argue.<sup>85</sup> But while the racial minority has, in this case, achieved an influence disproportionate to its numbers, one needs to posit a baseline standard of social desirability to conclude that its influence is disproportionate to the influence it should have had.

If, for example, one's normative standard of racial justice mandates equality of results, then (as in the racial oppression example) the minority's interest in affirmative action normatively "outweighs" the majority's interest in avoiding affirmative action. The minority's organizational advantage does not, under this stipulated measure of social desirability, enable the minority to achieve an influence "disproportionate" to its interest. Rather, it simply enables the minority to achieve a political influence commensurate with the level of interest that should be ascribed to the minority. Or, alternatively, one might say that the majority's disorganization disabled it from achieving a degree of political influence that (as in the racial oppression example) it did not merit.

Now instead assume one's normative standard of racial justice mandates an equality of opportunity that is violated by the particular affirmative action program under consideration. In that case, the racial minority's organizational advantage has indeed enabled it to achieve a political influence disproportionate to its "true" interest in affirmative action. And the majority's structural disorganization has prevented it from fully expressing the interest of its members in equal job opportunity.

In short, even if interest group theory can explain in all the above cases how the racial minority was able to achieve an influence disproportionate to its numbers, by itself the theory cannot generate any normative conclusion about whether the group's influence was disproportionate to the influence it should have had. Such a normative conclusion requires some normative baseline about which levels of influence were appropriate for the minority and the majority.<sup>86</sup> But once one has such a normative baseline, interest group theory

persons than the benefits. Obviously many members of racial majorities in fact favor affirmative action, suggesting either that they do not make political judgments based solely on personal benefit or that they derive some indirect and probably nonfinancial benefit (such as the good feeling of doing what they believe is right) from affirmative action. The former assumption is obviously inconsistent with the premises of interest group theory. The latter assumption of a personal ideological "taste" for voting certain ways may be tautological enough to undermine the theory's predictive power because any observed behavior can be reconciled with a personal taste to act that way. Compare Farber & Frickey, *supra* note 7, at 894 n.129 (calling taste assumption tautological) with Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 193-98 (1988) (rejecting claim of tautology).

85. See Jennifer Roback, *The Separation of Race and State*, 14 HARV. J.L. & PUB. POL'Y 58, 59, 62 (1991). Roback does not single out minority interest groups or affirmative action but rather argues against rent seeking by groups of any ethnicity or interest.

86. The argument here, that we cannot determine when a minority has excessive political influence without a normative baseline, complements a similar argument, often made in critiquing process-based constitutional theories, that we cannot determine when a minority has too little political influence without making substantive judgments. See, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072-76 (1980). Judicial review designed to protect the majority

provides no additional normative insight. The normative standards used to derive the baseline could simply be applied directly to the governmental action to reach the same conclusions without the detour through interest group theory. Unless the underlying normative issues are recognized, interest group theory threatens to obscure rather than illuminate the debate.

These examples may seem tendentious because they involve race relations, an area where some "interests" (such as venting prejudice) can justifiably be deemed unconstitutional or otherwise unworthy of satisfying, and where concerns about majoritarian exploitation are especially serious. But I begin with them only because they illustrate the problem most clearly and graphically. The same problem exists if we limit our analysis (and any changes in judicial review) to the realm of economic regulation.

Suppose, for example, that the majority wishes the government to take the property of a wealthy minority without providing any compensation. The members of the wealthy minority, however, are intensely interested in avoiding the taking of their property while the majority's members have a more diffuse interest in dividing up the minority's wealth. This organizational advantage enables the minority to block the uncompensated taking.<sup>87</sup> Is this undesirable? The answer would seem to be "no" under our Constitution's Takings Clause. The answer would also seem to be "no" to most economists, including public choice economists,<sup>88</sup> because uncompensated takings produce allocative inefficiency and undermine productive incentives.<sup>89</sup>

One thus cannot say that in the realm of economic regulation it is generally undesirable for the minority to exercise political influence in disproportion to its numbers. How, then, do we know when a group has exercised "disproportionate" influence? The economist's apparent answer is that a group's political clout is disproportionate when it exceeds the group's economic interest in the matter.<sup>90</sup> Thus, as we have seen, the arbitrary confiscation of property is categorized as majoritarian exploitation, and any minority success in preventing it is applauded and not regarded as the product of disproportionate interest group influence.<sup>91</sup> On the other hand, the enactment of the Sherman Act,

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or the minority from the political process must rest on substantive judgments about when which groups should win.

87. Cf. Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. (forthcoming May 1992) (arguing that public choice theory predicts that a group of landowners threatened with uncompensated taking will generally exercise more political clout than other groups who could bear cost of the taking).

88. See Gwartney & Wagner, *supra* note 37, at 17-18; Riker & Weingast, *supra* note 44, at 374 & n.2.

89. See William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretation of "Just Compensation" Laws*, 17 J. LEGAL STUD. 269 (1988); Rose-Ackerman, *supra* note 10, at 342 n.5 (collecting sources).

90. Cf. Stigler, *supra* note 11, at 11 (arguing that unlike the private market, "the political process does not allow participation in proportion to interest and knowledge").

91. See also GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING* 32 & n.3 (1989) (arguing that small group aims should be implemented where "it would cost society less than

which took monopoly profits away from cartelists to benefit consumers, is not viewed as majoritarian exploitation. The reason is that prohibiting cartels eliminates a dead weight loss, which is another way of saying that the aggregate economic gain to consumers exceeds the economic loss to cartelists.<sup>92</sup> Similarly, where producers succeed in getting price floors enacted, their success is not hailed as preventing majoritarian exploitation. Rather, their success is regarded as interest group politics because the price floors impose economic costs on consumers that exceed the economic gain enjoyed by producers.<sup>93</sup>

But using a group's economic interest as the baseline measure of what degree of political influence it should have is appropriate only if one believes that economic efficiency should be our governing normative standard. Whenever groups comply with the baseline norm, and the political process is thus operating "correctly," the side with the largest economic interest at stake will win. Whenever the side with the smaller economic interest triumphs, the political process can always be condemned as reflecting either majoritarian exploitation or (if the group is in the minority) the exercise of "disproportionate" influence by a special interest group.<sup>94</sup> It follows that under this baseline no governmental decision will be regarded as properly influenced unless it favors the side with the largest economic stake—that is, unless it maximizes the aggregate economic wealth in society. Because wealth maximization is the standard generally used to measure economic efficiency,<sup>95</sup> this amounts to the

the benefit to the small group"); *id.* at 4 (concluding that lobbying by company he represented was not rent seeking because it sought to remove market restriction rather than impose one).

92. See Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 23-24 (1983); Thomas J. DiLorenzo, *The Origins of Antitrust*, REG., Fall 1990, at 26, 26 (quoting survey of economists). There is a dissenting strand of scholarship which argues that the enactment, enforcement, and interpretation of the antitrust laws have reflected interest group pressures. See, e.g., Benson & Greenhut, *supra* note 46, *passim*; DiLorenzo, *supra*, at 27-34. But this dissenting strand is based on the premise that actual antitrust regulation is inefficient, not on the premise that efficient antitrust regulation would constitute majoritarian exploitation.

93. See, e.g., OLSON, *supra* note 23, at 47, 74 ("On balance, special-interest organizations and collusions reduce efficiency and aggregate income . . ."); TULLOCK, *supra* note 91, at vii, 20 (describing rent seeking as situations of net economic loss that benefit a minority); Gary Becker, *Public Policies, Pressure Groups, and Dead Weight Losses*, 28 J. PUB. ECON. 329, 343-45 (1985) (arguing that condemnation of interest group influence is justified only when that influence reduces social output); Posner, *supra* note 34, at 341 n.13 ("It is interesting to note that 'interest group' is not a pejorative term for most of the political scientists, since they are either indifferent to or unaware of the fact that the economic costs of regulation procured by an interest group normally exceed the economic benefits.").

94. See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 291-92 (1962) (stating that problem of political profit-seeking groups arises when collective activities confer differential benefits by either (1) benefiting selected few and imposing costs throughout community or (2) benefiting general community and imposing costs on selected few).

95. Economic analysts sometimes use efficiency to mean Pareto efficiency. A change is Pareto efficient if it benefits at least one person without making anyone worse off. See, e.g., ROBERT PINDYCK & DAN RUBINFELD, *MICROECONOMICS* 581 (2d ed. 1992). However, because just about any regulatory decision harms some persons and benefits others, Pareto efficiency is usually a useless standard for judging governmental action. Cf. Guido Calabresi, *The Pointlessness of Pareto*, 100 YALE L.J. 1211, 1215-21 (1991) (arguing that any Pareto optimal change already would have been achieved). Breaking up a price-fixing cartel, for example, is not Pareto efficient because it harms the cartelists. Thus, in judging regulatory decisions, economists usually employ the Kaldor-Hicks test of efficiency, under which a change is efficient if the winners gain enough that they could compensate the losers. See J.R. Hicks, *The Valuation of the Social*

conclusion that the only governmental actions that are properly influenced are those that advance economic efficiency.

This should hardly be surprising since, after all, economic efficiency is what economists consider to be in the public interest. Indeed, as economists themselves explain, their entry into public choice theory was motivated largely by a desire to explain why the political and regulatory process was not producing the economically efficient laws and regulations that economists believed would advance the public interest.<sup>96</sup> But wealth maximization is hardly an uncontroversial measure of social desirability.<sup>97</sup> It is not even an uncontroversial measure of efficiency. Many instead believe that Pareto's test is the true measure of efficiency<sup>98</sup> or that utility maximization is a more appropriate measure of social efficiency.<sup>99</sup> Under both those measures of efficiency, the distribution of wealth can be as important as its maximization.<sup>100</sup>

More important for our purposes, interest group theory provides no reason for changing whatever view one holds about the attraction of wealth maximization (i.e., economic efficiency) as a normative standard. If one believes that economic efficiency should be the normative standard for assessing the desirability of laws, one gains no additional insight by examining whether the groups backing a law exercised influence disproportionate to their economic interest, for in the end that examination replicates the assessment of the regulation's economic efficiency. And if one does not believe economic efficiency is the appropriate normative standard, one should not be misled into implicitly applying precisely that standard by using an interest group theory that con-

*Income*, 7 *ECONOMICA* 105 (1940); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549 (1939). Because the Kaldor-Hicks test does not require that the winners actually compensate the losers, it is identical to defining efficiency as wealth-maximization if (as is typical) gains and losses are measured monetarily.

96. See, e.g., McCORMICK & TOLLISON, *supra* note 35, at ix, 3-5; GEORGE J. STIGLER, *THE CITIZEN AND THE STATE* ix (1975); Peltzman, *supra* note 11, at 211-12; Posner, *supra* note 34, at 336-37.

97. For a range of views on the issue, see *Symposium on Efficiency as a Legal Concern*, 8 *HOFSTRA L. REV.* 485 (1980).

98. Obviously changes can be Kaldor-Hicks efficient yet Pareto inefficient. See *supra* note 95. Perhaps less obviously, changes can (if one considers multiple commodities) be Pareto efficient yet inefficient under Kaldor-Hicks criteria. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 44-45 (2d ed. 1963). The only necessary connection between Pareto and Kaldor-Hicks efficiency is that every Kaldor-Hicks efficient change *could* be converted into a Pareto efficient change.

99. See generally Hovenkamp, *supra* note 56, at 68-74 (arguing that wealth maximization is inaccurate surrogate for measuring social utility).

100. The traditional response is, of course, that regulatory policy should strive for economic efficiency because wealth redistribution can usually be accomplished more efficiently and precisely through general taxation and welfare programs. See, e.g., A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 124-27 (2d ed. 1989); Wiley, *supra* note 66, at 761. Although this claim often has merit, it rests on contestable empirical assumptions. As Richard Posner has pointed out, there is no a priori reason to believe that the inefficiencies created by redistributive taxes are lower than the inefficiencies caused by a redistributive regulatory regime. Richard A. Posner, *Taxation by Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 22, 41-45, 47 (1971). And other, perhaps more particular, facts about persons may be relevant to determining a just distribution. See Calabresi, *supra* note 95, at 1224 n.36. In any event, the traditional response does not demonstrate the desirability of any legal change that increases wealth but is not coupled with further tax redistribution.



demns influence as disproportionate when it exceeds a group's economic interest.

To illustrate the controversy that can result from this implicit normative baseline when applying interest group theory, suppose that the issue is whether a city government will repeal its rent control ordinance. Suppose further that landlords are better organized than tenants because landlords have greater per capita stakes in repealing rent control than tenants have in maintaining it. As a result, the rent control ordinance is repealed. Does this reflect disproportionate influence (or capture) by a special interest group, namely landlords? Or have the landlords merely undone prior capture by tenants, who were a special interest group that initially got the rent control ordinance enacted because incumbent tenants had far more votes than landlords and much higher per capita interests than prospective tenants?

The answer under economic interest group theory would seem to depend on whether rent control is economically inefficient. If, as most economists argue, rent control is inefficient,<sup>101</sup> then the tenant group's influence was "disproportionate" to its economic interest, and the landlords have undone interest group politics. If rent control is efficient, then the landlords have exercised disproportionate influence and the repeal reflects (rather than undoes) interest group politics. Again, the use of interest group theory seems gratuitous. If one is willing to make normative judgments about rent control based on its efficiency, there is no particular value in using that same normative judgment to assess the political influence that led to the enactment or repeal of rent control. One may as well immediately move to the issue of whether the resulting law is efficient.<sup>102</sup>

Efficiency is not, however, the only implicit normative baseline used in assessing interest group influence over economic regulation. For example, Cass Sunstein, in his writings decrying interest group influence, argues that courts should invalidate governmental actions that reflect "naked preferences" for distributing wealth to politically powerful groups at the expense of others.<sup>103</sup>

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101. See Bruno S. Frey et al., *Consensus and Dissension Among Economists: An Empirical Inquiry*, 74 AM. ECON. REV. 986, 987 (1984).

102. A parallel problem affects McChesney's rent extraction theory, see *supra* note 36, because one cannot easily distinguish what McChesney would deem rent extraction from what other theorists would deem interest group success in blocking governmental action, see SCHLOZMAN & TIERNEY, *supra* note 36, at 314-15, 395-96, 398. Much would seem to turn on whether one views the threatened governmental action as desirable or not. For example, suppose landlords make campaign contributions to city council members who run on platforms that favor stricter rent control laws, but who refrain from actually imposing vacancy controls. To McChesney, this would presumably be an example of the city council members extracting rents from the landlords by threatening to pass a law that would expropriate their wealth. Among tenant advocates, however, such activity is commonly decried as an instance of a special interest group blocking the enactment of public interest legislation. The distinction between rent extraction and blocking public interest legislation thus seems vulnerable to the same normative baseline problem that applies to interest group theory more generally.

103. Sunstein, *Interest Groups*, *supra* note 65, at 49-55, 86; Sunstein, *Naked Preferences*, *supra* note 65, at 1689-95.

But defining which preferences are “naked” requires some normative baseline. As Sunstein himself has stressed, the existing distribution of wealth in part reflects existing legal entitlements, which are themselves the product of governmental action.<sup>104</sup> One thus cannot condemn all governmental decisions that redistribute wealth—unless, that is, one adopts the status quo as one’s normative baseline. Sunstein rejects the status quo as a baseline, asserting that some governmental decisions to redistribute wealth are not “naked” because they promote the public good rather than reward “raw” political power.<sup>105</sup> But distinguishing the redistributions that are nakedly based on raw political power from those that promote the public good requires a theory of distributive justice. Sunstein nowhere articulates such a theory, but one might infer that his implicit baseline norm involves a more equal distribution of wealth.<sup>106</sup> The political power of an interest group, under this interpretation, is only disproportionate (or raw) when it exacerbates inequalities in wealth. Interest group influence that results in redistributions that reduce inequality is apparently not raw or naked but clothed with a public interest justification.

Such an egalitarian baseline can lead to conclusions about the excessiveness of interest group influence that differ significantly from the conclusions derived using an efficiency baseline. The differences are often present when efforts are made to change or reinstate the common law.<sup>107</sup> To the economist who believes the common law is generally efficient,<sup>108</sup> attempts to alter the common law will likely appear to be a manifestation of interest group influence. Under an egalitarian baseline, however, social welfare is not maximized by retaining or reinstating a common law regime that is wealth maximizing but does not redistribute wealth. Efforts to retain or reinstate the common law may thus seem to manifest the disproportionate influence of a certain group—namely, the most economically productive members of society.<sup>109</sup> To be sure, the economically less productive might be worse off if the law redistributed wealth more equita-

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104. See Sunstein, *Interest Groups*, *supra* note 65, at 51; Sunstein, *Naked Preferences*, *supra* note 65, at 1729.

105. Sunstein, *Interest Groups*, *supra* note 65, at 51; Sunstein, *Naked Preferences*, *supra* note 65, at 1729.

106. For a discussion of “Public-Interested Redistribution” and “Interest Group Transfers” that suggests this baseline, see CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 55-57, 69-71 (1990). See also Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 907 & n.168 (1987) [hereinafter Sunstein, *Lochner’s Legacy*] (citing Ackerman and Rawls as possible sources “to generate a baseline independent of either the common law or the status quo”).

107. Although property and tort rules have stronger distributional effects than contract rules, recent experimental evidence suggests that even waivable contract presumptions have some distributional effects. See Stewart Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEGAL STUD. 237 (1988).

108. See, e.g., POSNER, *ECONOMIC ANALYSIS*, *supra* note 6, at 229-33.

109. Indeed, because (as Part III will show) interest group theory also applies to efforts to influence the judiciary, the original adoption of the common law could also be seen as a demonstration that the most economically productive members of society had a disproportionate influence on the litigation process. Cf. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 212, 253-59, 266 (1977) (arguing that early American judges changed common law to subsidize commercial interests at expense of less powerful groups).

bly, because the resulting decrease in incentives to produce might leave little wealth to redistribute. But this may not always be true, and one cannot be sure what empirical conclusions those implementing an egalitarian baseline are likely to draw.<sup>110</sup>

Finally, a definitional system sometimes used by political scientists deserves mention. Professors Schlozman and Tierney, among others, have distinguished special interest groups from public interest groups on the ground that the latter seek “a benefit, the achievement of which will not benefit selectively either the membership or the activists of the organization.”<sup>111</sup> As one example, they cite the National Taxpayers Union (NTU), because if that group succeeds in cutting taxes “all taxpayers—not just NTU members or leaders—can enjoy the benefits.”<sup>112</sup>

But the conclusion that the NTU does not confer selective benefits is incorrect. Lowering taxes does not confer net benefits on everyone or even on all taxpayers. Some people pay no taxes to begin with, and will probably suffer from a decline in government benefits or services if taxes are lowered. Others may be taxpayers, but will suffer a net cost from NTU successes because the decrease in government benefits or services outweighs any decrease in the taxes they enjoy. The governmental action sought by the NTU thus selectively benefits those persons who will be better off with lower taxes. To be sure, many persons will benefit from NTU successes whether or not they contribute membership dues or volunteer time to the group. But all this means is that some beneficiaries of the interest group’s activity are free riders. Such free riding by nonexcludable beneficiaries is endemic to all groups.<sup>113</sup> Being nonselective in only this sense thus does not distinguish public interest groups from any other interest group.

Elsewhere Schlozman and Tierney suggest that what they really mean is that public interest groups have so many free-riding noncontributors that they

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110. See, e.g., Lucian A. Bebchuk, *The Pursuit of a Bigger Pie*, 8 HOFSTRA L. REV. 671 (1980) (arguing that legal policy of wealth maximization generally harms poor and benefits rich). The related claim that an efficient regime can always redistribute wealth better through the tax system is likewise empirically debatable. See *supra* note 100. Moreover, even if true, the claim would not defeat the objection that any legal change that maximizes wealth without being coupled with a redistributive tax reflects the “excessive” political influence of the economically productive.

111. SCHLOZMAN & TIERNEY, *supra* note 36, at 29, 37.

112. *Id.* at 29.

113. See OLSON, *supra* note 16, at 15-16. Similarly, Scholzman and Tierney are wrong in suggesting that the Sierra Club “by definition” does not confer selective benefits. SCHLOZMAN & TIERNEY, *supra* note 36, at 32. If one believes that the Sierra Club supports some environmental measures that impose economic costs exceeding the measures’ environmental benefits, then net costs are imposed on many people, especially the poor who may lack the resources and leisure time to enjoy the environmental benefits and who suffer more from the increase in consumer costs and the decrease in employment. See HARDIN, *supra* note 20, at 88-89. Under this view, those who benefit from Sierra Club activities benefit selectively. Of course, if one believes that every measure supported by the Sierra Club confers environmental benefits that, for every person, exceed the costs imposed on that person, then the Sierra Club does confer benefits nonselectively. But such a conclusion follows from a normative evaluation of the Sierra Club’s actions, not “by definition.”

are “underrepresented.”<sup>114</sup> If so, they have effectively defined a public interest group as a group with many diffusely interested members. But unless one adopts a simple normative baseline of influence in proportion to numbers, these characteristics do not alone show that a group is more likely to advance the public interest than other groups. They just show that the group is likely to be less organized. Scholzman and Tierney, who recognize that a lukewarm majority should sometimes lose to an impassioned minority,<sup>115</sup> are thus correct to refrain from drawing any normative conclusions based on their labelling of some groups as public interest groups.<sup>116</sup> But without such a normative implication, it is unclear why their distinction between public interest groups and other interest groups should be of interest.

One thus cannot apply interest group theory to condemn the political process without some independent normative baseline. One might object, however, that this normative baseline need not turn on the substance of outcomes. Imagine, for example, a baseline which accepts any political outcome that would have been reached under circumstances where each person had full information and equal political influence.<sup>117</sup> Such a baseline might seem purely process based. However, because interest group theory assumes that each participant acts solely in her self-interest,<sup>118</sup> applying such a baseline is identical to applying a standard that only upholds an outcome if the outcome benefits a greater number of persons than it hurts.<sup>119</sup> This standard, which I call the majoritarian baseline, turns on the substance of outcomes and is just one alternative to other substantive standards such as wealth maximization (which

114. SCHOLZMAN & TIERNEY, *supra* note 36, at 32.

115. *See id.* at 35-36.

116. *See id.* at 34-35.

117. *See* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda*, 6 J.L. ECON. & ORG. 167, 176-78, 181-82 (special issue 1990) (distinguishing “special interest policies” from “general interest policies” by defining latter as those policies that would be ratified by an informed polity without organization and monitoring costs).

118. *See supra* text accompanying notes 11-12. If one assumes, as do Levine and Forrence, that political motives may be other-regarding, *see* Levine & Forrence, *supra* note 117, at 174-75, a purely procedural baseline might theoretically be possible. But in practice the standard would be impossible to apply without using implicit substantive standards to assess what would have happened if everyone had full information and equal influence. *Cf. infra* note 124. Judges could not, for example, rely on referenda or polls as a reflection of what people really want because interest group theory predicts that organized groups will have a disproportionate influence on any political body, including the electorate. All voters will get more information from small intense groups, and voters who belong to small intense groups are more likely to absorb the information and to vote or express an opinion. *See supra* text accompanying notes 13-14. Moreover, interest groups will have a disproportionate influence on what issues get polled or put on the referendum and how the questions get framed. *See* ARANSON, *supra* note 6, at 604-05. Judges would thus have to deduce how the referenda or polls would have turned out if everyone had been equally informed and motivated and the questions were balanced. This will be hard to do without some implicit substantive standard.

119. It is, of course, possible for judicial review to condemn a law on process grounds unrelated to the application of interest group theory. Suppose, for example, that white landowners get a zoning ordinance enacted that, on its face, would pass rationality review but which was motivated by the desire to preserve property values by excluding blacks. Judicial condemnation based on such a racist motive would not be outcome dependent. However, the condemnation rests on norms that have little to do with interest group theory.

turns on whether the outcome benefits some by a greater number of dollars than it hurts others), utility maximization (same with utility), or distributive justice (which turns on whether the distribution of benefits and costs brings us closer to an equitable distribution).<sup>120</sup> In any event, whether substantive or procedural, majoritarian baselines are normatively unattractive because they do not account for the varying intensity of individual preferences.<sup>121</sup>

### B. *The Implications for Justifying Expanded Judicial Review*

The implications of the above analysis turn in part on what sort of expanded judicial review one wishes to justify with interest group theory. The implications are the most devastating for those proposals that, by requiring some threshold finding of (actual or likely) disproportionate interest group influence before more intrusive substantive review is triggered, seek to limit the scope of expanded judicial review to a subset of political action that results from interest group influence.<sup>122</sup> At first glance, these proposals might appear more promising because they leave the political process to operate absent a special defect and thus need not rely on the proposition that the problems of interest group influence are so pervasive that our democratic processes should *generally* be narrowed by expanding judicial review. Rather, the proposals could rest on the more modest proposition that, even if courts are not generally better societal decisionmakers than the other branches, at least courts can be expected to improve the decisionmaking process in those cases where interest group influence has undermined the political process.<sup>123</sup>

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120. One might instead condemn a law because of the methods used to petition for it, such as bribery or large campaign contributions. Such method-based condemnation would not be outcome dependent and might well stop certain interest group abuses. But it would not constitute a general proposal for more intrusive review in the sense I have defined it. *See supra* text accompanying notes 6-10. Moreover, method-based proposals alone cannot curb excessive interest group influence because the main lesson of interest group theory is not that special interest groups employ distinctive methods for influencing the government, but that they will be more successful in utilizing whatever methods are permitted. *See supra* text accompanying note 80; *see also* ARANSON, *supra* note 6, at 601-02 (discussing limits of campaign finance reform as a method of curbing interest group influence); Congleton, *supra* note 41 (concluding that, even without campaign contributions, special interest groups would enjoy extra influence because their members are more likely to engage in single-issue voting).

121. Of course, many constitutional clauses seem designed to protect intensely interested minorities from various harmful government actions. One might thus argue for a normative baseline wherein the majority should prevail on any issue not covered by the Constitution. But this baseline is hard to defend: the Constitution does not exhaustively cover all the situations where an intensely interested minority deserves to prevail. More important, for present purposes, such a conclusion would require substantive (and legal) justifications independent of interest group theory. One might also note the extreme implications of an interest group proposal founded on a baseline that incorporates such a constitutional theory. Courts would both be empowered, under the constitutional theory, to strike down any majority victory that was unjustifiable and be empowered, under the interest group proposal, to strike down (or at least narrow) any minority victory that was unjustifiable. The result would be to effectively transfer all (or most) lawmaking authority to the judicial process.

122. *See supra* Section I.B (describing proposals by Easterbrook, Eskridge, Sunstein, and Wiley).

123. *See, e.g.,* Wiley, *supra* note 66, at 764-69 (arguing that antitrust efficiency review should apply only to regulation resulting from producer capture because alternative would lead to "antitrust imperialism").

But the above analysis explodes the claim that one can effectively limit an expanded judicial review to a subset of cases by permitting the expanded review to be triggered only where courts make a threshold finding that interest groups have exercised excessive political influence. Whether courts will find any given level of influence excessive depends upon the normative baseline they use. The problem is not just that judges, being mortal, will likely succumb to the temptation to use implicit normative baselines; even an ideally conscientious and knowledgeable judge will be unable to separate judicial findings about whether interest group influence is excessive from normative conclusions about how much influence that interest group should have.<sup>124</sup> Thus, in making the threshold finding that supposedly narrows their normative discretion, judges will be making precisely the sort of normative judgment that the proposals seek to limit to a subset of cases. The result is no different than if the judge applied that normative standard to all cases.

For example, suppose a proposal suggests that, where a judge finds that a statute resulted from disproportionate interest group influence, the judge should be more willing to find statutory ambiguities and to interpret them against the interest group.<sup>125</sup> The judge must adopt some baseline to deter-

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124. The problem is thus related to, but distinct from, another problem: the difficulty of judicially determining whether courts can discern if interest group influence "caused" the governmental action. See MARK TUSHNET, *RED, WHITE, AND BLUE* 73-83, 94-107 (1988) (arguing that courts will have to make controversial empirical judgments if they take into account informal political obstacles like interest group theory). Determining what motivates the government has long been a problematic task, both practically and conceptually. See Seth F. Kreimer, *Allocational Sanctions*, 132 U. PA. L. REV. 1293, 1334-38 (1984) (describing problems). The problems are compounded when a court must determine what the government would have done "but for" the interest group influence. It seems likely that, while engaging in this counterfactual inquiry, courts will rely on some implicit baseline of how a government "undistorted" by interest group influence would behave. See *id.* at 1337; see also TUSHNET, *supra*, at 75 (concluding judges will resolve empirical disputes by consulting their own policy inclinations). If courts do use such implicit baselines, their application in deciding the causation question makes the baselines de facto norms for judging governmental action.

The problems are related in the sense that, in both, a nominally factual determination is rendered normative by an implicit normative baseline. The problems are distinct, however, in that one could imagine a conscientious judge with perfect information resisting the temptation to let her normative views affect her judgment about causation questions. In assessing whether interest group influence is disproportionate, however, the judge has no choice: the inquiry calls for a judgment that she can only make on normative grounds.

125. This proposal roughly corresponds to proposals by Easterbrook and Sunstein and to one of Eskridge's proposals. See *supra* section I.B. Eskridge's other proposal, that courts broadly interpret diffuse benefits/concentrated costs statutes, faces similar problems. His normative baseline here appears to be some general notion of majoritarianism: if a concentrated small group succeeds in limiting a statute benefiting a large diffuse group, judges should try to overcome those limits. If one uses other normative baselines, however, the desirability of broadly interpreting diffuse benefits/concentrated costs statutes is far from clear.

Recent work by John Dwyer, for example, argues that such statutes are likely to be marked by a pathology of symbolism because the need to mobilize large numbers of people requires legislators to announce a simplistic position that does not reflect the accommodation of competing concerns necessary to make the statute functional. See John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 245-46 (1990). Implicitly adopting a baseline that balances the benefits and costs of environmental regulation, Dwyer views interest group influence on environmental agencies as salutary because it forces some consideration of regulatory costs for "a statute whose costs are grossly disproportionate to its benefits." *Id.* at 234. Accordingly, he argues that courts should defer to agency interpretations that narrow symbolic diffuse benefits/concentrated cost statutes. See *id.* at 236, 311-15.

mine when a group's influence is disproportionate. A judge whose view of proper policy is economic efficiency will likely adopt that view as her baseline, finding interest group influence disproportionate whenever a statute is inefficient and then interpreting any plausible ambiguities to make the statute more efficient. A judge who has an egalitarian view of proper policy will likely adopt that view as her baseline, finding interest group influence disproportionate whenever a statute exacerbates inequality and then interpreting any plausible ambiguity to achieve a more just redistribution of wealth.

The result is precisely the same as if the proposal suggested that a judge should be more willing to find statutory ambiguities and to resolve them in accord with the judge's own view of proper policy. In either case, statutes conforming to the judge's normative view will be left untouched and other statutes will be interpreted to bring them into closer conformity with the judge's views. Worse, there may be no telling what normative baselines a judge will use.

Of course, one could imagine proposals that specify the normative baseline to be used in assessing interest group influence and the normative policy views to be used in the expanded judicial review. Moreover, one could imagine that the normative baseline used in assessing interest group influence might differ from—and be more limited than—the normative policy view applied in the expanded judicial review. For example, one might argue that judicial efficiency review is only appropriate where an interest group's influence is disproportionate to *both* its numbers *and* its economic interest.<sup>126</sup> Wouldn't such a proposal effectively limit the expansion of judicial review?

Although such proposals do limit the likelihood of judicial condemnation, they do so by weakening the normative judgment courts are authorized to apply, not by limiting the scope of governmental action subject to normative review by judges. The proposal sketched in the last paragraph, for example, would have more limited results than a proposal to review all governmental action under an efficiency standard. But the proposal has precisely the same effect as a proposal to have judges review all governmental action under a normative standard condemning any governmental action that is both inefficient and harms more persons than it helps.<sup>127</sup> The normative judgment condemning inefficien-

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Also undermining Eskridge's conclusion is McChesney's theory that politicians extract rents by threatening to enact laws imposing concentrated costs. *See supra* note 36. If McChesney is right, then some distributed benefit/concentrated cost statutes reflect the carrying out of the threats necessary to extract rents. Interpreting such statutes broadly would be undesirable under his baseline because it would enhance, rather than undermine, the credibility of the threat.

126. *Cf.* TULLOCK, *supra* note 91, at 20 (describing typical rent seeking as situations where "[t]otal losses are greater than the total gains" and "the number of people who gain is much smaller than the number who lose"); Wiley, *supra* note 66, at 765-69 (arguing that, to avoid "antitrust imperialism," antitrust efficiency review should apply only where regulation resulted from producer capture).

127. Where the normative baseline used in assessing interest group influence does not overlap the normative policy view used in the expanded judicial review, the resulting review is cumulative but still normative. It effectively calls on judges to review all governmental action under a normative standard that condemns only governmental action that contravenes both the normative view implicit in the baseline and

cy that harms the majority is less sweeping, and perhaps more attractive, than the normative judgment condemning any inefficiency.<sup>128</sup> But one should recognize that the proposal nonetheless calls for judges to review all governmental action under the stipulated normative policy view. If judges should expand their review of governmental action, it would be better (and certainly less misleading) for scholars to make the normative argument directly and for judges to apply the stipulated normative view openly rather than smuggling it into a seemingly factual and process-based determination of whether interest group influence was disproportionate.

The analysis so far reveals that proposals advocating an increased judicial activism that is triggered by findings of capture or disproportionate interest group influence do not avoid the problems of general judicial substantive review. What, however, are the implications for the proposals that judicial review of all governmental action should be expanded? What, for example, of the arguments that, because interest group theory demonstrates the general unreliability of the political process, judges should narrowly interpret all statutes or intensify rationality review of any governmental action?

One implication is that attention should focus on the underlying normative justifications rather than the potentially misleading implications of interest group theory. The key point again is that interest group theory offers no reason for condemning our political process that stands independent of our condemnation of the results of that political process. As argued above, condemning interest group influence as disproportionate in any particular case is effectively

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the normative view applied in the expanded judicial review.

Although unavoidably normative, some might support such a proposal on administrative grounds. Suppose, for example, we have a normative consensus that inefficiency is undesirable, but believe that it would be administratively unfeasible for courts to review the efficiency of all legislation. One might then propose judicial efficiency review only when triggered by a finding that a statute, for instance, harmed ten times as many persons as it helped. Such a proposal would, however, be indistinguishable from a proposal that courts judge all statutes under a two-part normative standard that condemned any statute which (1) harmed ten times as many persons as it helped, and (2) was inefficient. Indeed, the proposal might be somewhat less administrable than such a two-part standard because sometimes it will be harder for a court to determine the numbers of persons harmed and helped than for a court to dismiss a case by concluding that no inefficiency existed.

If aimed at eliminating inefficiency, the proposal also suffers from two further problems. First, the threshold finding bears no necessary connection to efficiency. As the rent control example shows, inefficient laws can benefit large groups as well as small. *See supra* text accompanying note 101. Some empirical research would be needed to show that the proportion of laws that are inefficient is greater when small groups are benefitted than they are for statutes in general. Second, even if we have this empirical foundation, one must demonstrate that the proportion of judicial decisions that are inefficient would not be even greater. This second point is explored further in Parts III and IV.

128. One could, of course, imagine proposals that embody even more narrow (and thus more attractive) normative judgments. For example, a proposal might authorize expanded judicial review only when interest group influence was disproportionate to *both* its numbers *and* its economic interest, *and* resulted in regulation that exacerbated inequality. Such a proposal, however, simply embodies the normative judgment that it is undesirable to take action that is inefficient, exacerbates inequality, and harms more persons than are helped. This normative judgment may often be justifiable, although arguably many popularly accepted features of our social security program violate all three of these standards, but the justification—and its limits—must be derived from some normative theory, not from interest group theory.



the same as condemning the political result in that case. For the same reasons, a more general judgment that the political process is pervasively distorted by interest group influence is effectively no different than a judgment that the results of the political process are pervasively undesirable. Perhaps one could make such a case, and also make the necessary showing that the results of judicial review would be pervasively better, but the argument would require much more than describing the collective action analysis set forth in Section I.A.

This point is often obscured because observations about interest group influence have a procedural flavor that submerges the underlying substantive judgment. Those arguing for expanded judicial review base their argument on the claim that interest group activity is systematically undermining the political process. They do not couch their argument in the underlying substantive terms. Those who, for example, use the economists' version of interest group theory, suggest that interest groups are undermining democracy, not just that the government enacts too many inefficient laws. The former method of phrasing the argument will have little adverse effect if the real meaning of the terms is understood. But there is a real risk that the seemingly procedural character of the former argument will misleadingly persuade some decisionmakers who disagree with the underlying substantive claim or who believe the claim is insufficient to justify more intrusive judicial review.

Suppose, for example, the issue is how judges should interpret statutes when the legislative materials are ambiguous. Two judges believe courts should resolve any ambiguity in accord with certain substantive values. One of the judges believes the substantive value should be efficiency; the other judge believes the substantive values should be drawn from some historical understanding of our country's values. A third judge believes that any effort to resolve ambiguities with substantive values will make courts too ready to find ambiguities, and she thus insists that judges discipline themselves by resolving ambiguities on solely formal grounds.

Now the proposal is made to these three judges that, whatever their other views of statutory interpretation, they should all interpret any ambiguity against special interest groups. If the judges do not realize that the special interest groups have been defined using normative baselines, they may be misled into adopting this rule of statutory construction. But the interpretive rule aids none of them and may undermine the theories of statutory interpretation they otherwise hold. Suppose, for example, special interest groups are defined by whether their political influence exceeds their economic interest. In that case, the judge who believes in applying an efficiency standard in resolving statutory ambiguities gets no additional mileage from interest group theory. The judges who, on the other hand, believe efficiency (or any normative standard) should *not* be used to resolve statutory ambiguities have been misled, if interest group theory persuades them to adopt the proposal, into exercising a form of judicial

review that implicitly uses precisely the type of substantive efficiency review they wish to avoid. My point is not that efficiency would be a bad standard, but if it is to be adopted, its adoption should not proceed under false pretenses.

The pseudo-procedural and vague nature of conclusions about when interest group influence is excessive also creates a false sense that there is broad agreement cutting across political lines. Because the baselines used in assessing interest group influence are implicit rather than express, persons of all political stripes decry the excessive political influence of interest groups. Excessive interest group influence thus appears to be a universal problem recognized and condemned by all observers. But this cross-cutting consensus is much like the cross-cutting consensus we can get on propositions such as "unfairness is undesirable" or "statutes should advance the public interest." Everyone seems to agree, but only because they harbor their own differing conceptions of what is unfair, what advances the public interest, and, in this case, when interest group influence is excessive. The liberal is, for example, more likely to conclude that affirmative action is fair, advances the public interest, and does not manifest excessive interest group activity. The conservative is more likely to conclude affirmative action is unfair, contrary to the public interest, and another manifestation of interest group influence. In short, when the liberal and conservative condemn excessive interest group influence, they are actually condemning a different array of outcomes. The only conclusion we can draw from the fact that persons of all political stripes seem unhappy with interest group activity is that everyone is unhappy with at least some results of the political process. That conclusion is hardly inconsistent with the proposition that the political process is working fairly well.

Indeed, interest group theory suggests that organizational activity may, in a rough way, offset the tendency a democratic government would otherwise have toward majoritarian exploitation. A perennial problem with a system of majority rule is that voting generally takes no account of how intensely different voters feel about the issues. Under a system of majority rule, informed voting by everyone would underweigh the interests of an intensely interested minority. Interest group theory, on the other hand, suggests that such intensely interested minorities will face less severe free rider problems in forming a political organization. This collective action advantage should sometimes enable the intensely interested minority to achieve political success that is socially desirable. The minority might block the enactment of laws that would undesirably cause much more harm than good (under a stipulated measure of social desirability) by distributing small benefits to a large number of persons and inflicting huge injury on a small number. Or the minority might secure the enactment of laws that will desirably cause much more good than harm (under the stipulated measure) even though these laws confer huge benefits on a small number of persons and impose minor costs on a large number. Such political

success by the minority might be regarded as not only desirable but necessary for the legitimacy of majoritarian rule.<sup>129</sup>

Thus, democratic bias and the concern about majoritarian exploitation may roughly tend to offset the free rider problem and the concern about minorities exploiting the majority. A group's observed willingness to expend the political resources necessary to achieve political success could be taken as evidence of the group's "revealed intensity," much as economics takes a person's observed willingness to buy or not buy a good at a given price as evidence of that person's "revealed preference" for that good.<sup>130</sup> One might accordingly deem whatever outcomes result from this political system as presumptively desirable.

To be sure, given the way the distribution of voting power and organizational advantage can bias the outcome, this measure of "revealed intensity" is rough indeed. But there is no clear reason to think this measure is any rougher than the measure of revealed preference commonly used in private markets, which is obviously heavily biased by individual variance in ability to pay. In both cases, relying instead on what groups/persons claim as their intensity/preference seems more likely to result in overclaiming than in increased accuracy.<sup>131</sup> Just as the revealed preferences used in our economic markets free us from making impossible interpersonal utility comparisons,<sup>132</sup> so too revealed intensity could be said to free us from making equally impossible intergroup utility comparisons in the political market.

Nor does the revealed intensity definition of socially desirable political outcomes seem inherently worse or rougher than other definitions, like wealth maximization, majority preference, or egalitarianism. Each of these seems an imperfect reflection of what individuals value: wealth maximization ignores the distribution of wealth; majoritarianism ignores the varying intensity of individual preferences; and egalitarianism undermines (and, in the extreme, eliminates) incentives to produce.<sup>133</sup> Each normative standard thus has its limits. Although revealed intensity has its own limitations, it at least has the attractive features

129. See generally MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 219-20 (1964) (pointing out that majority rule is often in tension with democratic theory, particularly when minority is more intensely interested than majority).

130. See, e.g., William Baumol, *The Empirical Determination of Demand Relationships*, in *MICRO-ECONOMICS: SELECTED READINGS* 67, 71-76 (Edward Mansfield ed., 5th ed. 1985).

131. Cf. POLINSKY, *supra* note 100, at 136 (noting that asking individuals how much they value a loss is likely to result in overclaiming).

132. See Hovenkamp, *supra* note 56, at 65.

133. Of course, not all theories of distributive justice are as simplistic as crude egalitarianism. John Rawls, for example, argues that distributive justice requires society to maximize the welfare of the worst-off individual. See JOHN RAWLS, *A THEORY OF JUSTICE* 75-83, 150-61 (1971). But this theory has proven highly controversial. It presumes that, behind the veil of ignorance, we are remarkably risk averse. See MUELLER, *supra* note 22, at 417-19. A more plausible assessment of risk aversion would lead to different results: behind the veil of ignorance we would willingly consent to a system that does not maximize the worst-off person's welfare, despite the risk that we may end up being the worst-off individual, provided that the system sufficiently benefits us if we end up being better off. See also *id.* at 421-23 (collecting experimental evidence that persons do not in fact choose Rawls' principle when defining ex ante distribution rules).

of being somewhat self-correcting and of providing an outlet for intense opposition to governmental laws.

In any event, if normative standards such as efficiency or egalitarianism are attractive, the basis for their attraction does not lie in interest group theory. They must be independently justified. Individually, we can each use interest group theory in conjunction with our own normative beliefs to reach individual conclusions about how the political process reaches undesirable outcomes. But interest group theory cannot generate the normative baselines necessary to draw these conclusions. Nor can interest group theory demonstrate that the polity, however ideally defined, shares the normative standards used in these baselines.<sup>134</sup> If we believe that we have an independent basis for deriving collective normative standards, interest group theory does not help us—for we or our judges could apply those independent normative standards directly. If we instead believe that only the polity can define the normative standards of society, interest group theory leaves us with no solid ground for collective condemnation at all.

### III. INTEREST GROUP THEORY DOES NOT DEMONSTRATE THAT THE LITIGATION PROCESS IS LESS DEFECTIVE THAN THE POLITICAL PROCESS

For some, the argument in Part II may be sufficient to conclude that interest group theory provides no affirmative justification for more intrusive judicial review. Without some independent normative standards, interest group theory does not justify a condemnation of the political process. To a value relativist who believes that no objectively correct choice can be made between conflicting normative judgments (at least not in any case of interest), we have no source for normative standards that are independent of the result of some political process. Nor can we be sure that an “undistorted” polity would share any normative judgments used in a baseline to measure interest group distortion.

Other readers, however, may still find interest group theory relevant because it weakens a faith they would otherwise hold that the democratic process does not produce certain results that are undesirable under specified normative baselines. For example, suppose one were independently convinced (on grounds other than interest group theory) that political outcomes which are inefficient and harm the majority are undesirable, but believed that such outcomes would seldom be possible in a democracy. Interest group theory, by undermining the latter belief, would suggest to that person that the political process operates less well than she had thought. More generally, one’s faith in

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134. Note that this is true even if one uses a crude majoritarian baseline and defines the polity as an informed majority: while a fully informed majority would, under interest group assumptions of self-interest, vote for any law that favored the majority, it might reject a majoritarian baseline as the standard for judging laws because such a standard would not, over all laws, maximize their expected welfare.

the democratic process might be shaken because, if accurate, interest group theory suggests that under practically *any* normative baseline or array of baselines that can be specified (other than the “revealed intensity” baseline sketched out in the last section), the political process will often produce undesirable results.

But justifying an expansion of judicial review requires more than a demonstration that the political process often produces defective outcomes. It requires a demonstration that expanding the realm of judicial decisionmaking would reduce the possibility of defective outcomes. After all, we have no guarantee that judges empowered to review laws will only strike down (or narrowly interpret) undesirable political outcomes; their review may also produce (or broadly interpret) undesirable political outcomes and strike down (or narrowly interpret) desirable political outcomes. Interest group theory can justify more intrusive judicial review only if it shows that the litigation process has some *comparative advantage* over the political process.<sup>135</sup>

Those advocating more intrusive judicial review rarely address this comparative question.<sup>136</sup> Instead the tendency is to emphasize the flaws of the political process and then assume without analysis that the litigation process will operate better. The litigation process plays the role of a *deus ex machina* that can correct the flaws that grip the other lawmaking branches but is apparently without flaw itself.

But the litigation process cannot be treated as exogenous to interest group theory: it too is susceptible to interest group influences. Under the analysis developed in Section I.A, individual members of groups that would benefit from favorable legal precedent have free rider incentives not to contribute toward the costs of establishing that precedent because they must share the benefits with other group members. Large diffuse groups unable to organize effective efforts to influence the political branches, where they at least have the advantage of more votes, are also likely to be unable to organize effective efforts to influence the litigation process. Accordingly, the same interest groups that have an

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135. Frederick Schauer has recently suggested that opposition to expanding judicial lawmaking must be based on the empirical premise that the likelihood of bad judicial decisions outweighs the likelihood of good ones. See Frederick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653, 663-67 (1991). (More precisely, he states that the expected disvalue must exceed the expected value, but I here assume for expositional clarity that the magnitude of good and bad for all decisions is equivalent.) Even if we focus only on outcomes (and thus leave aside concerns about the legitimacy of processes), Schauer's suggestion is untrue. Opposition to expanded judicial decisionmaking need only be based on the empirical premise that judges are less likely to make good decisions than the political branches. Suppose, for example, that the mix of good/bad decisions is 60/40 for judges and 80/20 for legislatures. We now expand judicial review to encompass an additional 100 statutes. Our assumed percentages mean that 20 of these statutes will be bad and that judges will strike down 60% of them, creating 12 additional good outcomes and leaving 8 bad ones. But 80 of the statutes will be good and judicial review will strike down 40% of those, creating 32 additional bad outcomes and leaving 48 good ones. The result is that expanding judicial review reduces the mix of good/bad outcomes from 80/20 to 60/40, even though judges are more likely to make good decisions than bad ones.

136. A notable exception is Eskridge, *supra* note 73, at 298-309, whose arguments I discuss below.

organizational advantage in collecting resources to influence legislators and agencies generally also have an organizational advantage in collecting resources to influence the courts. Increasing the lawmaking power of the courts may only exacerbate the influence of interest groups.

We thus need to examine whether there is any reason to believe that the litigation process is less susceptible to interest group influence than the political process,<sup>137</sup> and whether any factors that make it less susceptible are likely to make it better at lawmaking. Although rarely delving directly into these comparative assessments, the literature taken as a whole suggests four reasons for having greater faith in the litigation process. First, some argue that the common law process of lawmaking allows the law to evolve toward efficiency. Second, class actions help groups overcome the free rider problem in litigation. Third, the adversarial structure of litigation guarantees that at least two viewpoints are represented. Finally, the litigation process is more insulated from political influence and thus from interest groups. I address each of those arguments in turn in the following sections.

#### A. *The “Evolutionary” Common Law Process*

One commonly cited advantage of judicial decisionmaking is that, under the common law process, judges cannot set their own agenda; judicial lawmaking authority must be triggered by a party’s decision to litigate, and is generally incremental and subject to appellate review. Using the same assumption of self-

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137. A separate argument for more intrusive judicial review rests not on the proposition that courts are less susceptible to interest group influence but rather on the ground that the courts represent a different set of interest groups: namely those that are underrepresented by the political process. See SHAPIRO, *supra* note 63, at 2, 17-25, 31-39. Others have noted that Martin Shapiro’s theory does not explain why we should expect the Court to be “systematically responsive to the *least* politically influential segments of the society.” Landes & Posner, *supra* note 12, at 876. Nonetheless, the nature and size of petitioning costs no doubt differ before different governmental institutions; one might thus expect that a somewhat different array of interest groups would enjoy success in different forums. Some groups may, for example, be better at marshaling the bodies that make effective political protest, others at attracting or paying for the best legal counsel. Power sharing among different institutions might thus be expected to result in the representation of a wider array of interest groups.

It is difficult, however, to see how this provides an affirmative argument for more intrusive judicial review. Under this theory, some interest groups already enjoy a representational advantage before the courts—why should we favor expanding the influence of these interest groups and contracting the influence of others? See generally R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 15, 347, 349-50 (1983) (providing groups defeated in other forums with access to judicial review means increasing power of those groups at expense of others). That the political process “underrepresents” some groups in the sense that they could do better in the litigation process does not show that they are normatively “underrepresented” in a way that justifies more intrusive judicial review. By that logic, one could equally well say that judicial deference should be expanded because the interest groups that do well in the political process are “underrepresented” by the litigation process. As Part II shows, conclusions that a group deserves more or less representation require a normative baseline that interest group theory does not provide. In any event, the interest group analysis to date does not (in part for reasons set forth in Parts III and IV) convince me that the set of groups that will, under interest group theory, enjoy success in the litigation process are very different from—or more deserving than—the set of groups the theory predicts will enjoy success in the political process.

interested behavior that underlies interest group theory, the field of law and economics has developed an evolutionary theory, which argues that rules formed through such a common law process will naturally tend to evolve toward efficiency. At least for those who believe that laws should be efficient, this would suggest that forming and changing legal rules through a common law process has a comparative advantage over lawmaking through the political process.<sup>138</sup>

First articulated by Paul Rubin,<sup>139</sup> the basic thrust of this evolutionary theory is that litigation challenges to inefficient precedents will be more frequent and skillful than challenges to efficient precedents. Assuming efficiency is defined as wealth maximization, those aggrieved by an inefficient rule suffer costs that, by definition, exceed the benefits to those who profit from the rule, and an inefficient rule imposes greater net costs than would a more efficient rule. Further, the theory notes, litigation is costly and will only be pursued to the extent that the benefits parties derive from litigation exceed its costs. Because the benefits from overturning a precedent are greater if the precedent is inefficient, parties are more likely to pursue litigation (to trial or on appeal) when it challenges inefficient precedents than when it challenges efficient precedents.<sup>140</sup> For similar reasons, parties challenging inefficient precedents (or defending efficient ones) will tend to expend more resources than their opponents on making skillful legal arguments.<sup>141</sup>

This difference in the frequency and skill of litigation will, evolutionary theory concludes, create a tendency for the law to evolve toward efficiency regardless of whether judges generally have the ability or the desire to make the law more efficient. Even if judges randomly decide which side wins in litigation, the increased frequency of litigated challenges to inefficient rules will

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138. See Macey, *supra* note 13, at 264-65 & n.189 (citing evolutionary theory to support proposal that judges should narrowly construe statutes in derogation of common law); see also Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1091-94 (1989) (reviewing literature and concluding that, if accurate, evolutionary theory justifies less judicial deference); Eskridge, *supra* note 73, at 306-07 (arguing that these features of common law process give courts comparative advantage but not noting that these features are same ones that underlie evolutionary theory).

139. Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977). For some of the other literature in the field, see John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

140. Priest, *supra* note 139, at 65, 67, 73; Rubin, *supra* note 139, at 51, 53-55. Although the theory generally emphasizes the decision to try a case rather than settle it, the logic underlying the theory would also seem to apply to the decision to pursue an appeal rather than accept an adverse judgment.

Another argument for differential litigation frequency is that inefficient rules will generate more legal disputes, and thus more litigation, than efficient rules. See Priest, *supra* note 139, at 74. Although in some instances an inefficient rule does seem more likely to generate legal disputes (such as when the inefficient rule generates more accidents), in other instances it seems likely to generate inefficient efforts to avoid disputes (such as a bad malpractice rule that induces competent doctors to cease practicing obstetrics). The literature has not yet developed any persuasive explanation for why, as a general matter, economically inefficient rules should generate more legal disputes than efficient rules.

141. Goodman, *supra* note 139.

make those rules more likely to be reexamined, and overruled, than efficient rules.<sup>142</sup> And assuming judges respond favorably to skillful legal arguments, the generally greater skill of legal arguments for efficient rules will, on balance, give challenges to inefficient rules a higher probability of success than challenges to efficient rules. Thus, over time, and without any conscious design, the common law process of making law through litigation will tend to displace inefficient rules in favor of efficient ones.<sup>143</sup>

However, as may already be evident, this analysis faces serious problems under interest group theory. Namely, as Paul Rubin himself has come to acknowledge,<sup>144</sup> the collective action problems described by interest group theory undermine evolutionary theory's premise that those with the greater economic interest will invest in more frequent and skillful litigation. Just as with laws enacted by statute or regulation, so too laws (or precedents) adopted through adjudication tend to confer benefits on a class of persons, whether or not they contribute to efforts to get that law adopted. This creates the same free rider problems that face groups in petitioning political actors; the groups that enjoy organizational advantages in collecting resources to petition the political branches should also enjoy the same advantages in collecting resources to petition the courts. Groups that are less susceptible to free rider problems, or better able to curb them, should fund more frequent and more skillful litigation than their counterparts.

Thus, far from explaining why the litigation process should be less susceptible to interest group influence than the political process, evolutionary theory

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142. Robert Cooter and Lewis Kornhauser have questioned the assumption that parties are more likely to pursue litigation challenging inefficient rules. They argue that, because *stare decisis* usually results in precedent being sustained, challenging an inefficient rule will likely result in the enforcement of an inefficient outcome that could have been avoided through settlement. See Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139, 155-56 & n.33 (1980). They thus suggest that challenges to inefficient rules may be *less* frequent than challenges to efficient rules because parties may have more to fear from challenging an inefficient rule than an efficient one. *Id.* at 155. However, the fear that challenging an inefficient rule will result in court-enforced inefficiency does not seem very significant because, even after a challenge is adjudicated, parties ordinarily can reach a settlement (on appeal or remand) that reflects the distributional aspects of the judgment but avoids actually carrying out any inefficient aspects. Parties might instead fear that unsuccessful challenges to an inefficient precedent will strengthen it. See POSNER, *ECONOMIC ANALYSIS*, *supra* note 6, at 528. But repeated challenges to precedent may weaken its authority even if the challenges do not succeed in overturning the precedent, as one might infer from contemporary litigation surrounding *Roe v. Wade*, 410 U.S. 113 (1973). (The point is not that *Roe* was inefficient in any meaningful sense, but simply that precedent is not always strengthened by repeated challenge.)

143. See Rubin, *supra* note 139, at 55, 61 (emphasizing that this evolutionary process does not depend on judicial preferences); Priest, *supra* note 139, at 68, 75-81 (same). Blind evolution will not result in complete efficiency because some proportion of the rules will remain inefficient. See Cooter & Kornhauser, *supra* note 142, at 141-45. Moreover, under some judicial decisionmaking processes, increasing the likelihood that litigants will challenge inefficient rules may not increase the overall efficiency of legal outcomes. See Lewis Kornhauser, *Notes on the "Logic" of Legal Change*, in *SOCIAL RULES: ORIGIN; CHARACTER; LOGIC; CHANGE* (David Braybrooke ed., forthcoming 1992).

144. See Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205, 211-14 (1982); see also Marc Galanter, *Why the "Haves" Come Out Ahead*, 9 LAW & SOC. REV. 95, 98-104 (1974) (discussing, from a sociological perspective, the strategic advantages repeat players enjoy over one-shot litigants).



explains the very mechanisms by which interest groups are likely to exert their "disproportionate" influence over the litigation process. This suggests not only that the litigation process is susceptible to interest group influence, but that increasing the lawmaking power of courts will simply encourage interest groups to invest more resources in litigation and thus exacerbate their influence over the litigation process.

Moreover, to the extent it has force, evolutionary analysis could just as well be applied to the political process.<sup>145</sup> Inefficient statutory and regulatory rules, like inefficient common law rules, confer fewer benefits and impose greater costs than do efficient rules. Parties aggrieved by an inefficient statute or regulation thus gain more from its repeal or nonenactment than their opponents gain from its retention or enactment. Parties who profit from an efficient statute or regulation gain more from its retention or enactment than their opponents gain from its repeal or nonenactment. Applying the same analysis, one might thus expect that efforts to repeal or block inefficient statutes or regulations (and efforts to retain or enact efficient statutes or regulations) will be more frequent and successful than counterefforts. If so, statutes and regulations will also tend to evolve toward efficiency. And, in fact, the literature arguing that the common law tends to evolve toward efficiency has a parallel in the statutory and regulatory world: Gary Becker's work arguing that, in the political arena, competition among interest groups will tend to lead to efficient laws.<sup>146</sup>

In both the judicial and political processes, a mixed picture is more accurate. Where efficient rules benefit organized groups at the expense of less organized groups, those rules are likely to become law in either forum. Where inefficient laws benefit organized groups at the expense of disorganized groups, the result is more uncertain. Sometimes the increased frequency and intensity of petitioning associated with better organization will exceed the increased frequency and intensity associated with opposition to inefficient laws. Sometimes the opposite will hold true. In any event, evolutionary theory provides no reason to believe that any disproportionate influence associated with better organization will be more pronounced in the political process than in the litigation process.<sup>147</sup>

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145. See GORDON TULLOCK, TRIALS ON TRIAL 198 (1980); Rubin, *supra* note 144, at 211-19.

146. See Becker, *supra* note 13, at 371, 373, 383-84, 386, 396. Becker realizes that some groups have an advantage in exerting political influence. See *id.* at 377, 379-80. He argues, however, that even such groups must overcome bigger obstacles in pursuing inefficient laws than in pursuing efficient (or less inefficient) laws. See *id.* at 383-84, 395-96. As a result, interest group competition has some tendency toward efficiency, though groups that are particularly efficient in generating political pressure may still garner subsidies. See *id.* at 386, 395. He thus does not conclude that the political equilibrium will eliminate all inefficient subsidies, but rather that a tendency will exist toward efficiency and toward more efficient forms of subsidization. See *id.* at 395-96. Becker's conclusions have, however, largely been ignored by public choice scholars. Rose-Ackerman, *supra* note 10, at 342 n.7.

147. Whether or not the common law *process* is prone to efficiency, there is of course a separate argument that the *substance* of the common law *is* efficient. See POSNER, ECONOMIC ANALYSIS, *supra* note 6, at 229-33. But even if this is true, these efficient common law rules can be undone by courts as well as by the political branches. Indeed, many law and economics scholars bemoan current judicial trends in

## B. *Class Actions*

William Eskridge has argued that one structural factor making the judicial process less susceptible to interest group influence than the political process is the availability of class actions in litigation.<sup>148</sup> Class actions, he argues, help curb free rider problems because they allow “entrepreneurial counsel” to organize a group that collectively finances the litigation through fees payable out of class action awards.<sup>149</sup> In this way, large diffusely interested groups that go unrepresented in the political process can get represented in litigation.

Class actions, however, are by no means always feasible whenever free rider problems regarding lawmaking exist. Such free rider problems exist when numerous persons cannot be excluded from the benefits of a favorable law produced by successful petitioning. But bringing a class action requires more than showing that class members share common interests in a particular legal issue; it also requires other factual demonstrations, most typically a showing that common legal or factual issues “predominate” their lawsuits.<sup>150</sup> And even if a class action is legally possible, it may not be feasible. To bring a class action seeking monetary relief, normally someone must incur the costs of notifying the class, and lawyers must incur the risk that they will not earn any fee if they lose or fail to get the class certified.<sup>151</sup> In the Agent Orange class action litigation, for example, five plaintiffs’ attorneys had to invest over two million dollars of their own funds to prepare for trial.<sup>152</sup> These large financial costs will often be sufficient to discourage anyone from bringing or pursuing class actions.<sup>153</sup> Moreover, where the class action seeks nonmonetary relief, and thus does not create a common fund, class action lawyers will get no recovery unless a fee-shifting statute is in place.<sup>154</sup>

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common law adjudication. *Cf.* Rubin, *supra* note 144, at 207, 209-10 (arguing that modern statutes and common law decisions are both inefficient). In any event, unless the current litigation process is more prone to efficiency than the legislative process, the claim that substantive common law is efficient is not an argument that transferring lawmaking power to the courts will improve governmental decisionmaking. Rather, it is an argument for preserving the status quo that supports more intrusive judicial review only on the ground that such review will make it harder for the government to change the law. I address that argument in Part IV.

148. Eskridge, *supra* note 73, at 303-04; *see also* ARANSON, *supra* note 6, at 512-13.

149. Eskridge, *supra* note 73, at 304.

150. FED. R. CIV. P. 23(b)(3); *see also* Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 37-39 (1982) (arguing that the case law requires near unity of interest among class members).

151. *See* Chayes, *supra* note 150, at 28-37 (outlining practical obstacles to class actions); John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney*, 86 COLUM. L. REV. 669, 684-90 (1986) (arguing that plaintiff’s attorney often has insufficient incentive to pursue litigation because she only gets portion of benefits of litigation).

152. Coffee, *supra* note 151, at 669-70 n.1.

153. Other practical obstacles may be posed by rules that limit who is qualified to serve as a named plaintiff and that subject class action attorneys to certain ethical charges. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation*, 58 U. CHI. L. REV. 1, 5-6, 61-105 (1991).

154. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 260-71 (1975).

A more fundamental problem is that class members have little choice in selecting who represents them in a class action. For class actions under rule 23(b)(3), the only effective choice available to diffusely interested members is whether or not to opt out of the class.<sup>155</sup> If the class action proceeds under rule 23(b)(1) or (b)(2), class members may not even have this choice.<sup>156</sup> Although, where applicable, the right to opt out certainly gives class members some say, it is difficult to see why the right to opt out should be regarded as more effective than the right to vote in general elections. The exercise of both rights seems likely to be marked by rational ignorance because, for each right, the costs of absorbing, analyzing, and acting upon the available information will often exceed the expected benefit from exercising the right in an informed manner.<sup>157</sup>

Indeed, the ability to select “political entrepreneurs” through voting<sup>158</sup> seems in many respects more effective than the right to select “entrepreneurial counsel” through opting out. In voting, individuals at least have a choice between candidates. In class actions, however, members can only choose between accepting or rejecting the representative the court has approved. Because of their small individual stake, it will not be feasible for them to fund their own representative; and because most of the class will not opt out, another lawyer is unlikely to come forward to represent the members who opted out. The opt-out choice thus has some similarities to voting with only one candidate on the ballot. And where class actions are not possible, diffusely interested persons get no representation at all in the litigation process, whereas in the political process they can at least be represented to some extent through voting.

There is also a coercive element to the opt-out choice. The voter who votes against the only candidate on the ballot will not be excluded from whatever collective benefits that candidate provides. But the class member who opts out of an action seeking monetary relief will be excluded from the benefits of the litigation (which will almost certainly proceed) and will usually find it infeasible to collect those benefits through a separate class action. Class members may thus decline to opt out of the offered representation—even though they would prefer a different representative—because they would likely receive no representation, and no recovery, if the class action goes forward without them. The coercion is similar to that posed by a tender offer, where shareholders may

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155. See FED. R. CIV. P. 23(c)(2). Class members can decide to fund their own representation, *see id.* 23(c)(2)(C), but for any diffusely interested member, this option will not be feasible.

156. See FED. R. CIV. P. 23(c)(3).

157. For both rights, the expected individual benefits from becoming sufficiently informed to exercise the right intelligently are far less than the collective benefit. This is because the individual discounts from his expected benefit: (1) the share of group benefits the individual does not receive; (2) the likelihood that absorbing the information will not change the individual's decision; and (3) the likelihood (which approaches 100% as the group grows large) that any individual member's vote (or opt out) will not make any difference to the collective outcome. *Cf.* MUELLER, *supra* note 22, at 205-06 (describing “rational ignorance” problem in voting).

158. See *supra* text accompanying note 36 (discussing literature on political entrepreneurs).

decide to tender their shares not because they want the tender offer to succeed but because they fear that their shares will have less value if the tender offer goes through and they are stuck in a minority position.<sup>159</sup>

All of this means that in class action litigation diffusely interested members have little ability to select or influence the attorney who acts on their behalf.<sup>160</sup> The class action attorney may have policy views that differ from the views of class members.<sup>161</sup> Worse, the attorney often has financial incentives to litigate in ways that do not advance the net interests of the class. In particular, lawyers may bring claims that offer a significant chance of recovery (in which the lawyer can share) even though the claims will increase each member's indirect or future costs by more than the recovery is worth.<sup>162</sup> The attorney also has strong incentives to agree to settlements with favorable fee arrangements even though the class members would prefer other settlements or further litigation.<sup>163</sup>

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159. See, e.g., Lucian A. Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693, 1696, 1708-35 (1985) (describing coercion problem in tender offers). For tender offers, Bebchuk proposes that each shareholder be entitled to tender but vote separately on whether or not they want the tender offer to succeed. See *id.* at 1698-99, 1747-64. This same solution might be applied to class actions. Class members could be permitted to opt in but vote separately on whether or not they approve the class representatives and lawyers. A majority vote against those representatives would mean that different representatives must offer their services for the class action to proceed. Note, however, that this would only eliminate the coercive element; it would not eliminate the rational apathy problem or make voting for litigation representatives any more reliable than voting for legislative representatives.

160. In practice, class action lawyers generally make decisions on behalf of the class because the named plaintiffs lack a sufficient stake to monitor the litigation. See, e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 534-45 (1991); Coffee, *supra* note 151, at 677-79. Moreover, even if the named plaintiffs do express an opinion, the class action attorney is not necessarily obligated to follow it. See Macey & Miller, *supra* note 153, at 41-44. In any event, in those few cases where named plaintiffs exercise actual decisionmaking authority, the problem remains that the other class members have no effective voice other than the decision to opt out.

161. See, e.g., Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1210-12 (1982).

162. See Coffee, *supra* note 151, at 680-81. For example, successful securities class actions may make it more costly for the plaintiffs to trade securities in the future; products liability or environmental class actions may make jobs scarcer or consumer goods more costly. As the above analysis shows, class members are unlikely to opt out even when such indirect or future costs exceed the recovery, for two reasons. First, rational apathy problems are likely to prevent class members from ascertaining that the litigation imposes net costs. Second, opting out deprives an individual member of her share of the recovery but is unlikely to prevent either the class action from going forward or any increase in future or indirect costs from occurring.

Although Jonathan Macey and Geoffrey Miller's intriguing suggestion that class action claims be auctioned to the highest bidder would solve many of the agency problems that plague the conduct of class action litigation, see Macey & Miller, *supra* note 153, at 105-10, it would apparently not solve this problem concerning the decision to litigate itself. Under their rule, bidders would have an incentive to submit bids up to the difference between the expected litigation recovery and the expected litigation expenses. Because the bidders will not suffer the indirect or future costs of class action litigation, this may lead them to bid and litigate even when the expected total (direct and indirect) costs of litigating exceed the expected benefits.

163. See Alexander, *supra* note 160, at 535-48; Coffee, *supra* note 151, at 671-73 & nn.5 & 9, 687-90, 714-20; Macey & Miller, *supra* note 153, at 22-23, 25-26, 44-45. Janet Cooper Alexander has concluded that, at least in some securities class actions, these and other problems are so severe that settlements bear no relation to the merits of the case. Alexander, *supra* note 160, at 499-501, 524-68.

To be sure, a court must approve any class action settlement<sup>164</sup> and may have to find that the lawyer adequately represents the interests of the class.<sup>165</sup> But judicial review of these issues is widely regarded as ineffective.<sup>166</sup> In any event, it would be bootstrapping to use the necessity of judicial approval to conclude that the judicial process has an advantage over the political process. Unless we have some independent reason for thinking that judicial decision-making is more reliable than political decisionmaking, requiring judicial approval cannot make the selection of litigation representatives more reliable than the selection of political representatives. Moreover, even if the attorney does fulfill her fiduciary duty to maximize the class members' recovery, the attorney has little if any financial incentive to use class action litigation to set favorable *precedent* that will confer benefits outside of the class action recovery.<sup>167</sup>

None of this is to say that class actions have no useful role. They permit the adjudication of small claims that otherwise could not feasibly be adjudicated at all.<sup>168</sup> But the question here is not whether class actions should be permitted. Rather, the question is whether class actions make litigation a more suitable forum for lawmaking than the political process. The observation that class actions can be better than no litigation is no more dispositive of that question than the counterobservation that providing public goods through the political process can be better than not providing public goods at all.

Finally, if the coercive financing of collective representation is litigation's advantage, then reforming the political process to allow such financing would appear to be a more attractive reform than expanding the lawmaking power of courts. Indeed, some examples of similar financing already exist: our current government financing of presidential campaigns and our financing of mailings by congressional incumbents. But, as many already object, such financing raises serious problems because it may unduly favor the incumbent parties or representatives. Not surprisingly, the problem parallels the difficulties inherent in our method of funding class action litigation.

Of course, funding candidates in general elections does not tailor the representation to a subset group in the same way that class actions can. As Section I.A notes, this creates the problem of issue bundling. But one could

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164. See FED. R. CIV. P. 23(e).

165. Rules of civil procedure usually provide that the court must certify that "the representative *parties* will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4) (emphasis added). But some courts have been willing to read this requirement as applying to the lawyers rather than the named plaintiffs. See Alexander, *supra* note 160, at 535 & n.147; Macey & Miller, *supra* note 153, at 94 & n.287.

166. See, e.g., Alexander, *supra* note 160, at 499 n.5, 536 n.153 (collecting sources); Coffee, *supra* note 151, at 714 n.121 (same). The underlying problems are (1) judges have little incentive to oppose settlements, and (2) the lawyers effectively control the court's access to information about the merits of the case and about the quality and quantity of legal representation. See POSNER, *supra* note ?, at 537; Coffee, *supra* note 151, at 714 n.121; Macey & Miller, *supra* note 153, at 45-47.

167. Cf. Alexander, *supra* note 160, at 524-26 (observing that very few securities class actions ever reach adjudication).

168. See Coffee, *supra* note 151, at 679; Macey & Miller, *supra* note 153, at 8-9.

imagine using a procedure similar to class actions to unbundle issues in the political arena. Organizations could petition courts to be recognized as the official political representatives of defined subgroups and could, if judicially approved, be given a portion of the subsidies received (or income taxes paid) by any of their subgroup's members. We could, in other words, have class action lobbyists. Currently, such a scheme would—unless it allowed members to opt out—apparently run afoul of First Amendment case law that has prohibited unions and bar associations from using legal coercion to force their members to finance the group's petitioning efforts.<sup>169</sup> And one might expect that members would take advantage of any opportunity to opt out because, unlike in class action litigation, they would not be any worse off if the group lobbying goes on without them. But if we were truly convinced that coercive financing is advantageous, we could adopt a constitutional amendment to allow it without an opt out in the political arena.<sup>170</sup>

I suspect, however, that most persons would oppose such a scheme for coercively financing political lobbying. The likely reason would be the same one that prompted the Court to adopt the current First Amendment doctrine: the possibility that such laws will help us avoid free rider problems in political lobbying does not justify the risk that such laws will coerce us into funding political positions that we do not support. Interest group theory does not alleviate concerns about the latter risk, for it suggests that the same groups that generally have excessive political power will also gain influence over decisions about which groups receive public financing. But if the hostility to coercive financing of political petitioning is justified, it suggests that we should not expand the coercive financing currently in use in class actions by transferring more of the lawmaking function to class action litigation. More generally, the analysis suggests that any scheme to cure underrepresentation by appointing a group representative, be it a class action lawyer or a class action lobbyist, does little more than shift the problem to a new level because it cannot solve the problem of who represents the disorganized group in choosing and guiding its group representative.<sup>171</sup>

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169. See *Keller v. State Bar of Cal.*, 110 S. Ct. 2228 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

170. Interestingly, the Court does not seem to have noticed that its case law prohibiting the use of coercion to finance group petitioning is in some tension with the coercion used to fund class action suits. It might distinguish the cases by concluding that in class actions the coerced funds are being expended on an activity "germane" to the group's legitimate purpose (namely litigation). Cf. *Keller*, 110 S. Ct. at 2236 (noting that coerced funds could be expended on activities "germane" to collective bargaining (for a union) or to regulating lawyers (for a state bar)). But this seems conclusory: it does not answer the question why petitioning judges (i.e., litigation) is a legitimate purpose of a compelled association but petitioning political lawmakers is not. More likely, the Court might conclude that the use by private counsel of class action procedures does not constitute "state action." But it would be difficult to persuasively distinguish *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082-87 (1991), which held that the exercise of peremptory challenges by private lawyers constituted state action.

171. Similar problems afflict efforts to represent underrepresented groups in litigation through government financing of public interest advocates. See Richard B. Stewart, *The Reformation of American*

### C. *Adversarial Structure*

Another argument for why the litigation process is less susceptible to interest group influence relies on the adversarial structure of litigation. Because of this structure, at least two opposing views are represented in every litigated case.<sup>172</sup> Thus, unlike legislators and agencies, judges generally do not make law having only heard the arguments supporting the resulting law.<sup>173</sup>

This is an important advantage of the litigation process. Unfortunately, it does not offset an interest group's ability to exercise any disproportionate influence it has. Small intensely interested groups are still likely to spend more on their litigation efforts than any large diffuse groups opposing them. They will on balance be able to hire more skilled lawyers and thus have more influence on the information presented to the court about the social desirability of the parties' conduct and any legal rule under consideration.<sup>174</sup> And, as Section III.A suggests, the very fact that they can fund more frequent litigation will ultimately tend to lead to more decisions favoring small intensely interested groups.

Moreover, the adversarial structure has offsetting disadvantages. First, courts generally only hear (or pay attention to) the arguments of the actual litigants. Other persons interested in the precedential implications of the case, but not in the judgment itself, generally lack standing and receive inadequate consideration. Nor, assuming there are more possible policy positions or legal rules than there are litigants, will the courts necessarily be presented with the full array of policy arguments and regulatory options. Each party may argue only for the policy or rule that is best for it; none may argue for the policy or rule that is best for society.<sup>175</sup>

To be sure, courts can accept amicus briefs from nonparties. But courts are not required to accept such briefs and generally do not take them as seriously

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*Administrative Law*, 88 HARV. L. REV. 1667, 1763-70 (1975).

172. TULLOCK, *supra* note 145, at 190; Eskridge, *supra* note 73, at 304.

173. There are, however, some notable exceptions. Only one of the parties was represented before the Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Court decided *Mapp v. Ohio*, 367 U.S. 643 (1961), based on an argument put forth by an amicus curiae but not addressed by either party. SCHLOZMAN & TIERNEY, *supra* note 36, at 370-71. Indeed, the Court has often decided major legal issues *sua sponte*, without any briefing of those issues by anyone. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288 (1989); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

174. *See generally* Stephen M. Bundy & Einer R. Elhaug, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313, 335-61 (1991) (explaining how improved legal advice helps parties influence information reaching tribunals).

175. TULLOCK, *supra* note 145, at 200; *see also* MELNICK, *supra* note 137, at 15-16, 347-48, 350, 352, 372 (courts tend to miss important policy issues because they rely on policy arguments sprinkled through parties' briefs).

as the parties' briefs.<sup>176</sup> In any event, amicus briefs are most likely to be supplied by the very interest groups best positioned to fund them.<sup>177</sup>

Indeed, if large diffusely interested groups really suffer such extensive free rider problems that they are unlikely to make any appearance in a political forum, they are also unlikely to make any appearance in litigation—unless they do so via a class action or public interest representative, which raises the problems discussed in Section III.B. Cases that do not involve such problematic representation are thus likely to present only the opposing viewpoints of intensely interested persons. The interests of the members of large diffusely interested groups can remain underrepresented or malrepresented.

A second, and related, problem is that courts tend to underweigh, or be underinformed about, the systemic and prospective consequences of their decisions because they focus on the particular parties and adjudicated historical facts before them.<sup>178</sup> A trial record usually reveals less about the social and economic consequences of the court's possible decision than does the information presented to legislatures or administrative agencies.<sup>179</sup> Even if a court is informed about the systemic effects on unnamed persons, those effects are unlikely to carry an emotional impact proportional to the plight of the identified human beings who will be bound by the court's judgment. Legislators and regulatory rulemakers, on the other hand, deal in systemic effects, and are less likely to be distracted by the idiosyncratic situations of particular persons.

The adversarial structure of litigation also creates a third serious problem: it permits parties to settle strategically in cases where the type of judge or set of facts seems likely to lead to unfavorable precedent.<sup>180</sup> A trade association seeking a favorable regulatory ruling may, for example, choose to settle a case if it gets assigned to a judge hostile to regulation. Or the trade association may be willing to refrain from appealing contrary judgments until it has a good "test case" where the facts seem particularly sympathetic. More recently, some courts have even allowed parties to vacate unfavorable precedent through post-judgment settlements.<sup>181</sup>

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176. In the Supreme Court, for example, amici must be granted leave to file a brief, have tighter page constraints than parties, have no right to file reply briefs, and are seldom permitted to participate in oral argument. ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 569, 573 (6th ed. 1986). Furthermore, the Court can treat a line of argument pressed by an amicus brief as waived if a party did not make it, and the Justices do not read all the amicus briefs. *Id.* at 573.

177. They will also be supplied by the Justice Department, but if interest group theory is accurate, those briefs will merely reflect the wishes of the interest groups that dominate the political process.

178. DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* 45-56 (1977); MELNICK, *supra* note 137, at 14, 347-48, 350, 352; TULLOCK, *supra* note 145, at 202-03.

179. To be sure, litigation has become much more likely to encompass a broad range of evidence, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1297-98 (1976), but the range is still more limited than that considered by an agency or legislature. HOROWITZ, *supra* note 178, at 47-56; MELNICK, *supra* note 137, at 14, 347-48, 350, 352. Moreover, courts generally focus on defining abstract legal rights without adequately considering the feasibility of enforcing those rights. HOROWITZ, *supra* note 178, at 34-35; MELNICK, *supra* note 137, at 14, 348.

180. See MELNICK, *supra* note 137, at 361-62; Galanter, *supra* note 144, at 101-02 & nn.18-19.

181. Jill E. Fisch, *Rewriting History*, 76 CORNELL L. REV. 589 (1991).



Small intensely interested groups will be better positioned to pursue a policy of molding precedent through strategic settlement. Such groups are repeat players with a relatively large stake in the value of setting precedent and a relatively low stake in how an individual case comes out.<sup>182</sup> Large diffusely interested groups will be harder pressed to collect the funds necessary to pay off litigants bringing worrisome cases. And isolated individuals, even if intensely interested in their case, have little interest in precedent and thus a strong incentive to accept any settlement favorable in the case at hand.

In the political process, a policy of strategic settlement is, on the whole, harder to implement. An interest group cannot usually expect that settling with opposing petitioners will vacate unfavorable legislation or regulation; nor can a group normally hope that, by settling today, an issue will get assigned to a different legislature or agency next time. Moreover, action taken by a legislature or agency is typically not targeted at specific individuals. This makes it both less likely that selective settlement will focus lawmakers on a more favorable set of facts and more difficult to pay off all the persons who might object to the lawmakers' actions.<sup>183</sup> One can think of exceptions to these general tendencies, but for our purposes it is not necessary to show that the political process is immune from strategic settlement, just that it is less susceptible than the litigation process.

In sum, the adversarial structure of litigation has offsetting advantages and disadvantages. Litigation guarantees that any decision takes into account at least two views and a particular factual situation, and that parties control the settlement of their own disputes. But litigation also means that decisions fail to consider the full range of views and societal facts, and that settlements do not reflect the entire spectrum of considerations. Litigation is thus likely to be more desirable where it is highly important to focus on the views, factual situations, and interests of a limited number of persons, and less important to have other views, facts, and interests fully represented. Or, to put the matter in more familiar terms, the adversarial structure of litigation generally makes it better suited for the adjudication of fact-specific disputes than for general rulemaking.<sup>184</sup>

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182. See Galanter, *supra* note 144, at 101-102 & nn.18-19.

183. One might think class actions undermine this argument because such litigation is often as general as any rulemaking by legislatures and agencies. Cf. Chayes, *supra* note 179 (arguing that much civil litigation involves not dispute resolution but creation and implementation of general regulatory policy). But in fact class actions are quite useful to an interest group pursuing a settlement strategy because they vastly increase the number of parties that the interest group can in effect *bind* not to re-petition the courts on the issue at hand. Further, because such binding payoffs are mainly directed at the class action attorney, their cost is not nearly as prohibitive as settling with each class member would be. See *supra* at Section III.B. See also Macey & Miller, *supra* note 153, at 31-32 (arguing that defendants can put off class certification, which class action attorneys generally wish to delay because of cost of individualized notice, until defendants find a case with a class action attorney who seems incompetent or willing to settle cheaply).

184. The counterpart to the district/committee structure of legislatures, see *supra* text accompanying notes 42-44, is the decentralized but hierarchical structure of the courts. Courts are decentralized in the sense that local trial courts generally control factfinding and decisions about fashioning remedies, but are

#### D. *Political Insulation*

Perhaps the most seriously pressed interest group argument for why judges make superior lawmakers is that they are insulated from political influence. Richard Posner, for example, stresses that judges have life tenure, that their salaries cannot be reduced, and that procedural rules limit the standing and ex parte contact of interest groups.<sup>185</sup> Because this general political insulation also shields judges from interest group pressure, judges are better able than legislators to fashion wise policy.<sup>186</sup>

The political insulation of *judges*, however, does not insure the insulation of the *litigation process* from interest group influence. Under the mechanisms already discussed, organized interest groups will still be able to litigate more frequently, to influence better the information tribunals receive, and to settle strategically cases that may produce unfavorable precedents. These methods do not require that the judge sympathize with any particular view; they depend solely on parties' (differential) decisions about when to litigate, what resources to devote to litigation, and when to settle.<sup>187</sup>

In fact, these methods seem *more* effective for influencing courts than other lawmakers. Unlike courts, legislators and regulators do not have their lawmaking power triggered by party action: they can initiate lawmaking on their own and are not forced to make a decision when a party petitions. Legislators and agencies also usually have far more resources to conduct their own investigations, whereas courts must generally rely on the information the parties present to them. Further, whereas in the political process the organizational advantages of small groups are somewhat offset by the greater votes of large groups, no such offset exists in the litigation process.

Nonetheless, one might conclude that these disadvantages of litigation are not only reduced, but outweighed, by the greater political insulation of judges. This conclusion, however, faces two main difficulties, which the following sections discuss in turn. First, interest groups can influence judicial appoint-

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hierarchical in the sense that appellate courts usually fashion general legal guidelines. Because the particularized effects on the litigants and the local community are more likely to influence (and be litigated before) the lower courts, the result can be policy incoherence, where broad legal principles are coupled with case-specific exceptions and practical nonenforcement. MELNICK, *supra* note 137, at 16, 354-55, 361-66. Conflicts between appellate circuits can also pose incoherency problems given the difficulty of securing Supreme Court review. *Id.* at 70, 352-53, 366-67.

185. POSNER, *ECONOMIC ANALYSIS*, *supra* note 6, at 501-02 & n.1. Posner also stresses that judges are not financially interested in their cases. *Id.* at 496. However, many statutes (for example, those prohibiting bribery or mandating recusals) also require legislators and regulators to abstain from financially interested decisionmaking. To the extent these statutes are incomplete, supplementing them would seem a more attractive focus for reform than expanding judicial review over both financially interested and disinterested governmental action. Moreover, as I have argued elsewhere, antitrust review already seems applicable where state and local officials are financially interested in the regulatory restraints they impose. See Elhauge, *supra* note 79, at 671-72, 682-96.

186. William Eskridge makes a similar argument. See Eskridge, *supra* note 73, at 305.

187. See *supra* sections III.A-C.

ments and are more likely to do so if we convert judges into more general regulators by expanding judicial review. Second, interest group theory does nothing to demonstrate that greater political insulation is desirable.

### 1. *Interest Group Influence Over Judicial Appointments*

Although federal judges need not run periodically for reelection,<sup>188</sup> they do not reach their positions in a nonpolitical fashion. They must be nominated by the President and confirmed by the Senate. Nominations and confirmations are matters over which special interest groups can exercise any disproportionate political clout they possess. One might thus expect that interest groups would use their political influence to ensure that judicial appointments go to persons holding views favorable to the interest group. Interest groups might, in short, disproportionately influence and even “capture” the selection of judges.

One objection to this might be that we do not in fact observe extensive interest group influence over judicial appointments, at least not by interest groups with an economic agenda.<sup>189</sup> But if this is true,<sup>190</sup> the reason likely lies in the fact that judges today are not major sources of economic regulation. If we changed that, by expanding judicial review, then economic interest groups would likely become far more active in the nomination and confirmation process. After all, before *Roe v. Wade*<sup>191</sup> we did not see major activity by pro-life and pro-choice groups regarding Supreme Court appointments. But after *Roe* made clear that the Court had become the country’s main abortion regulator, both groups became highly active in attempting to influence who gets nominated and confirmed.

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188. A minor problem with the political insulation argument is that often the proposals would transfer regulatory policy to state court judges who may be subject to periodic recall or election. State court judges do, for example, have jurisdiction over many issues of constitutional law and statutory interpretation. And the proposals to narrowly construe statutes effectively transfer some regulatory authority to a common law fashioned by state court judges. See *supra* notes 74-75 and accompanying text. A related minor problem is that some of the proposals contemplate an expanded constitutional or antitrust review that would sometimes give federal judges more authority to review a state court’s making of law through the creation of common law or the interpretation of state statutes or constitutions *even* in those few states where judges *do* have life tenure. Obviously, the political insulation argument (and interest group theory in general) provides no reason for transferring authority from politically insulated state judges to politically insulated federal judges.

189. Cf. Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935 (1990) (arguing that confirmation process is not that heavily influenced by interest groups).

190. More radical normative baselines, such as those used by Critical Legal Studies scholars, might regard businesses or the upper class as special interest groups that influence judicial appointments. See HORWITZ, *supra* note 109, at 101, 201, 212, 253-59, 266 (arguing that 19th century common law was developed to serve commercial interests rather than public good); see also Kahn, *supra* note 54, at 298-99 (noting that some common law rules favoring commercial interests may have been undesirable under both egalitarian and efficiency standards); cf. JOHN H. ELY, *DEMOCRACY AND DISTRUST* 58-59 (1980) (arguing that judges using moral reasoning will likely choose “the values of the upper-middle, professional class from which most lawyers and judges . . . are drawn”); Schauer, *supra* note 135, at 659-61 (observing that career paths likely to lead to Supreme Court appointment might explain why Supreme Court has generally been more likely to protect property rights than personal rights).

191. 410 U.S. 113 (1973).

Thus, any expansion of judicial review that gives courts a larger role in economic regulation may—instead of curbing interest group influence over the political process—have the perverse effect of *exacerbating* interest group influence over judicial appointments.<sup>192</sup> To the extent we value political insulation for other reasons (such as facilitating the fair adjudication of facts or the neutral application of law), we undermine that insulation if we encourage interest groups to step up their participation in the appointment process by converting courts into ordinary regulatory lawmakers.

Although judicial appointments are susceptible to interest group influence, it must be conceded that the lack of *ongoing* political accountability makes judges somewhat less susceptible to political influence than legislators. Ongoing accountability may not, however, be that relevant. We do not usually observe notable shifts in policy when a President enters his second term or when a legislator serves out her last term before a planned retirement. By and large, the policy preferences that got them into office turn out to be the same policy preferences they carry out when they have no need to position themselves for reelection.<sup>193</sup> Moreover, to the extent judges are less subject to ongoing accountability, that factor may serve only to encourage interest group influence over the initial appointment because it makes the fruits of successful interest group capture more durable and thus more valuable.<sup>194</sup>

A more significant difference between judges and politicians may lie in the length of their terms. Even if interest groups can “capture” the appointment or election process, they can only make sure that the *current*—and *known*—views of those they appoint or elect will favor the interest groups on the issues the groups can currently *foresee*. But persons change, unknown views surface, and unforeseen issues arise; the longer the term of service, the more likely such changes and unforeseen developments will be. Thus, influencing the appoint-

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192. The political method of appointing judges also faces an issue-bundling problem similar to that encountered in electing political representatives. *See supra* notes 39-41 and accompanying text. This may lead to implicit logrolling that is considered socially desirable. For example, each interest group might agree to an appointee who favors efficiency rather than any particular group because, as a general policy, efficiency advances each group's interest. But the implicit logrolling caused by issue bundling can also be socially undesirable if the logrolling coalition benefits at the expense of those not in the winning coalition. *See generally supra* note 40.

193. Recent empirical studies show that retiring politicians are no more prone to changing their voting behavior than politicians facing reelection. *See* John R. Lott, *Political Cheating*, 52 PUB. CHOICE 169, 183 (1987); Mark A. Zupan, *The Last Period Problem in Politics*, 65 PUB. CHOICE 167 (1990). The initial conclusion drawn from this evidence was that planned retirements had no effect on voting behavior. *See* Lott, *supra*, at 169, 183. But this conclusion has been undermined by evidence that politicians who have lasted long enough in office to plan retirements start that final term with a closer fit between their views and the views of their constituents. *See* Zupan, *supra*, at 168, 177. Accordingly, one study concludes that, although retiring and nonretiring politicians exhibit a similar propensity to change voting behavior, the decision to retire does make politicians more prone to changing their voting behavior than those same politicians were before. *Id.* at 168. Nonetheless, the evidence that these changes in voting behavior are no greater than those exhibited by politicians seeking reelection does support the conclusion that entering a final term does not produce large or notable shifts in decisionmaking.

194. *Cf.* Landes & Posner, *supra* note 12, at 877-79 (arguing that obstacles to undoing legislation encourage interest group lobbying).

ment of judges to lifetime terms will have a less certain influence on the decisions that ultimately get made than will influencing the election of politicians to their final (shorter) terms.<sup>195</sup> This raises the question: does interest group theory provide any reason to think that this somewhat greater political insulation is desirable?

## 2. *Interest Group Theory Does Not Show Political Insulation Is Desirable*

This is not the place for an extended discussion of the benefits and dangers of politically insulated judicial review. Fortunately, an extended discussion is unnecessary because the issue here is whether interest group theory provides any affirmative reason to regard political insulation as desirable, not whether political insulation is desirable for other reasons.

In answering this more limited question, we must remember that the critical bite of interest group theory comes from its claim that the political process inaccurately reflects the will of the polity. The theory demonstrates that groups' structures affect their political influence in a way that can, under some normative baselines, distort how the political process aggregates the affected social

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195. Although some difference in accountability (and length of effective term) exists, its extent is disputed. Some scholars argue that the chances of an incumbent member of the House of Representatives losing her seat are sufficiently slight to be comparable to the slight chances of a judge being promoted. See Mark V. Tushnet et al., *Judicial Review and Congressional Tenure: An Observation*, 66 TEX. L. REV. 967, 972-83 (1988). Moreover, the lengths of judicial and legislative careers are similar: representatives leaving office have served an average of 12 years, as opposed to 14 years for judges. *Id.* at 982-83. These scholars conclude that the political accountability of both judges and legislators is mainly marked by "retrospective responsiveness" to the political forces that first won them office. *Id.* at 984-85.

There are, however, problems in the interpretation of this data. One might interpret the success rate of legislative incumbents to mean that accountability is strong, not weak: incumbents win because they do whatever it takes to assure reelection. See MAYHEW, *supra* note 11, at 36-37. To be sure, legislative defeats can more readily be traced to scandals or a failure to provide constituent services than to any regulatory decisions a legislator may make. See Tushnet et al., *supra*, at 972-80. But that does not mean legislators do not conform their regulatory decisions to the political views of their constituents. Indeed, there is evidence that the more reelections a legislator has won, the more closely the legislator's votes reflect the views of his constituency. See *supra* note 193.

There is also other evidence that tends to undermine the conclusion that legislators and judges are equally unaccountable. Senators are not quite so hard to defeat as Representatives, and many elections in both Houses are close. MAYHEW, *supra* note 11, at 33, 36. Senators are also, compared to Representatives, less focused on constituent casework and more on issues. MORRIS P. FIORINA, CONGRESS 116 (2d ed. 1989). Further, it is not quite fair to compare the likelihood of judicial promotion to only the likelihood of legislators losing reelection since legislators also angle for promotions and are probably more likely to get them than judges. See Zupan, *supra* note 193, at 169 (showing that politicians whose voting behavior more closely reflects their constituents' interests are more likely to get opportunity to run for higher office). Finally, there is evidence that legislators believe they are accountable for their voting positions, see MAYHEW, *supra* note 11, at 37-38, 70; John H. Ely, *Another Such Victory*, 77 VA. L. REV. 833, 866 n.103 (1991) (collecting sources), which might be just as significant as actual political accountability in affecting their legislative behavior.

The evidence thus does not support the conclusion that judges and legislators have the same political accountability. But the evidence does suggest that the difference in political accountability is less than one might think. This in turn suggests that, assuming political insulation is an advantage at all, the difference in insulation is probably not sufficient to outweigh the other disadvantages of using the litigation process to set regulatory policy.

interests or otherwise defines the public interest. In particular, the theory demonstrates that the political process can produce outcomes harmful to the majority, a result that is undesirable under a (crude) majoritarian baseline.

But this critique provides no reason to prefer lawmaking insulated from political pressure, for such insulation shields lawmakers not only from interest groups but from the rest of the polity as well. This insulated lawmaking can produce even *worse* distortions and results that are even *more* antimajoritarian. While the political process may disproportionately reflect the views of minority groups, an insulated judicial process can disproportionately reflect the views of single individuals—namely the views of judges who may make no effort to represent the views or interests of the polity. Even if judges do try to represent the polity, the very unresponsiveness to, and unfamiliarity with, the affected interests that creates political insulation also makes judges more likely to err in assessing, canvassing, weighing, or maximizing the affected interests.<sup>196</sup> As inaccurate as the political process may be in reflecting the will of the polity, there is no reason to believe it is less accurate than judicial lawmaking.<sup>197</sup>

One might of course argue, especially with respect to constitutional law, that the point of judicial review is precisely *not* to represent the political will but to rise above it in articulating fundamental, and perhaps objective, principles of justice. But here we must be careful to separate the question at hand from the question of who should develop general constitutional principles. In our constitutional system, politically insulated judges have an important role to play in protecting certain enduring principles from the vagaries of politics. Questions about the scope and source of those principles—whether, for example, they should be derived from the original constitutional meaning or created in an ongoing judicial process—are hotly debated.<sup>198</sup> Interest group theory is, however, largely unrelated to this debate. If, based on other factors, we conclude that a given case falls within the scope of fundamental (or objective) principles, interest group theory does not help us. The principles should be enforced whether or not the political will reflects the views of the majority (or of some

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196. See HOROWITZ, *supra* note 178, at 45; MELNICK, *supra* note 137, at 14, 372-73. Insulation may also make judges nonchalant or irresponsible about the feasibility or costs of their decisions, *see id.* at 348, or give them inadequate incentives to invest sufficient time and resources into lawmaking, *see* TULLOCK, *supra* note 145, at 190, 198-99.

197. See JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4-59 (1980) (concluding, based partly on numerous earlier empirical studies, that despite various defects, political process reflects will of majority of voters more accurately than Supreme Court does).

198. Compare ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 25-26, 236-37 (1962) (arguing that judges should develop principles because political branches are less suited to task) with ROBERT H. BORK, THE TEMPTING OF AMERICA 133-265 (1990) (arguing that constitutional principles must be derived from original understanding of constitutional provisions). These are not, of course, the only positions. John Hart Ely, for example, rejects both originalism and judicial value development, arguing that judges should conform constitutional decisions to the representation-reinforcement principle. See ELY, *supra* note 190, at 58-59. Michael Perry argues that judges must be both originalists and nonoriginalists. See Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 695-702 (1991).

other definition of the polity). The principle of free speech, for example, should invalidate a law prohibiting the expression of certain viewpoints whether the law is the product of interest group politics or majority sentiment. If our case falls outside the scope of these principles, then the debate about whether political insulation helps judges develop fundamental (or objective) principles is beside the point.<sup>199</sup>

If politically insulated lawmaking does not represent the polity, and we put aside its potential for developing fundamental principles, what sort of predictions does interest group theory suggest about insulated lawmaking? Within the paradigm of interest group theory, it seems that consistency requires ascribing some sort of self-centered motivation to judges. This is not, of course, to deny that judges have more altruistic motivations, but interest group theory cannot consistently assume that all legislators act solely out of self-interest but that judges do not. The theory must employ the same behavioral assumption across the board.<sup>200</sup>

Some suggest that judges seek to expand their own power.<sup>201</sup> It is hard to see why this should be expected to improve decisionmaking. In specific cases, the motive to expand judicial power would often lead to undesirable results. More generally, the judicial power expansion likely to result from such a motive appears unlikely to be desirable unless we have some independent reason for believing judicial lawmaking is better than political lawmaking.

Other possible public choice theories are that judges seek to maximize their salaries, their budgets, or their jurisdiction by pleasing legislators.<sup>202</sup> A Congress displeased with judicial decisions might effectively reduce judicial salaries by refusing to adjust for inflation, might make insufficient appropriations for judicial support staff, or might dilute judicial power by expanding the number of judgeships or shrinking a court's jurisdiction.<sup>203</sup> But such methods of legislative retaliation are unlikely to be effective because they are not selective: they cannot punish the judges or judicial activity that the legislature dislikes without

199. One might, in theory, believe that while some propositions are core principles that judges should enforce against the majority, and some propositions are mere policy conclusions that judges should never enforce against the political process, other intermediate propositions are "contingent principles" that have enough force that judges should enforce them against the political process *if* the political process does not represent the will of the majority. It seems self-evident to me, however, that any such "contingent principles" have no real claim to being objective or fundamental principles rather than just the judge's view of wise policy. An argument for "contingent principles" is thus indistinguishable, to my mind, from an argument that judges should feel free to engage in policymaking when the political process does not appear to represent the will of the majority.

200. *Accord* Rubin, *supra* note 56, at 49-52; Peter L. Strauss, *Comment: Legal Process and Judges in the Real World*, 12 CARDOZO L. REV. 1653, 1658-59 (1991).

201. *See, e.g.*, Cooter & Rubinfeld, *supra* note 138, at 1093; Rubin, *supra* note 56, at 51 (discussing this as possible public choice theory about judicial motives); Mark Tushnet, *Public Choice Constitutionalism and Economic Rights*, in LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 23, 33-34 (Ellen F. Paul & Howard Dickman eds., 1990).

202. *See* Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 345-46 (1988); *see also* Rubin, *supra* note 56, at 49-51 (discussing such motivations); Tushnet, *supra* note 201, at 32-33 (same).

203. *See* Landes & Posner, *supra* note 12, at 885.

also punishing the judges and judicial activity that the legislature likes.<sup>204</sup> And individually, each judge will conclude that the likelihood of her decision provoking a favorable or unfavorable legislative response is low.<sup>205</sup> It is thus not surprising that historically there is little connection between judicial decisions and legislative action on judicial pay and jurisdiction.<sup>206</sup> In any event, to the extent these motives *do* operate, they suggest judges are unlikely to be better decisionmakers than the legislatures they seek to please.

Another hypothesis is that courts seek the approval of lawyers and legal academics.<sup>207</sup> To the extent this is true, courts are accountable, but to a rather narrow segment of society. This creates its own distortion because lawyers and legal academics hardly represent a cross section of the polity.<sup>208</sup> Moreover, interest groups who realize where the real power lies can exert influence on the bar or the academy through hiring and foundation grants.<sup>209</sup> In any event, judges are unlikely to care about the approval of lawyers and academics unless they already share the judge's political leanings: a conservative judge will not be swayed (and will probably be relieved) if her decision has been critiqued by a leftist law professor, and a radical judge will not lose much sleep if his decision garners the disapproval of the corporate bar.<sup>210</sup>

Finally, judges might be motivated by the desire to impose their own values and policy preferences on society.<sup>211</sup> But, at least within interest group theory,

204. Nonetheless, these mechanisms might provide some ongoing accountability in the sense that they can be used where, across the board, judicial activity runs contrary to congressional wishes.

205. For further discussion of this debate about judicial motives, see *infra* Part IV.B.

206. Rubin, *supra* note 56, at 49-51.

207. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 194-96 (1990); Robert Cooter, *The Objectives of Private and Public Judges*, 41 *PUB. CHOICE* 107, 129-30 (1983); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 *VA. L. REV.* 471, 498 & n.80 (1988). Posner and Macey also conclude that judges seek the approval of fellow judges, but without some independent reason to think those fellow judges will make better decisionmakers than politicians, this does not provide an argument for expanded judicial lawmaking. Cooter hypothesizes that judges seek the approval of litigants, but that raises the problems discussed in Sections A, B & C of this part: interest groups will put forth litigants more frequently and will make better efforts to select the sorts of litigants whose approval judges would value.

208. See ELY, *supra* note 190, at 59 (suggesting that social class of lawyers and academics affects what they are likely to deem fundamental values); SHAPIRO, *supra* note 129, at 9 & n.10 (describing interest group literature that treats lawyers and academic writings as part of constellation of political forces that influence the Court); Lino Graglia, *Judicial Activism of the Right*, in *LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT* 65, 69-71 (Ellen F. Paul & Howard Dickman eds., 1990) (arguing that academics, lawyers, and media have distorting influence on judicial lawmaking).

209. Cf. HORWITZ, *supra* note 109, at 140-59, 259 (linking changes in common law doctrine favoring commercial interests in part to relation between those interests and bar). I do not mean by this to suggest that I believe academics are willing to alter their views to obtain foundation grants. But interest group theory must apply the same basic behavioral hypothesis to all actors; it cannot assume that only academics are immune from self-centered motivations. Moreover, by influencing the topics that are published or discussed in conferences and by deciding which professors get extra time and resources to write articles, grants can have some degree of influence on scholarship without ever paying a professor to alter her views.

210. Cf. Tushnet, *supra* note 201, at 33 (concluding that the most plausible source of prestige is approval by "the ideological successors to those holding power at the time of the judge's appointment").

211. See POSNER, *ECONOMIC ANALYSIS*, *supra* note 6, at 506; Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 *J.L. ECON. & ORGANIZATION* 263, 267 (1990); Rubin, *supra* note 56, at 56-57.



any differences between judicial views and the present balance of political influence can be traced to one of four things: (1) the dead hand of past political influence that is reflected in the initial, known views the judge held at the time of appointment and did not change; (2) the migration of the judge's views since appointment; (3) views that the judge did not reveal at appointment; and (4) the application of the judge's initial, known views to issues unforeseen at appointment. The first factor hardly suggests an improvement; the influence of previously powerful interest groups may be not only disproportionate, but also a reflection of outdated factual circumstances. The other three factors seem to represent an essentially random package of views. One is reminded of the story about the newly appointed judge who, upon meeting a United States Supreme Court Justice, says: "I'm delighted to meet you in person because I have just taken an oath to support and defend whatever comes into your head."<sup>212</sup> Interest group theory gives us no reason to think that whatever comes into a Justice's head (or was within that head but unknown or unappreciated at the time of appointment) will produce better social policy than a more politically responsive process.

#### IV. INTEREST GROUP THEORY DOES NOT DEMONSTRATE THAT MORE INTRUSIVE JUDICIAL REVIEW WILL DESIRABLY INCREASE THE TRANSACTION COSTS OF LEGAL CHANGE

Even if interest group theory does not show that the litigation process is less defective than the political process, one might see another interest group justification for expanding judicial review—namely that two obstacles are better than one. Because interest groups would have to influence two bodies of government, more intrusive judicial review might be justified on the ground that it reduces the promulgation of legal changes favoring interest groups by increasing the transaction costs of interest group capture. Arguments based on such transaction-cost reasoning are common in the literature. Jonathan Macey, for example, justifies separation of powers on the ground that it increases the transaction costs of interest group capture.<sup>213</sup> Professors Aranson, Gellhorn,

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Although Posner regards this hypothesis as "consistent with the normal assumptions of economic analysis," POSNER, *ECONOMIC ANALYSIS*, *supra* note 6, at 506, it is difficult to distinguish the desire to impose one's views about wise social policy from the desire to promote the public interest. Moreover, this assumption about judicial motives conflicts with public choice theory's assumption that legislators do not seek to further personal policy views. Rubin, *supra* note 56, at 17-18, 47-52, 56-57. Nonetheless, assuming that both judges and legislators in part seek to further their personal ideologies, the greater political insulation of judges would appear to give them somewhat greater freedom to do so in cases where their ideologies conflict with the current balance of political power.

212. BORK, *supra* note 198, at 171.

213. See Macey, *supra* note 207, at 494-505.

and Robinson advocate reviving the nondelegation doctrine to increase the transaction costs of private interest legislation.<sup>214</sup>

However, even if we posit a normative baseline by which we can determine that laws favoring interest groups are against the public interest, the transaction-cost argument for more intrusive judicial review founders on four scores.<sup>215</sup> First, more intrusive judicial review does not necessarily force interest groups to influence two bodies of government: influencing just the judiciary will often be enough. Second, even if more intrusive judicial review does increase the transaction costs of capture, that can perversely encourage interest group activity by making successful capture harder to undo. Third, because increasing transaction costs also increases the costs facing large diffuse groups, it may increase the *relative* advantage of small intense groups and thus increase their success. Finally, any increase in transaction costs will affect not only legal changes favoring organized interest groups but all legal changes, a result that interest group theory does not justify because it provides no grounds for finding the status quo preferable to the mix of likely legal changes. The following sections elaborate each of these points.

#### A. *Two Obstacles?*

The premise that more intrusive judicial review will increase the transaction costs of interest group capture assumes that laws favoring special interest groups come about only if the laws are first enacted by a legislature or agency and then upheld by a court. But if interest groups enjoy disproportionate influence over the judiciary, influencing the court may often be the only step necessary.

Suppose, for example, that laws enforcing only the written terms of franchise agreements are efficient, and that efficiency is our baseline standard for judging whether political influence is disproportionate. The legislature has enacted an efficient statute requiring the enforcement of franchise agreements without regard to their "fairness." However, the franchisees have (under our normative baseline) a disproportionate influence on the courts. Because of this influence, the franchisees persuade a court to strike down (or narrowly construe)

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214. See Aranson et al., *supra* note 11, at 56, 63-64. Because their proposal aims to shift authority from the agencies to the legislature, only the objections described in Sections B, C, and D are directly applicable to their argument.

215. This part analyzes whether a transaction-costs argument can be made even if the litigation process has no comparative advantage over the political process. If one believes that politically insulated judges can use their expanded review to increase costs for legal change that reflects interest group capture more than they increase costs for legal change that "undoes" capture, then interest group activity may be discouraged. As Parts II and III argue, however, the litigation process may have no comparative advantage, and, in any event, judges cannot impose differential costs without an implicit normative baseline. The need for such a normative baseline poses three problems: (1) we cannot derive the needed norm from interest group theory or be sure that the polity (however ideally defined) favors the norm; (2) if a correct norm exists, judges could and should apply the norm directly instead of implicitly; and (3) we cannot be sure the litigation process will recognize the correct norm or be able to apply it.

the statute, either under the court's generally expanded authority or on the ground that the statute must have been the product of capture by franchisors.<sup>216</sup> Under this example, interest group capture is effectuated solely by influencing the judiciary.

Indeed, the availability of judicial lawmaking may sometimes *decrease* the transaction costs of interest group capture. Interest groups facing higher transaction costs in the legislature (or relevant agency) than in court may simply push for the result they want in the lower-cost forum. For example, suppose that in the last hypothetical the franchisees could have won in the legislature, but at a much higher cost. They may then simply decide to accept their defeat in the legislature, relying on their ability to influence the courts at a lower cost.<sup>217</sup> Or, if the transaction costs in the legislature are so high that the franchisees could not have met them at all, the expanded judicial review may make possible a capture that otherwise could not have happened. Instead of erecting two obstacles, more intrusive judicial review may simply provide two bites at the apple.

#### B. *Increasing Transaction Costs Can Encourage Interest Group Activity*

Now assume that we have a case where more intrusive judicial review has increased the transaction costs of capture. The interest group must first induce the legislature to enact the law and then persuade a court to uphold it (or to refrain from construing it narrowly). Does it follow from this that interest group activity will be discouraged? Not necessarily, for the simple reason that increasing transaction costs may also increase the *benefits* of interest group capture by making that capture harder to undo. Where these increased benefits outweigh the increased transaction costs, more intrusive judicial review will actually *encourage* interest group activity.

My reasoning builds on the analysis offered in an influential article by William Landes and Richard Posner.<sup>218</sup> Using the interest group theory premise that legislatures supply legislation to the highest bidder, Landes and Posner

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216. The finding of capture might be made either because the courts employ a normative baseline other than efficiency or because they disagree about whether the statute is efficient. See generally Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990) (arguing, based in part on modern economic theory of relational contracts, that courts should not always enforce the letter of franchise agreements). If one believes such a statute would be inefficient, one could easily construct another hypothetical that demonstrates the possibility of one-step capture. Simply assume that this time the legislature enacts a statute specifying the efficient grounds for refusing to enforce certain terms in franchise agreements. The court, however, disproportionately influenced by franchisors, strikes down the statute either as inefficient (on erroneous neoclassical grounds) or as the product of capture by franchisees.

217. Where the transaction costs of persuading judges are higher than the costs of persuading the legislature or agency, the interest group cannot so easily avoid the high-cost forum: even if the group succeeds in the legislature or agency, it still faces a challenge in the courts. However, if the interest group is a party to litigation challenging the statute or regulation, it may sometimes be able to preserve its favorable legislation or regulation through a judicially enforced settlement. See *supra* Part III.C.

218. Landes & Posner, *supra* note 12.

argue that a significant obstacle facing interest groups is that the legislature may not carry out the bargains it makes.<sup>219</sup> The legislature might later repeal the statute or, if it controls the judiciary, get courts to nullify it.<sup>220</sup> The problem of repeal, they argue, is solved by such procedural rules as bicameralism, which increase the transaction costs of enacting new legislation.<sup>221</sup> The problem of judicial nullification is solved by having an independent judiciary that enforces statutes according to their original meaning.<sup>222</sup> Landes and Posner accordingly conclude that, by increasing the durability (and thus the value) of interest group bargains, “an independent judiciary facilitates rather than, as conventionally believed, limits the practice of interest-group politics.”<sup>223</sup>

The main critique of Landes and Posner’s analysis has focused on their assumption regarding the judicial incentive to take part in this scheme. Landes and Posner argue that judges are willing to enforce statutes embodying interest group bargains because the judges realize that, if they fail to do so, their independence will be taken away from them.<sup>224</sup> Jonathan Macey argues that this assumption regarding judicial incentives is unrealistic because of free rider problems: each judge should realize that she will enjoy the benefits of a general judicial independence whether or not she enforces interest group bargains and that her own decisions will have little impact on whether the general independence is revoked.<sup>225</sup> Richard Posner elsewhere takes the view that appellate review can successfully curb these free rider problems.<sup>226</sup>

This dispute about judicial motives does not, however, determine the issue at hand. Whether judicial review is independent, prone to enforce the original legislative understanding, or itself subject to interest group influence, expanding judicial review increases the transaction costs of securing a “complete” legal change: that is, a legal change *that survives judicial review*.<sup>227</sup> Once the inter-

219. *Id.* at 877.

220. *Id.* at 877-79.

221. *Id.* at 878.

222. *Id.* at 879.

223. *Id.*

224. *See id.* at 885.

225. Macey, *supra* note 207, at 496-99.

226. POSNER, *ECONOMIC ANALYSIS*, *supra* note 6, at 506 & n.3, 512.

227. Of course, some legal changes may receive more review than others. A legal change that repeals a statute is generally less likely to receive judicial scrutiny than is a legal change that enacts a statute. But this will not always be true: courts can narrowly construe a statute repealing other laws. In any event, any apparent asymmetry in judicial review generally reflects an implicit normative baseline that views the repeal as returning us to a legal regime (usually the common law) regarded as desirable. *See* Sunstein, *Lochner’s Legacy*, *supra* note 106, at 874-75, 887-88, 891-93. Where legal repeals do not seem desirable under the implicit baseline, they can receive close judicial scrutiny. *Cf.* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 80-88 (1976) (reviewing state decision abrogating trespass laws); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating state constitutional amendment that overturned state antidiscrimination statutes). An argument based on the apparent asymmetry of judicial review is thus an argument that the normative baselines used by judges are desirable, not an argument that more intrusive judicial review, regardless of its content, desirably increases the transaction costs of interest group capture. To the extent it relies on the content of judicial review, the interest group argument for more intrusive judicial review suffers from the problems described in Parts II & III. *See also supra* note 215.

est group has incurred the higher transaction costs of getting special interest legislation through both the legislature and the courts, a complete legal change undoing that legislation also requires incurring higher transaction costs.<sup>228</sup> This makes any legal change that survives judicial review more durable and thus more valuable to the captors.

To illustrate, suppose that the issue is again what law should govern franchise agreements. The franchisees must incur certain costs in order to (disproportionately) influence the legislature to enact an inefficient statute making certain "unfair" terms unenforceable. The expansion in judicial authority means that the franchisees must now also incur extra costs and risks to get judges to uphold the statute. If, however, the franchisees incur these costs and succeed in getting the statute enacted and upheld, the franchisors cannot overturn the law by incurring only the costs of getting the legislature to enact a new statute making unfair terms enforceable. The franchisors must also be willing and able to incur both the extra costs of persuading the court to uphold the new statute and the heightened risk that it will not. Those increased costs and risks will often make an otherwise feasible franchisor attack unfeasible. Accordingly, the increased transaction costs of a complete legal change make the initial statute favoring franchisees less vulnerable to franchisor attack and thus more durable and valuable.

Although the enhanced value from improved durability increases the benefit to interest groups of securing favorable legal changes, a more difficult question is whether this increased benefit outweighs the increased cost of securing legal changes. Landes and Posner show that under certain assumptions it should.<sup>229</sup> But these assumptions will not always hold. Seeking a legal change that survives judicial review requires an interest group to incur substantial costs and risks, and the payoff may come far in the future. Depending on how averse the group is to risk and how much it discounts future profits, the increased stream of expected future profits resulting from enhanced durability may not be worth the extra cost.

The analysis thus does not compel the conclusion that increasing the transaction costs of legal change necessarily encourages interest group activity. It does, however, suggest that it may. Accordingly, the effect of increasing transaction costs on interest group activity must, absent empirical evidence, be

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228. Having to persuade both the legislature and the courts to complete a legal change parallels the requirement that a bill pass two separate houses of a legislature, a requirement which Landes and Posner argue will encourage interest group activity. See Landes & Posner, *supra* note 12, at 878. Of course, just as influencing judicial review may be the only step necessary to achieve interest group capture, see *supra* Section A, so too influencing judicial review may be the only step necessary to undo interest group capture. But this section proceeds on the assumption that influencing both the political and judicial branches is necessary to complete a legal change. Moreover, where an interest group has influenced the judiciary, the binding force of *precedent* will make it somewhat harder for the opposition to undo the completed legal change through one-step influencing of the judiciary.

229. See Landes & Posner, *supra* note 12, at 880-85.

regarded as ambiguous and thus an unsupported justification for more intrusive judicial review.

C. *Increasing Transaction Costs Can Increase the Relative Advantage of Interest Groups*

The foregoing sections establish that sometimes more intrusive judicial review will not increase transaction costs and that sometimes increasing transaction costs can encourage interest group activity. Nonetheless, it remains possible that, in some cases, more intrusive judicial review will discourage interest group activity. But even in such cases, the promulgation of laws favoring interest groups may not decline. The reason is that although increased transaction costs may discourage interest group activity, they may also discourage opposition to interest group activity. The net effect may be an *increased* promulgation of laws favoring organized interest groups.

Under interest group theory, the likelihood that the government will promulgate a requested legal change turns not on the absolute level of a group's petitioning efforts but on whether those efforts exceed the efforts made by other groups.<sup>230</sup> It does not matter how many votes one can deliver so long as one can deliver more votes than anyone else. Indeed, the theory's basic deduction from the free rider problem rests on this premise. The theory observes that free rider problems will cause all groups—small and large—to invest less in petitioning than would be optimal for the group.<sup>231</sup> But the theory concludes that, because greater free rider problems plague large diffuse groups, the large groups' level of petitioning will fall farther short of optimal than the small groups' level, and that this will increase the likelihood that the government will rule in the small groups' favor.<sup>232</sup> Thus, the free rider problem itself discourages interest group activity but, because it discourages opposition activity more, increases the likelihood of laws favoring special interest groups.

Increasing the transaction costs of legal change can have a similar effect. Even when such an increase discourages interest group activity, it may also discourage political activity by the opposition. The opposition, after all, must incur both the costs of pursuing litigation as far as the interest group is willing to take it and the risk that the interest group will be able to salvage any defeats it suffers in agencies, legislatures, or lower courts by taking the issue to the next stage.<sup>233</sup>

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230. See *supra* text accompanying note 12 (noting that interest group theory posits that lawmakers award laws to highest bidder); see also Becker, *supra* note 13, at 380 (concluding that a group's political effectiveness is not determined by its absolute efficiency but by its efficiency relative to other groups).

231. *Supra* text accompanying notes 21-22.

232. *Id.*

233. See generally SCHLOZMAN & TIERNEY, *supra* note 36, at 377 (concluding that part of advantage of organized groups is that they have resources to pursue both political strategy and litigation strategy). Increasing the transaction costs of legal change to discourage interest group activity thus seems similar to

Worse, if the costs rise equally, the impact on the opposition will generally be *greater* than the impact on the organized interest group. After all, organized interest groups are, by definition, groups that are especially able and willing to expend resources on seeking or opposing legal change. Their opponents are less organized (otherwise the interest groups would not be exerting disproportionate influence) and thus less able to organize the expenditure of petitioning resources. Organized interest groups will thus be better positioned to meet increased transaction costs than will their disorganized opponents. One might accordingly expect that an increase in transaction costs would often decrease the opposition's level of activity more than the interest group's,<sup>234</sup> and that the interest group's chances of success will increase instead of decrease.

#### D. *Discouraging All Legal Change*

Let us now assume that the arguments in the prior sections have been rejected or deemed inapplicable, and that one accordingly believes more intrusive judicial review will increase transaction costs, discourage interest group activity, and retard the promulgation of legal rules favoring special interest groups. Even then, however, the transaction-costs argument faces a serious problem—namely that increasing transaction costs discourages not only legal changes favoring organized interest groups, but also legal changes benefiting the general public. Such an effect is desirable only if one has grounds for preferring the status quo to the mix of legal changes likely to result under our present system. Interest group theory, however, provides no persuasive grounds for believing the status quo is preferable to the mix of likely legal changes.

##### 1. *Are the Laws Embodied in the Status Quo Preferable to Likely Legal Changes?*

Under interest group theory, the laws embodied in the status quo are just as likely to reflect the past influence of organized interest groups as current legal changes are likely to reflect their present influence. The legislation and regulation in place will reflect which groups used to have political influence. The judge-made law in place will, as Part III shows, reflect either past political influence or a politically insulated lawmaking that interest group theory gives no reason to prefer over lawmaking that does reflect political influence. Interest

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making litigation more costly and burdensome in order to discourage strike suits. The extra costs may in fact discourage such suits. But because defendants will also have to incur these higher costs, the increased costs may also help strike-suit plaintiffs coerce settlements.

234. An exception would be the case where the opposition is so large and diffuse that it already expends no time or money on petitioning, for increased transaction costs cannot decrease the petitioning activity of a group that engages in none. Under interest group theory, however, it would seem that, in such a case, reducing interest group activity would have little effect: as long as the interest group engages in *some* activity, its "bid" will be higher than the opposition's, and the interest group should still win.

group theory thus provides no grounds for believing that the mix of laws present in the status quo is more desirable than the mix of legal changes that the current system is likely to produce.

Of course, one might regard the laws embodied in the status quo as desirable on independent normative grounds. For example, the common law still forms much of our current law, and Richard Posner, who argues that the law should be efficient,<sup>235</sup> regards the common law as generally efficient.<sup>236</sup> But not everyone believes the common law is efficient<sup>237</sup> or otherwise desirable.<sup>238</sup> More importantly, this is a fundamentally different kind of argument—that we should increase the transaction costs of legal change because we pretty much like the law the way it is. Such an argument may be persuasive to some, but it is not an argument supported by interest group theory. Nor is it an argument that the current *process of lawmaking* is worse than the past one.<sup>239</sup> It thus seems an argument that should have its persuasiveness tested by presenting it to our current lawmakers rather than an argument to stop those lawmakers from making law.

## 2. *Does the Status Quo Embody a Private Ordering Preferable to Likely Legal Changes?*

A different sort of argument is that we should discourage legal changes because they generally interfere with a private market ordering that, under the Coase Theorem, is presumptively better than any mix of legal changes.<sup>240</sup> The Coase Theorem provides that, no matter how the legal rule assigns initial rights or liabilities, the efficient outcome will always result if private bargaining is unimpeded by transaction costs or other obstacles.<sup>241</sup> Although the Theorem is obviously persuasive only if one accepts economic efficiency as the best

235. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 60-103 (1981). More recently, Posner has conceded limits to this claim without abandoning its core. See POSNER, *supra* note 207, at 374-92.

236. See POSNER, *ECONOMIC ANALYSIS*, *supra* note 6, at 229-33.

237. See, e.g., TULLOCK, *supra* note 145, at 187 (stating that Posner's arguments about efficiency of common law depend on empirical assumptions about which one could make equally plausible alternative assumptions); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711 (1980) (arguing that efficiency of property and contract law is based on debatable empirical assumptions).

238. See HORWITZ, *supra* note 109; see also Sunstein, *Lochner's Legacy*, *supra* note 106 (arguing that central lesson of *Lochner* is that common law should not be regarded as baseline of desirable governmental regulation).

239. Paul Rubin suggests that the past system was more efficient because over time technological factors have lowered the costs of organizing interest groups. See Rubin, *supra* note 144, at 207, 213, 218. But, as he also notes, this decrease in organizational costs can have desirable consequences. *Id.* at 218. Indeed, lower organizational costs would seem of greater benefit to large diffuse groups than to small intense ones given their relative inefficiencies.

240. See Macey, *supra* note 207, at 477-78, 515-16; Macey, *supra* note 13, at 238-39 n.74.

241. See R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 2-8 (1960).



normative standard,<sup>242</sup> the ordering produced by Coasean bargaining does not appear to depend on any claims about the desirability of past legal decisions.<sup>243</sup> To an adherent of efficiency, then, the Coase Theorem seems to provide a reason to think that our current system of interest-group-influenced lawmaking is likely to worsen the status quo—not because that status quo reflects better laws or a better process of lawmaking, but because it reflects the efficient private ordering created by the process of Coasean bargaining.<sup>244</sup>

This argument, however, is flawed in several respects. The first set of flaws reflect what I will call the *generic problems* with the Coase Theorem because they apply whether or not there are collective action problems. The second set of flaws, of particular relevance here, arise from the fact that *collective action problems* can afflict the correction and conduct of Coasean bargaining in a way that disadvantages the same groups that are likely to be disadvantaged in lawmaking.

(i) *Generic Problems With Coasean Bargaining.* The logical underpinnings of the Coase Theorem can readily be seen by defining efficiency to mean wealth maximization under Kaldor-Hicks criteria.<sup>245</sup> Under that definition, the economic loss from an inefficient outcome will always exceed the economic gain. Those who would lose from an inefficient outcome will accordingly always be willing to pay an amount (to avoid that loss) that exceeds what others gain from the inefficient outcome. If unimpeded by transaction costs or bargaining breakdowns, the losers and winners from the assignment of initial rights can therefore always reach a mutually advantageous agreement that avoids inefficient outcomes.

But in the real world, Coasean bargaining often fails to correct inefficiency. Even if transaction costs are zero, bargaining may break down because each party wants a larger share of the gains created by an efficiency-enhancing

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242. If one adopts a definition of efficiency (or social desirability) that turns on utility maximization or the distribution of wealth, the efficient (or desirable) outcome will not (even with zero transaction costs) occur independently of how the legal issue is decided. See Herbert Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 783, 798-809 (1990).

243. It therefore differs from arguments that “the free market” produces better decisions because such arguments are really arguments for the set of traditional common law rules and rights that make up what we call “the free market.”

244. This argument also differs from the claim that courts should judge governmental action under an efficiency standard because it does not depend on courts being relatively immune from interest group influence. Rather, it depends only on the claim that increasing the transaction costs of any governmental action, whether by courts or other governmental branches, will prevent disruption of a desirable private ordering. One who believes in efficiency and in this argument might thus approve of increasing judicial obstacles to governmental action without believing that judges or the litigation process can actually be entrusted to adjudicate efficiency properly.

245. See *supra* note 95 (defining Kaldor-Hicks efficiency). Guido Calabresi has recently shown that, if we strictly define Pareto efficiency, broadly define transaction costs as anything that prevents us from reaching a Pareto-efficient state, and treat overcoming transaction costs as a moving outward of the Pareto frontier, we will (even with transaction costs) always be in one of the possible Pareto-efficient states. See Calabresi, *supra* note 95, at 1215-21. But this does not help demonstrate the desirability of the private ordering, for if one adopts Calabresi’s definition of the terminology, “the Pareto criterion is of no general use as a normative guide.” *Id.* at 1216.

bargain.<sup>246</sup> Moreover, the transaction costs of bargaining are frequently large enough to block the Coasean bargaining necessary to avoid inefficient outcomes, with the result that a wrong assignment of legal rights will stick, producing inefficiency.<sup>247</sup>

Even in a world without any obstacles to bargaining, the Coase Theorem does not—despite appearances—establish that the resulting private ordering will be independent of the legal entitlements recognized. To begin with, the assignment of initial entitlements can affect a party's ability or willingness to pay (or to accept payment) in order to change outcomes. Parties allocated initial entitlements tend to demand more to sell those entitlements than those same parties would (or could) pay to buy the same entitlements were they allocated to someone else.<sup>248</sup> Accordingly, rights will not only tend to stay where they are initially allocated, but the initial allocation can actually determine *which* outcome is regarded as efficient under a wealth-maximization standard.<sup>249</sup> The Coase Theorem thus does not actually show that unimpeded bargaining will produce *the* efficient outcome regardless of how the legal right is assigned; it shows only that *an* efficient outcome will result whose identity may depend on the legal assignment made. Because one of these efficient outcomes may

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246. See Robert Cooter, *The Costs of Coase*, 11 J. LEGAL STUD. 1, 16-29 (1982). Bargaining breakdowns are even more likely if the bargaining involves more than two participants. See Varouj A. Aivazian & Jeffrey L. Callen, *The Coase Theorem and the Empty Core*, 24 J.L. & ECON. 175 (1981).

247. These transaction costs include the costs of: identifying fruitful bargains, evaluating the rights at issue, finding all the affected parties and getting them together, hammering out terms, and monitoring and enforcing any bargain struck. See Robert C. Ellickson, *The Case for Coase and Against "Coaseanism,"* 99 YALE L.J. 611, 614-15 (1989) (identifying some of these costs). Coase himself recognizes the importance of these transaction costs. See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 26, 174 (1988).

248. Under traditional economic theory, initial allocations of rights can affect a party's ability or willingness to pay or to accept payment, but only by altering that party's wealth. More recent experiments and surveys by economists and psychologists, however, suggest an endowment effect far beyond any wealth effect: endowing individuals with something dramatically increases their subjective valuation of it so that even if the object has trivial wealth effects, individuals demand far more to sell it than they would pay to buy it. See, e.g., Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990); Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277 (1989); Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAVIOR & ORGANIZATION 39, 43-47 (1980). Even if one does not accept the proposition that this endowment effect operates strongly in real markets, the existence of wealth effects undermines any claim that efficiency can be defined independently of initial allocations of entitlements.

249. See Cooter, *supra* note 246, at 15; Hovenkamp, *supra* note 242, at 785. For example, if people have a right to pollute, a party who has \$30,000 in wealth may be unwilling to pay more than \$15,000 to have her neighbor stop polluting, but if people have a right to be free from pollution, the same party may refuse to take less than \$25,000 to sell it. Suppose that, because stopping pollution is costly, polluters value the right to pollute at \$20,000. If the regime recognizes a right to be free from pollution, the efficient outcome that will occur is no pollution (because the holders of rights to no pollution value it by \$5,000 more than those desiring a right to pollute); if the regime recognizes a right to pollute, the efficient outcome that will occur is allowing pollution (because the holders of rights to pollute value it by \$5,000 more than those desiring a right to be free of pollution).

be more desirable than the other,<sup>250</sup> the decision about how to allocate initial rights can affect whether the most desirable efficient outcome occurs.<sup>251</sup>

Further, Coasean bargaining and the so-called "private ordering" actually depend on the state definition and enforcement of contract and property rights. Without a state law promising legal enforcement, such contract and property rights would be meaningless, and Coasean bargaining and the resultant "private ordering" would be impossible. The Coase Theorem may sometimes mean that efficiency will not be affected by *which* property rights are defined, but the law must define *some* property rights—and enforce contracts trading those rights—for parties to be able to make binding Coasean bargains. The laws embodying individual rights to exercise a state-enforced authority to protect and trade property rights are, to be sure, traditional in this country, and perhaps obviously desirable. Nonetheless, they are laws, and they reflect public policy choices that were not inevitable and are not universal in all societies or in all areas of our society.<sup>252</sup> To the extent the laws we have seem obviously desirable, that would suggest that our current system is capable of making (and retaining) wise policy choices, not that a private ordering can accomplish social policy objectives without regard to the legal decisions made.

(ii) *Collective Action Problems With Relying on Coasean Bargaining.* The analysis so far demonstrates that Coasean bargaining often fails. Transaction costs or strategic behavior frequently prevent the bargaining necessary to reach efficient outcomes. Other times the best efficient outcome may not occur, or no efficient outcome will occur, because of the way legal rights are defined. But the problem with relying on Coasean bargaining is not simply that it leaves a neutral mix of Coasean failures. A more pointed problem is that the same collective action problems that afflict the lawmaking process also afflict the past legal correction of Coasean failures, the initial distribution of those failures, and the conduct of Coasean bargaining. Large diffuse groups are thus disproportionately likely to be harmed both by Coasean failures and by Coasean bargaining itself.

To see this, first assume the initial mix of Coasean failures is neutral. Even under this assumption, the mix of *uncorrected* Coasean failures would not be neutral under interest group theory because small intensely interested groups

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250. In such cases, the Kaldor-Hicks definition of efficiency provides no grounds for deciding between the outcomes because the assignment of initial rights determines which of the outcomes maximizes wealth.

251. Indeed, some argue that an important function of creating legal entitlements is to alter the preferences on which a private market ordering is based. See, e.g., Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 8-14 (1991).

252. For example, many communist nations and Native American tribes have not recognized any tradeable property rights in land. And our own country does not recognize a property right to sell babies or organs. For some classic pre-Coase arguments about how the private ordering reflects the public policy decisions made at common law, see Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 585-87 (1933); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12-14 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470-79 (1923).

have an advantage in legally correcting Coasean failures.<sup>253</sup> Small intense groups are more likely than their counterparts to secure legal changes (from the legislature or the courts) that alter the initial assignment of property rights to benefit themselves; they are also more likely to block legal changes that would harm them. As a result, large diffusely interested groups are, at any given time, more likely to be afflicted with legally uncorrected Coasean failures.

Further, the initial distribution of Coasean failures will also be affected by collective action problems. Because greater free rider problems plague large diffuse groups, they will be less successful than small groups in overcoming the transaction costs necessary to complete Coasean bargains that avoid inefficient property assignments that harm their group. Suppose, for example, that the state has assigned a right to pollute (free of a claim for nuisance), and that in two towns pollution would be inefficient given the effect on the surrounding residents. In the first town, the surrounding residents are numerous, not very wealthy, and each owns a small house. Here, the individual harm from the pollution is relatively modest, though the collective harm is great. In the second town, the surrounding residents comprise a few very large vacation resorts. These resorts suffer high per capita harm from the pollution, but no more collective harm than the residents of the first town. Obviously collective action problems are more likely to plague the large diffuse group harmed by the first polluter than the small intense group harmed by the second polluter. The small intense group will face lower organization costs and will be less susceptible to free riding. It will thus be more able and willing to negotiate with the polluter, to pay the polluter enough to conclude a Coasean bargain, and to monitor and enforce any Coasean bargain that is struck. Accordingly, Coasean bargaining is more likely to protect the small intense group than the large diffuse group from inefficient pollution.<sup>254</sup>

More generally, assume (as seems appropriate if one places one's faith not in the legal regime but in Coasean bargaining) that the legal regime has randomly distributed initial rights: some assignments are efficient and some inefficient, some harm small groups and some large groups. Where the property assignment is efficient, the Coase Theorem predicts that neither small nor large

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253. See Kahn, *supra* note 54, at 304-07.

254. If pollution is efficient, and the state inefficiently assigns landowners a legal right to nonpollution, we have the mirror image of the free rider problem: the holdout problem. Assuming the right to nonpollution receives injunctive enforcement, one holdout can block the efficient result by insisting on a greater share of the bargaining surplus than other landowners. Assuming the right is enforceable only in damages that exceed the landowner's actual harm, then holdouts can free ride by failing to contribute their waiver of damages. (If the damages are less than or equal to the harm, then the legal right produces no inefficiency because the polluter will simply pay the damages.) Small intense groups should be less susceptible to such holdout problems than large diffuse groups. Note, however, that the inefficient outcome in such cases "harms" the landowners only in the sense that their net wealth could be increased by concluding a bargain. Accordingly, a legal change can relieve the harm to the landowners only if it couples a change in the inefficient legal assignment with some other legal change that redistributes wealth to the landowners.

groups will be able to shift that assignment through bargaining.<sup>255</sup> Where the property assignment is inefficient, the right will be transferred if the groups can overcome the transaction costs of bargaining. But where successful bargaining to avoid an inefficient outcome will confer benefits on the group as a whole, their greater susceptibility to free riding means that large groups will have a harder time overcoming these transaction costs than small groups will. Thus, even if initial rights are randomly distributed, and even if large groups did not have a disadvantage in securing legal corrections, they would still be more likely to be harmed by inefficient assignments of rights that are uncorrected by Coasean bargaining.<sup>256</sup> Coasean failures afflicting large diffuse groups are not only more likely to go legally uncorrected, but are more likely to exist in the first place.

Finally, sometimes Coasean bargaining can *exploit* the collective action problems of large groups and actually *increase* inefficiency. Consider, for example, the situation presented by a famous antitrust case, *United States v. Griffith*.<sup>257</sup> A group of four affiliated theater chains had a monopoly in some towns, but had competitors in other towns. The affiliated theater chains threatened each film distributor that its films would not show in the monopoly towns unless it gave the chain exclusive rights in the competitive towns. One by one, each of these distributors gave the affiliated theater chains exclusive rights, thereby driving the chains' competitors out of business and creating monopolies in all the towns. An initial situation that was efficient in some towns and inefficient in others was not (as one might expect under the Coase Theorem) converted by bargaining into an outcome that was efficient in all towns, but rather into an outcome that was inefficient in all towns. The final outcome was also clearly more disadvantageous to the distributors than the initial situation, since they now faced a monopsony in all the towns.

Why would the distributors agree to such a disadvantageous bargain? The key is that, because of free rider problems, the bargains benefitted them individually though not collectively.<sup>258</sup> Thus, although each distributor may have

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255. As we will soon see, however, this prediction will sometimes be inaccurate because small groups may be able to exploit free rider problems by striking bargains with individual members of a large group that benefit the members of the large group individually but not collectively. See *infra* text accompanying notes 257-58.

256. Based on the premise that small intense groups are more likely to be the lower cost avoiders, see Kahn, *supra* note 54, at 300, Peter Kahn suggests a related point: that an efficient assignment of initial property rights would give most rights to large diffuse groups. *Id.* at 306-07 & n.101. If his premise is correct, a random distribution of initial rights should result in more Coasean failures harming large groups because an efficient distribution of initial rights would have given the large groups a greater than random share. But factors other than determining who has the organizational advantages to be the "best briber" are relevant to determining who is the lower cost avoider. See GUIDO CALABRESI, *THE COST OF ACCIDENTS* 150 (1970). A group may, for example, be the lower cost avoider because its individual members have more control over the relevant activity even though the group as a whole is too large to police free riding.

257. 334 U.S. 100 (1948).

258. Accord Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 532-33 (1985).

realized that all of them would be better off if none of them agreed to the exclusive contracts, each also knew that individually it would be better off if the others refused and it did not: it would gain an advantage in the monopoly towns and still face no monopsony in the other towns. Further, each distributor knew that its individual refusal to grant an exclusive contract would make little difference to the ultimate market structure if the other distributors did not refuse. In other words, each distributor had an incentive to free ride because it would benefit from other distributors' antimonopoly efforts whether or not it contributed to those efforts and because its contribution would make little difference to the chances of blocking the monopoly.

Thus, at least when avoiding an inefficient injury requires a collective refusal to bargain by the potentially injured members of a group, a well-organized bargainer can exploit the members' incentives to free ride by offering a bribe worth less than the per capita injury that will result when all of them agree to the bargain. The bargains are Coasean in the sense that each bargain not only benefits the well-organized bargainer, but also benefits each member of the group, *acting individually*, because each rationally realizes that its individual agreement will have little impact on whether the more general market injury ultimately results. But the overall result is an increase in inefficiency. Small intense groups are not only less susceptible than large diffuse groups to being exploited by such bargaining, but can sometimes use such bargaining to directly exploit larger, more diffusely interested groups.

In summary, the same sort of collective action problems that plague large diffuse groups in political effort also plague them in correcting and conducting Coasean bargaining. There thus seems to be no persuasive ground for believing that the process of Coasean bargaining will produce better results than the process of lawmaking. This suggests that the private ordering is more likely to reflect the undesirable exercise of rights by small intense groups than the undesirable exercise of rights by large diffuse groups and that there are thus more potential legal changes that will benefit the general public than there are potential legal changes that will profit organized interest groups. Accordingly, interest group theory, even when coupled with the Coase Theorem, does not support the conclusion that it would be desirable to decrease the likelihood of legal change by increasing the transaction costs of such change.

V. DECISION THEORY DOES NOT JUSTIFY MORE  
INTRUSIVE JUDICIAL REVIEW EITHER

Although the interest group theory I have been analyzing so far spans both economics and political science, the economic version of interest group theory is often categorized as a branch of public choice theory.<sup>259</sup> The other branch, decision theory, concerns logical problems in forming collective social choices. The theory demonstrates that no method of aggregating individual preferences into a social choice function can guarantee "a consistent social ranking of policy alternatives."<sup>260</sup>

The most common illustration of the problem is that majority rule can be intransitive: policy *A* could command a majority against policy *B*, which commands a majority against policy *C*, which commands a majority against policy *A*.<sup>261</sup> Such intransitive situations will produce a perpetual cycle unless the voting process is structured to lead to a final vote, the winner of which cannot be challenged by any losers of prior votes. When the voting process has this finality, the policy alternative chosen will turn on how the voting agenda is ordered.<sup>262</sup> In the parlance of the literature, this is known as "path dependence." If the order in which alternatives arise is random, the final choice may seem arbitrary.<sup>263</sup> If instead some person or entity, such as a legislative committee, consciously orders the agenda, that agenda setter will have significant influence on the final outcome.<sup>264</sup>

More generally, Arrow's Impossibility Theorem proves that it is impossible to construct any process of collective decisionmaking that simultaneously (1) avoids intransitivity, (2) is nondictatorial, (3) adopts Pareto preferences, (4) does not restrict how individuals order their preferences, and (5) decides between two policy alternatives without regard to independent alternatives.<sup>265</sup> The result is quite striking. Even if individuals are perfectly informed in assessing how they would order various policy alternatives, and even if those preferences are aggregated with perfect accuracy, no method of collective aggregation will satisfy Arrow's five conditions.

259. For example, Ed Rubin argues in favor of using political science versions of interest group theory to inform statutory interpretation but against using public choice theory, by which he means both decision theory and economic interest group theory. See Rubin, *supra* note 56, at 45-55, 58-60.

260. Riker & Weingast, *supra* note 44, at 381.

261. See, e.g., MUELLER, *supra* note 22, at 63-65, 197-98; Riker & Weingast, *supra* note 44, at 382-85. To illustrate, assume three voters with the following preference orderings: (1) voter 1 prefers  $A > B > C$ ; (2) voter 2 prefers  $B > C > A$ ; and (3) voter 3 prefers  $C > A > B$ . In a vote between *A* and *B*, *A* wins 2-1. In a vote between *B* and *C*, *B* wins 2-1. And in a vote between *C* and *A*, *C* wins 2-1.

262. See MUELLER, *supra* note 22, at 87-89, 390-91; Riker & Weingast, *supra* note 44, at 385-86, 393-94.

263. MUELLER, *supra* note 22, at 390-91; Richard M. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy*, 90 COLUM. L. REV. 2121, 2136-37 (1990) (collecting sources); Riker & Weingast, *supra* note 44, at 374 ("[T]here is a fundamental and inescapable arbitrariness to majority rule.").

264. See MUELLER, *supra* note 22, at 87-89; Riker & Weingast, *supra* note 44, at 385-87, 394.

265. MUELLER, *supra* note 22, at 385-87.

Like interest group theory, decision theory has to some suggested support for more intrusive judicial review. William Riker and Barry Weingast argue that, because decision theory shows that majority rule is arbitrary and manipulable by agenda setters, judicial deference is inappropriate.<sup>266</sup> Laurence Tribe draws the more modest conclusion that Arrow's Theorem at least "puts the burden of persuasion on those who assert that legislatures (or executives) deserve judicial deference as good aggregators of individual preference."<sup>267</sup> Others, such as Erwin Chemerinsky, employ decision theory as one of their arguments for more intrusive judicial review.<sup>268</sup>

Also like interest group theory, decision theory has sparked empirical debate. Scholars differ, for example, about the extent to which cycling and inconsistency are significant in practice.<sup>269</sup> But again I find it largely unnecessary to enter the empirical debate.<sup>270</sup> My focus is on whether, to the extent these problems are empirically significant, decision theory justifies less deferential judicial review.<sup>271</sup> For reasons that parallel the reasons explicated in Parts II to IV with respect to interest group theory, I conclude that the answer is no.

266. See Riker & Weingast, *supra* note 44, at 374-75.

267. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-7, at 12 n.6 (2d ed. 1988).

268. See Chemerinsky, *supra* note 60, at 79-80. For a more exhaustive collection of sources, see Pildes & Anderson, *supra* note 263, at 2124-26 & nn.8-22.

269. Compare Riker & Weingast, *supra* note 44, at 383-85, 388-89 (arguing that cycling is pervasive) with DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 48-53 (1991) (arguing that cycling is often avoided) and Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 *IOWA L. REV.* 949, 954-66 (1990) (arguing that cycling and inconsistency are minimized by various cardinality-producing mechanisms in political process).

270. One empirical issue should, however, be noted because it provides an important link between decision theory and interest group theory. Public choice scholars have shown that if voting behavior does not reflect a precise ordering of preferences, but rather reflects a probabilistic ordering (where voters are more likely to vote for the alternatives they prefer but will not do so 100% of the time), then majority voting can in fact avoid the cycling problem. See MUELLER, *supra* note 22, at 196-203. Such probabilistic voting will occur if voter knowledge about the issues (or candidate knowledge about voter preferences) is somewhat fuzzy, see *id.* at 198, which seems likely given the lack of incentives to incur the huge information costs of precisely evaluating policy alternatives, see *supra* note 157 (describing rational ignorance). Legislators may also have insufficient incentives to become fully informed about the policy alternatives. See MAYHEW, *supra* note 11, at 121-25. This theory of probabilistic voting is, however, often dismissed on the ground that, if voters' knowledge of the issues is fuzzy in this sense, it is also susceptible to influence by campaign expenditures and interest groups. See MUELLER, *supra* note 22, at 203-15. Public choice theory thus implies that voting is either deterministic, in which case the instability problems identified by decision theory apply, or probabilistic, in which case the interest group theory critique applies. In an important sense, then, interest group theory provides a necessary supplement to the decision theory critique of the democratic process, a supplement that raises all the issues addressed in Parts II to IV. For the purposes of this part, however, I assume that voting is deterministic and that the problems with preference aggregations identified by decision theory are thus significant.

271. As with interest group theory, I put aside (as beyond the scope of the Article) questions about whether the judiciary should change *which aspects* of the political process it accords deference. I thus do not address, for example, whether decision theory proves that courts cannot meaningfully defer to legislative "intent" but must rather defer to "the meaning of the enactment," Frank H. Easterbrook, *Statutes' Domain*, 50 *U. CHI. L. REV.* 533, 535 n.3, 547-48 (1983), or whether decision theory provides a reason to favor delegations to agencies, see Mashaw, *supra* note 6, at 98-99. For a response to Easterbrook, see Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 *VA. L. REV.* 423 (1988). For a response to Mashaw, see Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 *NW. U. L. REV.* 646, 664 (1988).



To begin with, it is not at all obvious that the problems identified by decision theory establish that the political process is normatively defective. To some, it merely demonstrates that the political system involves more than the mechanical task of preference aggregation.<sup>272</sup> Moreover, two of Arrow's conditions, transitivity and the irrelevance of independent alternatives, have proven to have a particularly controversial normative content.

The requirement that social choices between alternatives be unaffected by independent alternatives (the independence condition) in effect excludes information that is relevant to the intensity of voters' views and from which one might derive voters' cardinal, interpersonally comparable utilities.<sup>273</sup> That Arrow chose a condition having this implication is not surprising: he believed interpersonal utility comparisons were meaningless and aimed to develop a social welfare function that did not rely on them.<sup>274</sup> But the normative superiority of purely ordinal preference rankings is hardly clear.<sup>275</sup> Indeed, Arrow himself has ironically provided perhaps the most convincing argument against a purely ordinal aggregation: its instability.

Nor is it obvious that intransitivity should be condemned normatively. To be sure, intransitivity implies either cycling, path dependence, or strong influence by the agenda setter. But the normative deficiency of all of these features is contestable.

Some scholars argue that cycling enhances, rather than undermines, the democratic process because cycling prevents a fixed majority from permanently subordinating the policy views of a fixed minority.<sup>276</sup> The minority that loses one vote always has the possibility of winning the next vote by reframing the issue. Cycling thus empowers the minority in a way that may be integral to distinguishing democracy from a dictatorship by the majority. Consider, for example, Robert Post's argument that democracy does not mean majority rule but self-determination, and that self-determination requires giving the minority some opportunity to engage in a public discourse that may influence govern-

272. See Pildes & Anderson, *supra* note 263, at 2127-28, 2142-66, 2175-2214. In deriving his theorem, Arrow consciously excluded other purposes of the political process, such as the possibility that persons derive value from political participation or that the political process alters their views and preferences. See ARROW, *supra* note 98, at 6-8.

273. See ARROW, *supra* note 98, at 59; MUELLER, *supra* note 22, at 393-95, 398-99, 406-07; Hovenkamp, *supra* note 269, at 952-54. A problem with voting procedures that allow individuals to express the intensity of their views is that such procedures can give voters incentives to strategically misrepresent their preferences, but this theoretical incentive often has little practical significance. See MUELLER, *supra* note 22, at 395-99, 406-07. To the extent that the instability problems of majority rule are viewed as more problematic than the strategic behavior problems raised by these alternative voting procedures, adopting the alternative voting procedures would seem a better avenue of reform than making judicial review more intrusive. See generally *id.* at 112-47 (comparing advantages and disadvantages of various voting procedures).

274. See ARROW, *supra* note 98, at 9-11, 31-33.

275. See, e.g., MUELLER, *supra* note 22, at 406-07, 424-40 (arguing that decisionmaking that admits interpersonal utility comparisons can be normatively attractive if implemented by individual decisions at stage of making basic structural rules).

276. See Pildes & Anderson, *supra* note 263, at 2166-67, 2171-75.

mental decisionmaking.<sup>277</sup> Decision theory suggests that this public discourse can have real bite even if it does not change anyone's mind, because it may allow the minority to reframe issues along lines that give it a chance of forming a winning coalition.

To the extent cycling is terminated (at least temporarily) by a final vote, intransitivity implies path dependence. This need not be devastating. It might be nice in some abstract sense if we could achieve path independence without sacrificing other decisionmaking values. But where no majority favors one alternative over all the others, and an arbitrarily chosen path is the only way to resolve the social choice, path independence is an unrealistic ideal against which to measure the desirability of the democratic process. Indeed, in other decisionmaking processes, path independence is not commonly regarded as essential. Sports leagues and tournaments routinely crown champions that might have lost to teams or players that lost earlier playoff rounds. As long as the method for determining the sequence of play is fair—and here fair means unbiased and sometimes random—this path dependence does not seem to detract from the acceptability of the process.<sup>278</sup> Rather, such processes, and the champions they produce, appear to be accepted on the quite sensible ground that the process is the best we can do.

A more significant problem may arise if agenda setters can utilize their agenda-setting power to influence the final outcome. Such an agenda setter, typically a legislative committee, will possess "the lion's share of influence over what alternative is chosen from among those that can beat the status quo."<sup>279</sup> But this is problematic only if the mechanism for choosing the agenda setter is somehow flawed. The decision theory critique of the democratic process here thus piggybacks somewhat on the argument that interest groups disproportionately influence committee members; the critique is therefore susceptible to the lines of argument developed in Parts II to IV. Further, if the method of selecting the agenda setter were the root problem, the logical avenue of reform would appear to be changing that method,<sup>280</sup> not making judicial review more intrusive.

More fundamentally, even if the decision about *which* of the alternatives the majority prefers to the status quo is arbitrary or influenced by the agenda setter, at least majority rule helps assure that a majority does in fact prefer the alternative to the present state of affairs.<sup>281</sup> That much certainly appears desir-

277. See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279-85 (1991).

278. See MUELLER, *supra* note 22, at 391-92, 398-99.

279. Riker & Weingast, *supra* note 44, at 386-87.

280. See Pildes & Anderson, *supra* note 263, at 2196-97.

281. A technical caveat is necessary here. If the agenda setter can require a series of votes in which winning alternatives replace the initial status quo and are then challenged in subsequent votes, then theoretically an agenda setter who knows the preferences of all voters can (where their aggregate preferences are intransitive) induce them to adopt *any* feasible policy alternative—including an alternative that would lose to the initial status quo. See Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models*

able, as is evidenced by the painful consequences that follow when tyrannies can ignore majority preferences. Cycling among alternatives may occur in a democracy, but at least the cycle will stay within relatively acceptable bounds.

This brings us to the next category of objections to the claim that decision theory justifies more intrusive judicial review: even if one concedes that decision theory demonstrates that majority rule is defective in some meaningful normative sense, this does not prove that more intrusive judicial review would be an improvement. As multimember bodies, the Supreme Court and other appellate courts are subject to precisely the aggregation problems of cycling or path dependence described above.<sup>282</sup> The potential problems may, indeed,

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*and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976); see also MUELLER, *supra* note 22, at 88-89 (summarizing McKelvey's analysis). McKelvey's analysis is of profound theoretical importance, and his general conclusion that agenda setting can influence the outcome is well founded. See, e.g., Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 571-87 (1977) (recounting examples where agenda-setting power was successfully used to reach result desired by agenda setter). However, his theoretical conclusion that an agenda setter can obtain *any* result, whether or not a majority prefers it to the status quo, exaggerates the actual influence of political agenda setters.

To begin with, the informational conditions necessary to reach McKelvey's theoretical conclusion are extreme and somewhat odd. The agenda setter must be remarkably well informed about the preference ordering of each voter to schedule an agenda that will produce a certain result. See McKelvey, *supra*, at 481. Further, the voters must be well informed about policy issues but oddly uninformed about agenda issues. They must be well informed about policy issues, see *id.*, otherwise their preference ordering may be probabilistic and not susceptible to cycling, see *supra* note 270. But they must also be sufficiently uninformed about agenda issues that they reveal their true preference ordering to the agenda setter and cast each vote without foreseeing the sequence of votes to come. See McKelvey, *supra*, at 481; MUELLER, *supra* note 22, at 91. Whether any real world voters possess such sophistication and ignorance simultaneously is dubious. Certainly if any agenda setter actually pursued the series of votes necessary for McKelvey's theoretical result, that would likely alert even the most obtuse of voters to take the possibility of subsequent iterations into account in future votes.

Moreover, real world political processes do not permit the repeated iterations and unified agenda control required for McKelvey's theoretical conclusion. Legislative committee chairs, the typical agenda setters, might be able to hold a series of votes to determine which bill comes out of committee to face the status quo. If, however, that bill wins, they would have difficulty convincing the legislature to devote further time to consider replacing the enacted bill with another, let alone to consider replacing the second enacted bill with a third, and so forth. Legislative time and effort is a scarce commodity, and legislatures are unlikely to be willing to spend the time necessary to go through the iteration of votes that will maximize the influence of the agenda setter. The House, for example, usually considers bills under a closed rule that allows no amendments from the floor. Riker & Weingast, *supra* note 44, at 388. Agenda-setting power is further limited by bicameralism, because an agenda-setting legislator in one chamber cannot control the voting agenda in the other chamber. See Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. (forthcoming May 1992). At most, the convener in one chamber shares (with the convener of the other) agenda-setting influence over the conference committee, see *id.*, but any product of the conference committee must be able to beat the initial status quo in both chambers. Agenda-setting influence is thus generally limited to influencing the alternative chosen from the set that can beat the status quo. Accord Riker & Weingast, *supra* note 44, at 386-87, 394, 397.

282. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 813-32 (1982). Lewis Kornhauser and Lawrence Sager agree that decisionmaking by multimember courts will exhibit path dependence, but use examples to argue that such courts will not exhibit the inconsistency of cycling. See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 107-15 (1986). The examples they choose, however, all assume either that there are only two possible outcomes or that some default rule (such as issue-by-issue voting) has been chosen which effectively orders the agenda into pairwise votes. *Id.* at 107-15. Where only two alternatives are present, it has long been recognized that cycling problems will not exist because Arrow's Theorem requires at least three alternatives. See ARROW, *supra* note 98, at 24. If instead, as seems appropriate in evaluating the decision theory critique, the assumption

be even worse than those faced by legislatures because under prevailing ethical norms judges cannot engage in the sort of logrolling that legislators commonly employ. Because logrolling can sometimes avoid cycling and path dependence (by violating the independence condition),<sup>283</sup> a decisionmaking body that does not engage in logrolling is, all other things being equal, more likely to promulgate inconsistent or path-dependent decisions than one that does.

Moreover, these aggregation problems will only be worsened if judges take on a greater lawmaking role. One possible method of avoiding the problems posed by Arrow's Theorem is to restrict the domain of choices voters can make.<sup>284</sup> Although constraining the choice of voters and legislators in the political sphere is commonly regarded as too great a restriction on free self-government to merit serious consideration, judicial choice is already somewhat constrained by the requirement that judges base their decisions on legal materials.<sup>285</sup> At least sometimes, this constraint should prevent Arrovian problems from arising. To the extent that we relax this constraint by giving judges more open-ended lawmaking power (and thus greater flexibility in ordering their policy preferences), we exacerbate the Arrovian problems that courts already face.

One might try to avoid these aggregation problems by having a one-member court. But that would violate an Arrovian condition for rational social choice far more fundamental than the condition of transitivity: the "nondictatorship" condition.<sup>286</sup> Majority rule may aggregate individual preferences inconsistently, but dictatorial decisionmaking need take no cognizance of it at all. Nor does there seem much attraction to the oligarchic rule of multimember courts, even assuming they could avoid aggregation problems.

More generally, judicial decisionmaking is, as a matter of decision theory, worse than intransitive majority rule in two important respects. First, in cases where a policy alternative does exist that commands a majority against all

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of unrestricted domain of choices that decision theory applies to the political process is also applied to the judicial process, then Easterbrook is correct about the vulnerability of multimember courts to Arrovian problems.

Similarly, the default rules used in Kornhauser and Sager's examples to order the judicial agenda would seem to be just as vulnerable to the charge of producing arbitrary results as rules that order the agenda in the political process. Kornhauser and Sager note, for example, that whether the default rule requires judges to vote on the judgment or issue-by-issue can (to a criminal defendant) make the difference between freedom and incarceration. See Kornhauser & Sager, *supra*, at 115. Moreover, the default agenda rule for judicial voting is in fact unsettled. In the Supreme Court, Justices sometimes vote directly on the judgment; other times they vote by issue, accepting the majority's resolution of other issues as binding. See Lewis A. Kornhauser, *Modelling Collegial Courts*, 12 INT'L REV. L. & ECON. (forthcoming May 1992) (manuscript at 49-57, on file with author) (collecting cases). This in effect gives a Justice with the swing vote the power to manipulate the agenda, depending on whether the Justice prefers to reach a particular result or a particular issue.

283. See Easterbrook, *supra* note 282, at 825; Rubin, *supra* note 56, at 9, 20 (collecting sources).

284. See MUELLER, *supra* note 22, at 392-93.

285. There is, to be sure, considerable dispute about the severity of this constraint. See Kornhauser & Sager, *supra* note 282, at 92-93 & n.15 (outlining spectrum of views).

286. See ARROW, *supra* note 98, at 30.

others, judges may refuse to choose it. Second, although committees may manipulate the choice among those policy alternatives that can defeat the status quo, judges can choose alternatives that *could not* beat the status quo.

To be sure, in the long run the Supreme Court can successfully impose an alternative only if it chooses one that is immune from reversal. In statutory interpretation cases, this requires that at least one of the three principal political actors—the House, the Senate, or (where his veto would be sustained) the President—prefers the judicially chosen alternative to any alternative that is considered preferable to the judicial choice by both the other two principal political actors.<sup>287</sup> But even this gives the Court substantial power to choose alternatives that could not defeat the status quo, especially when coupled with the scarcity of legislative time and the power of legislative inertia. In constitutional cases, the Court faces a weaker restriction:<sup>288</sup> the judicially chosen alternative cannot be so far out of the mainstream that two-thirds of both Houses of Congress *and* a majority in three-fourths of the state legislatures would vote to overturn the judicial choice.<sup>289</sup> If the Court is satisfied to impose its policy preference over the *short run*, then even these limited restrictions would not restrain its (short run) power to choose alternatives that could not beat the status quo.<sup>290</sup>

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287. See Gely & Spiller, *supra* note 211, at 266, 268-77 & n.20. If the relevant House and Senate committees have effective gatekeeping power, it may also be sufficient if one of the two committees prefers the judicially chosen alternative to what the Congress would enact to override that alternative. See Eskridge, *supra* note 44. This sharply increases the lawmaking power potentially available to the Court in interpreting statutes because it means that, where the veto and gatekeeping powers cannot be overridden, only one of five political bodies—the House, the relevant House committee, the Senate, the relevant Senate committee, or the President—has to prefer the judicial alternative to an overriding statute for the judicial choice to prevail.

288. This restriction is sufficiently weak that a more feasible way of overturning constitutional decisions in the long run may be to change the composition of the Court via appointments. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283-86 (1957). The Court's shift in constitutional interpretation in the 1930's might suggest that threats to pack the Court can have a shorter-term impact. But Gely and Spiller point out that the threat of constitutional amendment may have provided the real impetus for this change because the Court voted to reverse its position before the Court-packing plan was announced, but soon after the 1936 election gave the Democrats supermajorities in both Houses of Congress and control over the lion's share of state legislatures. See Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions*, 11 INT'L REV. L. & ECON. (forthcoming Dec. 1991) (manuscript at 4, on file with author). Gely and Spiller's predictions about the sorts of electoral changes that will induce changes in the Court's constitutional interpretation have some interesting parallels to Bruce Ackerman's theory that radical changes in constitutional interpretation are justified during certain "constitutional moments" when the public "place[s] a constitutional meaning upon a sustained series of electoral victories." Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1055 (1984).

289. See U.S. CONST. art. V. In theory, two-thirds of the states could initiate a constitutional amendment or convention, but to date all amendments have been initiated by Congress. See Gely & Spiller, *supra* note 288.

290. Gely and Spiller's results are based on the assumption that the Court seeks to avoid being reversed because reversal undermines the Court's legitimacy and credibility. See Gely & Spiller, *supra* note 211, at 267-68 & n.15. Although this assumption seems generally true, Gely and Spiller also assume that courts wish to impose their policy preferences. *Id.* at 267. Often these motives will conflict, and it seems likely that a desire to impose judicial policy preferences over the short run will sometimes supersede the desire to avoid the effect on the Court's legitimacy of eventual reversal. Particularly when the loss of legitimacy

Perhaps those who advocate more intrusive judicial review based on decision theory are operating on the premise that such judicial review will be limited to nullifying deviations from the status quo and, in particular, from the free market.<sup>291</sup> But it is plain that judicial review can and often does cause deviations from the status quo and the free market.<sup>292</sup> This is especially true when courts exercise review under the Equal Protection Clause, which can be read as an affirmative rejection of common law baselines,<sup>293</sup> or when courts interpret regulatory statutes, which often involves filling in or extending the meaning of market regulation.

Even if judicial review were limited to policing deviations from a free market, decision theory would not demonstrate the desirability of more intrusive judicial review. The reason is that the free market is itself a method of aggregating preferences to make collective social choices, most notably choices about how to allocate labor and resources.<sup>294</sup> Thus, as Kenneth Arrow made clear in his seminal work, the free market is just as susceptible to the problems identified by his theorem as is majority rule or any other method of making collective social choices.<sup>295</sup> Arrow's Theorem describes the logical problems

is delayed, and thus mainly affects succeeding generations of Justices, sitting Justices who possess the motives Gely and Spiller ascribe to them are likely to be tempted to expend the previously accumulated reputation of the institution to further their own policy agendas over the short run.

291. Riker and Weingast's call for less judicial deference concerning "economic rights," see Riker & Weingast, *supra* note 44, at 375-79, suggests that they may be envisioning a judicial review that would strike down only deviations from the free market.

292. See generally Sunstein, *Lochner's Legacy*, *supra* note 106 (arguing that central lesson of *Lochner* is that market ordering under common law is no longer an appropriate baseline for measuring governmental "inaction" or "neutrality").

293. See *id.* at 912-15.

294. See ARROW, *supra* note 98, at 2 (noting that, in contrast to making social decisions through dictators or by convention, "[t]he methods of voting and the market . . . are methods of amalgamating the tastes of many individuals in the making of social choices").

295. See *id.* at 5 ("[T]he distinction between voting and the market mechanism will be disregarded, both being regarded as special cases of the more general category of collective social choice."); see also MUELLER, *supra* note 22, at 385 ("no process (voting, the market, or otherwise) exists that satisfies" Arrow's conditions). Similarly, social decisionmaking that comports with the Kaldor-Hicks criteria also fails to satisfy Arrow's conditions. See ARROW, *supra* note 98, at 38-45; see also *id.* at 31-32, 37 (same holds for utility maximization and Pareto efficiency based solely on consumption).

It is easiest to describe how the market fails Arrow's conditions if we assume we have (as we do) an imperfect market. Under such conditions, market exchanges will involve bargaining over extra-market surpluses. If the bargaining involves more than two persons, and there is no core bargaining solution, cycling is possible. See Aivazian & Callen, *supra* note 246, at 146; Hovenkamp, *supra* note 269, at 968-70. In any event, the completed bargains will have wealth or endowment effects, which will then alter which future market transactions occur. The result is that the order in which market exchanges occur will alter the final market outcome, making the market path dependent.

It is somewhat more difficult to identify the Arrowian violations if we assume a perfectly competitive market, where all possible transactions are simultaneously identified and no extra-market surplus exists. But even this ideal market violates the Arrowian conditions, as indeed any decision process must, since Arrow's Theorem is a general impossibility theorem. First, the Pareto optimal results produced by such a market depend on the initial set of entitlements. See *id.* at 968. Thus, market results are infected by whatever flaws infect the process used to create initial entitlements. Second, the results of general competitive equilibrium are derived by assuming convex preference curves. See KENNETH J. ARROW & F.H. HAHN, *GENERAL COMPETITIVE ANALYSIS* 169 (1971). This violates the unrestricted domain condition. Third, the very assumption that people start with entitlements to property and their labor, which they use to "vote" in the

in forming any collective decision out of a diverse set of individual views. The problem does not lie in the particular method used for making social choices, for none can satisfy his conditions.

In short, for reasons that parallel the reasons offered regarding interest group theory, decision theory does not justify more intrusive judicial review. First, the proposition that decision theory identifies defects in the political process is controversial and requires an independent normative theory. Second, decision theory by no means demonstrates that judges are better decisionmakers than legislators. Finally, one cannot justify more intrusive judicial review by claiming that it impedes a flawed decisionmaking process that is likely to disturb the status quo or the free market because judicial review may not fulfill that role and because those same decisionmaking flaws infect the status quo and the free market.

### CONCLUSION

It is common among modern legal scholars influenced by public choice theory to speak derisively of the naive view earlier legal theorists had of the political process. That earlier public interest view of the political process, they argue, has been thoroughly discredited and with it, they imply, so have the earlier theorists.

But many modern legal scholars have been guilty of their own naiveté about scholarly theory, the judicial process, and the private ordering. They have naively assumed that, because a theory provides a helpful tool for analyzing as *individuals* how our collective decisionmaking process can produce apparently undesirable regulation, the theory can be implemented into a legal apparatus for making *collective* decisions about when the results of our collective process should be respected. They also have naively assumed that, because they have found defects in the political process, expanding the scope of judicial lawmaking and (perhaps) the private ordering would improve the situation, but they have not critically examined whether the latter processes can be expected to produce *better* results than the processes they would replace.

These assumptions, I hope I have shown, are unfounded. The political process may have defects, but critical analysis is misleading if it proceeds on the premise that those defects should be measured by the “nirvana” standard,

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market, means that the market will take their cardinal preferences into account. I might choose to buy (and through the market have society choose to produce) a Mazda Miata over a Mazda RX-7, even though I would otherwise prefer the RX-7, because I want to have money left over to buy a laptop computer that has just hit the market. More generally, a new good can be expected to change demand curves, which in turn change prices and hence output for other goods. The introduction or subtraction of possible goods can thus alter decisionmaking, and this violates the condition of the irrelevance of independent alternatives. The market does, on the other hand, make decisions independent of goods that cannot feasibly be produced. See ARROW, *supra* note 98, at 110.

where any deviation from an unobtainable ideal is grounds for criticism.<sup>296</sup> A more accurate measure of the desirability of any legal process, or for that matter any law, is whether the mix of results it produces is better than the mix of results we could get with alternative processes or laws. By this comparative standard, the political process measures up quite well against the processes that would supplant it under the various proposals to curb interest group influence. This suggests that the true basis for putting one's faith in the democratic process is not a naive belief that it will always produce the best results, but a lack of naiveté about the alternatives. Or, as Winston Churchill once put it, "democracy is the worst form of Government except all those other forms that have been tried from time to time."<sup>297</sup>

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296. See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1-4 (1969).

297. OXFORD DICTIONARY OF MODERN QUOTATIONS 55 (Tony Augarde ed., 1991) (quoting Winston Churchill).