

The U.S.-French Dispute Over GATT Treatment of Audiovisual Products and the Limits of Public Choice Theory: How an Efficient Market Solution Was "Rent-Seeking"

Thomas M. Murray

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**THE U.S.-FRENCH DISPUTE OVER GATT TREATMENT OF
AUDIOVISUAL PRODUCTS AND THE LIMITS OF PUBLIC
CHOICE THEORY: HOW AN EFFICIENT MARKET SOLUTION
WAS "RENT-SEEKING"**

THOMAS M. MURRAY*

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I. INTRODUCTION

Public Choice Theory postulates that politicians rely on the "financial backing, publicity and endorsements" provided by organized interest groups to get elected and thus can be bribed to do the legislative bidding of those groups.¹ Adherents to Public Choice Theory have suggested, with some success, that the theory's normative implications should guide judges, legislators, and other policymakers in their legal and public policy decisions.² The centerpiece of this theory is the concept of "rent-

* Associate, Spivak, Lipton, Watanabe, Spivak & Moss LLP, New York, New York. I would like to thank Professor John O. McGinnis of Benjamin Cardozo School of Law for his helpful comments and encouragement with this article.

1. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 23 (1991).

2. See *generally id.* at 63-143.

seeking," which can be defined as the actions and decisions of political actors that result in wealth transfers which reduce the economic well-being of society.³ Thus, the basis for the normative application of Public Choice Theory depends on an accurate determination of what political behavior may be defined as rent-seeking.

The problem of defining rent-seeking behavior, however, represents the principal barrier to Public Choice Theory as positive law because the concept reflects a simplistic, two-dimensional approach that fails to account for the political reality of policymaking. This article employs a Public Choice analysis of the dispute between France and the United States regarding treatment of film and audiovisual products under the General Agreement on Tariffs and Trade (GATT) to demonstrate how the simplistic definition of rent-seeking limits the normative application of Public Choice Theory.

Specifically, this article looks at two problems that French and American trade negotiators faced in the audiovisual products dispute. The first problem centers on the question of whether France's fight to maintain trade barriers on cultural products could legitimately be labeled rent-seeking behavior. This problem is a common one that reflects a debate which Public Choice Theorists have had over when interests in the common good of society outweigh inefficient market policies.

The French and American audiovisual products dispute particularly highlights the more interesting problem of defining the behavior of a special interest group that does not satisfy the usual indicia of rent-seeking behavior. The American entertainment industry advocated what would normally be an efficient market solution, the removal of trade barriers. However, had the United States refused to compromise on the issue of the inclusion of audiovisual products in GATT, the talks would have collapsed without a final agreement. The result would have been an even more economically inefficient outcome because American industry as a whole benefited much more from GATT than the potential gains the entertainment industry lost as a result of the failure of its GATT agenda. Thus, there is a paradox of competing economically efficient outcomes that the concept of rent-seeking behavior fails to capture.

The audiovisual products dispute illustrates how one economically efficient policy may in fact be inefficient if it trumps a greater wealth-creating policy. It similarly illustrates how a seemingly inefficient, rent-seeking public policy may in fact be efficient if it satisfies public concerns on a controversial matter, thereby preventing a potentially greater inefficient political outcome. This failure to address the complex political

3. See *infra* notes 51-54 and accompanying text.

reality in which political actors actually make choices renders the Public Choice Theory a poor predictor of political behavior and makes it of limited utility as positive law.

When the Uruguay Round of the GATT talks concluded on December 14, 1993, one of the most difficult, final hurdles the negotiators had to overcome was the dispute between France and the United States regarding the treatment of film and audiovisual products under the GATT.⁴ In the end, France won the dispute.⁵ France and other European Community countries wanted the audiovisual sector to be excluded from the services section⁶ of the GATT talks; the United States wanted the sector included.⁷ The American entertainment industry, which lobbied heavily for inclusion, was seen as the "big loser."⁸

To those who subscribe to the theory of Public Choice, this outcome would seem surprising. Agreement on removal of all trade restrictions on film and audiovisual products was very important to the American entertainment industry.⁹ President Clinton was "particularly indebted to Hollywood" because of his and the Democratic Party's close ties to Hollywood.¹⁰ Clinton's choice for United States Trade Representative was Mickey Kantor, a "Los Angeles lawyer with close ties to the movie business," and the chief lobbyist for the film industry was Jack Valenti, president of the Motion Picture Association of America (MPAA), a Democrat and former special assistant to President Lyndon B. Johnson.¹¹ Clinton had met with top entertainment industry executives a couple of months before completion of the talks to pledge that the United States would "not accept trade restrictions or quotas" on audiovisual products.¹²

4. See Jonas M. Grant, *'Jurassic' Trade Dispute: The Exclusion of the Audiovisual Sector from the GATT*, 70 IND. L.J. 1333, 1336 (1995). See also Keith Bradsher, *The World Trade Agreement: U.S. and Europe Clear the Way for a World Accord on Trade, Setting Aside Major Disputes*, N.Y. TIMES, Dec. 15, 1993, at A1; Roger Cohen, *The World Trade Agreement: A Realignment Made Reluctantly*, N.Y. TIMES, Dec. 15, 1993, at D19.

5. See Marc Sandalow et al., *Historic Global Trade Pact: GATT Issues Resolved by 116 Nations*, S.F. CHRON., Dec. 15, 1993, at A1; Bernard Weinraub, *The World Trade Agreement: The Hollywood Reaction; Clinton Spared Blame by Hollywood Officials*, N.Y. TIMES, Dec. 16, 1993, at D1.

6. General Agreement on Trade in Services (GATS).

7. See 10 INT'L TRADE REP. (BNA) No. 38, at 1628 (Sept. 29, 1993); Grant, *supra* note 4.

8. Grant, *supra* note 4, at 1334.

9. See David J. Fox, *Entertainment Industry Gets Clinton's Free Trade Pledge*, L.A. TIMES, Oct. 15, 1993, at D5.

10. Grant, *supra* note 4, at 1354-55. See also Weinraub *supra* note 5.

11. Weinraub, *supra* note 5.

12. Fox, *supra* note 9. The participants in the White House meeting included MCA

Public Choice Theory would lead one to predict that this was a situation in which the Clinton Administration would deliver the trade policies favored by the American entertainment industry, but that did not happen. This article explains why that did not happen. Furthermore, this article argues that Public Choice Theory is limited in its ability to evaluate and predict the choices made by political actors because it fails to recognize and take account of the complexity of the social and economic circumstances at the time such decisions are made.

Part II of this article describes the dispute between France and the United States over GATT treatment of audiovisual products. It explains the relationship between the political actors in each country and their relationship to their respective entertainment interest groups. Most importantly, this part describes how national identity and fears of cultural imperialism in France and Europe created a powerful force united against the United States, and insured that purely economic efficiency arguments would lose out to cultural protection.

Part III evaluates the application of Public Choice Theory to international trade policy. While Public Choice Theory usually looks at the behavior of legislatures, it has been used to assess the actions of the Executive Branch as well. Thus, because the power to make international trade policy is chiefly within the authority of the Executive Branch, this part describes how Public Choice Theory has been applied to both the Executive Branch and international affairs.

Finally, Part IV explores the Public Choice Theory implications of the audiovisual products dispute at the GATT. It demonstrates the limits of the Public Choice analysis as applied to international economic relations, specifically the problem of determining when political actors' behavior can rightly be labeled as rent-seeking. This article attempts to demonstrate that, although the U.S. entertainment industry was fighting for what most people would consider the most efficient market solution for the treatment of audiovisual products in the GATT, that fight was paradoxically rent-seeking behavior.

II. THE PROBLEM: EUROPEAN TRADE RESTRICTIONS ON FILM AND AUDIOVISUAL PRODUCTS

In addition to President Clinton's ties to the American entertainment industry, there were other obvious reasons for the United States to push

Chairman Lew Wasserman and President Sidney Sheinberg, Paramount Communications Chairman Martin Davis, Viacom Chairman Sumner Redstone, Walt Disney Co. President Frank Wells, Warner Bros. President Terry Semel, Sony Pictures President Alan Levine and Fox President Chase Carey. *Id.*

so hard for free trade treatment of the American entertainment industry. The American entertainment industry is the second largest export industry in the U.S. after the aerospace and aviation sector, generating foreign revenues of approximately \$18 billion annually and producing a trade surplus of \$4 billion in 1992 alone.¹³ Furthermore, 414,700 workers were directly employed in the film industry and, for every two direct jobs, three were created in support industries.¹⁴

The two major sources of friction between the European Union (EU) and the United States regarding trade restrictions on audiovisual products were national quotas on European television and subsidies for European films.¹⁵ Adding to this friction, France was "the most aggressive and vocal [EU member] in opposing free audiovisual trade."¹⁶ In fact, the battle was widely and accurately perceived as a fight between the Americans and the French.¹⁷ The United States wanted the audiovisual sector fully covered by the GATT and governed by the free trade rules embodied in the GATS, while France and the EU wanted special treatment so that "cultural goods" would be treated differently than industrial and service products.¹⁸

The national quotas were embodied in what came to be known as the "Television Without Frontiers Directive."¹⁹ This Directive was an attempt by the EU to integrate the member states into a single market with standardized broadcast regulations. The Directive used quotas to create a "cultural safety net" designed to protect the television industries of the member states in order to foster and preserve common European values and goals.²⁰ The quotas, which sought to limit American broadcast products,²¹ required that EU members abide by set minimum percentages of

13. Kirsten L. Kessler, *Protecting Free Trade in Audiovisual Entertainment: A Proposal for Counteracting the European Union's Trade Barriers to the U.S. Entertainment Industry's Exports*, 26 LAW & POL'Y INT'L BUS. 563, 563 (Jan. 1995).

14. *Id.* at 564.

15. *Audiovisual: A GATT Tug-of-War; General Agreement on Tariffs and Trade*, VIDEO AGE INT'L, Oct. 1993, at 40 [hereinafter VIDEO AGE].

16. Kessler, *supra* note 13, at 563.

17. *See* Weinraub, *supra* note 5.

18. *See* 10 INT'L TRADE REP. (BNA), No. 41, at 1777 (Oct. 20, 1993).

19. Council Directive 89/552 on the Coordination of Certain Provisions Laid Down By Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23.

20. *See* Kessler, *supra* note 13, at 566-69; Grant, *supra* note 4, at 1337-40; Richard Collins, *The Screening of Jacques Tati: Broadcasting and Cultural Identity in the European Community*, 11 CARDOZO ARTS & ENT. L.J. 361, 365-66 (1993).

21. *See* Kessler, *supra* note 13, at 568. As of 1995, American companies' share of EU programming was 28%, or 70,000 hours. *Id.* At the time the Television Without Frontiers Directive was passed, over 70% of European television fiction was U.S. made. *See*

broadcasts of European origin, although members were free to enact more stringent standards.²² This requirement was the most irritating to U.S. producers.²³

European Union subsidies to member states' film industries was the second major source of disagreement between the EU and the United States. As with the Television Without Frontiers Directive, this battle was mainly waged between the French and the Americans because the EU subsidies and quotas had the most effect on American films in France.²⁴ Furthermore, the French film industry is the most profitable in the EU and the second largest film industry in the world, after the U.S.²⁵ More than half of all the film subsidies in the EU were granted to French filmmakers by the French Government.²⁶ These subsidies were mainly funded by taxes on movie ticket sales, proceeds from television, and sales of pre-recorded videotapes.²⁷ Because such a large percentage of the taxes were from sales of American made films, the source of the subsidies was particularly galling to the Americans.

The United States and France saw this fight from very different perspectives. The United States saw entertainment products as no different than any other commercial products, and thus as legitimate items for inclusion in international trade agreements. The French and other Europeans, on the other hand, viewed film and audiovisual products as cultural items that should be treated differently than other commodities and services.²⁸

The U.S. position is evident from the public statements of the Americans involved with the GATT negotiations. Jack Valenti, chief lobbyist for the U.S. film industry, said, "This [debate] has nothing to do

Grant, *supra* note 4, at 1338.

22. See Grant, *supra* note 4, at 1338-39. The Directive called for a majority of transmission time, excluding news, sports, games, advertising and teletext services, be reserved for European works. *Id.*

23. *Id.* at 1339.

24. See Grant, *supra* note 4, at 1340. U.S. movies had only 58% of the French box office receipts in 1992 compared to 93% in Britain and 70% in the rest of the EU. *Id.* at 1339.

25. See *id.* at 1339-40.

26. See *id.* at 1344 n.109. Total subsidies by EU countries in 1992 were \$493.1 million, with France's share of that amount being \$250 million. *Id.*

27. See *id.* at 1344.

28. See *id.* at 1345-52; Collins, *supra* note 20, at 361-64 nn.1-16; Roger Cohen, *Aux Arms! France Rallies to Battle Sly and T. Rex*, N.Y. TIMES, Jan. 2, 1994, § 2, at 1; Andrew Marr, *Don't Mock: The French Have a Point*, THE INDEPENDENT (London), Oct. 15, 1993; 10 INT'L TRADE REP. (BNA), No. 41, at 1777 (Oct. 20, 1993); 10 INT'L TRADE REP. (BNA), No. 37, at 1590 (Sept. 22, 1993); Jonathan Schell, *GATT's Star Wars With a Certain French Accent*, NEWSDAY, Dec. 9, 1993, at 123.

with culture unless European soap operas and game shows are the equivalent of Molière. This is all about the hard business of money.”²⁹ Noting the importance of the film and television industry to the U.S. economy, U.S. House Majority Leader Richard Gephardt (D-Mo) said, “This is an area where we’re truly on the cutting edge, truly are competitive, and it adds a tremendous amount to our job base in this country. And therefore we really need to put our workers and businesses on as level a playing field as we can get them on.”³⁰

This view of cultural goods as no different than any other type of commercial good was bipartisan. In response to French cultural protection arguments, Carla Hills, President Bush’s trade representative and GATT negotiator, said, “Make films as good as your cheese and you will sell them!”³¹

The French displayed bipartisan unity as well, arguing for a cultural exception in the GATT in order to preserve French culture and identity. Conservative Foreign Minister Alain Juppe accused the United States of “intellectual terrorism.”³² Former Culture Minister, socialist Jack Lang, said, “The soul of France cannot be sold for a few pieces of silver.”³³ Thus, “[p]erceived cultural imperialism [was] at the heart of the U.S.-EU trade dispute. EU countries — particularly France — fear[ed] they [were] being overrun with U.S. culture.”³⁴ What was even more troubling to Europeans was the marketing and merchandising behemoth that American movies had become. Many feared the propaganda value exhibited by American film and its power to promote not only the American way of life, but also American products and industries.³⁵

29. Grant, *supra* note 4, at 1343.

30. 10 INT’L TRADE REP. (BNA), No. 42, at 1820 (Oct. 27, 1993).

31. Grant, *supra* note 4, at 1351.

32. *Id.* at 1346.

33. *Id.* at 1347.

34. *Id.*

35. *See id.* at 1347-49. German film director Wim Wenders said, “People increasingly believe in what they see and they buy what they believe in. If we ever give up the European film industry, then all the other European industries will suffer in the future. People use, drive, wear, eat and buy what they see in the movies. We need to regard our films in the same way as we do our literature. Books would never be included in international trade industry deals.

Id. at 1347. French director Jean-Marie Pore added, “I want to see films with Italian cars, British cars, French clothes and European cafes. . . . I want us to draw on our culture.” *Id.* at 1348. Bertrand Tavernier, another French director, stated,

America takes film seriously . . . not just because it is a big industry, but because it sells a way of life. They know cinema is a vehicle for ideas, and they want to sell those ideas [all] over the world. The Americans take cinema, and

A variation on the theme of cultural imperialism was the assertion that Europeans were also defending against an American monopoly by supporting free trade.³⁶ As Spanish director Fernando Troueba said, "The Americans have between 55% and 93% of markets in EC nations. They are not happy with that; they want everything."³⁷ The French argued that the Americans were engaged in cultural dumping because the size of the American market allowed their entertainment industry to recoup its investment at home while earning extra profits in Europe, in the case of film, and selling for a fraction of the production costs, in the case of television shows.³⁸

III. PUBLIC CHOICE AND INTERNATIONAL TRADE LAW

A. *Public Choice Theory*

Some commentators have applied Public Choice Theory to international trade law.³⁹ Doing so, however, is more problematic in many respects than applying the theory to other areas of domestic law because the political mechanisms by which the government conducts its trade relations are different than for domestic policymaking.⁴⁰ A brief description of Public Choice Theory is necessary to see why this is so.

Public Choice Theory is also known as the "interest group or economic theory of legislation."⁴¹ It posits the view that the legislative process is a microeconomic system where legislative activity is governed by pressure groups that use "political instruments" to further their inter-

the propaganda power of images, very seriously.

Id.

36. *See id.* at 1351.

37. Fox, *supra* note 9.

38. *See* Grant, *supra* note 4, at 1351. Richard Self, U.S. negotiator for GATS, agreed that the Americans had "certain economic advantages" because of the size of their market. *See supra* note 7, at 1628.

39. *See generally* Paul B. Stephan, III, *Interdisciplinary Approaches to International Economic Law: Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U.J. INT'L L. & POL'Y 745 (1995); *see also* Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 239-59 (1993).

40. Furthermore, the application of Public Choice Theory to international trade law often implicates questions of national sovereignty and cultural identity in the countries with which the United States conducts its trade, thereby inflaming nationalist sentiments and rendering outcomes more unpredictable.

41. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 n.6 (1986) [hereinafter Macey, *Public-Regarding Legislation*].

ests.⁴² The legislators sell legislation to interest groups, who pay for it with “ ‘campaign contributions, votes, implied promises of future favors, and sometimes outright bribes.’ ”⁴³ The legislator’s motive is the desire to be re-elected in order to retain the benefits that come with holding office, which requires financial and other support from powerful interest groups.⁴⁴ Legislators pass opaque legislation which imposes high transaction costs on voters who might seek to understand the effect of the legislation.⁴⁵ “[P]oliticians can advance their own private interests by identifying and helping enact legislation that transfers wealth from groups with high information and transaction costs to groups with low information and transaction costs.”⁴⁶ Groups that are already organized for other purposes, such as labor unions, corporations, and trade associations, not only overcome these informational problems, but also are able to overcome the “free rider” problem that inhibits the successful transfer of wealth.⁴⁷ The individual who is not a member of a well-organized group rightly assumes that his vote will have, for all practical purposes, zero effect on the outcome.⁴⁸

Organized groups thus exploit the rational ignorance of the general population. Rational ignorance refers to the idea that, for the individual, it does not pay to become adequately informed in order to develop an opinion on most issues nor to attempt to influence some political outcome regarding a given issue.⁴⁹ For example, Professor Jonathan R. Macey points out that

42. FARBER & FRICKEY, *supra* note 1, at 14-15.

43. *Id.* at 15 (quoting William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975)).

44. *Id.* at 23. See generally Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 45-47 (1988) [hereinafter Macey, *Theory of the Firm*].

45. See Macey, *Public-Regarding Legislation*, *supra* note 41, at 232 n.47 (“Legislators have incentives to search for issues in which the winners (special interest groups) are easily identified, while the losers (the general polity) cannot be easily identified. By masking the true purpose of a statute and claiming that it is actually in the public interest, legislators and interest groups lower the cost of passing statutes that transfer wealth to themselves.”).

46. *Id.* at 230.

47. See Macey, *Theory of the Firm*, *supra* note 44, at 47-48. See also Macey, *Public-Regarding Legislation*, *supra* note 41, at 231 n.44 (stating that individuals have no incentive to devote their own resources to obtain legislation that will benefit everyone because they can “free ride” on the efforts of others who invest in the legislation and obtain the benefits that will enure to everyone).

48. See Macey, *Public-Regarding Legislation*, *supra* note 41, at 231 n.44.

49. See Macey, *Theory of the Firm*, *supra* note 44, at 47.

[w]here a piece of legislation will cost a taxpayer \$50.00, and the net cost of obtaining information about the effects of the legislation (including the opportunity costs of the taxpayer's time, and the start-up costs of identifying the issue) are greater than \$50.00, no rational taxpayer will obtain the information necessary to affect legislative outcomes.⁵⁰

The legislator, thus, relies on the rational ignorance of constituents to curry favor with well-organized groups that then help the legislator win reelection.

B. *Rent-Seeking Behavior*

Public Choice theorists have labeled the efforts on the part of interest groups to seek wealth-transferring legislation as rent-seeking.⁵¹ "Rent seeking refers to the attempt to obtain economic rents (i.e., payments for the use of an economic asset in excess of the market price) through government intervention in the market. A classic example of rent-seeking is a corporation's attempt to obtain monopolies granted by government."⁵²

The negative implication of this theory is that the legislation favored by well-organized groups will transfer wealth from society as a whole to these groups, thereby reducing societal wealth and harming economic efficiency.⁵³ Judge Richard Posner refers to such rent-seeking wealth transfers as "amorally redistributive," because they are Kaldor-Hicks inefficient, meaning that the wealth transfer "makes one group better off but makes some other groups worse off by an even greater amount."⁵⁴

Public Choice theorists do not regard all legislation as rent-seeking. They label legislation that benefits society as a whole as "public regarding."⁵⁵ The problem of trying to determine whether a statute is rent-seeking or public-regarding, however, is difficult because there is no precise definition of "public-regarding."⁵⁶ As Professor Macey has pointed out, however, the concept of public-regarding is vague but not devoid of meaning. He defined the concept as follows:

50. *Id.*

51. FARBER & FRICKEY, *supra* note 1, at 15.

52. Macey, *Public-Regarding Legislation*, *supra* note 41, at 223 n.6.

53. *See id.* at 230.

54. *Id.* at 228 n.28. *See also* FARBER & FRICKEY, *supra* note 1, at 34 ("When economists describe special interest legislation as 'rent-seeking,' they mean that the legislation is not justified on a cost-benefit basis: it costs the public more than it benefits the special interest, so society as a whole is worse off.").

55. *See generally* Macey, *Theory of the Firm*, *supra* note 44, at 49-51.

56. *See* Macey, *Public-Regarding Legislation*, *supra* note 41, at 228 n.29.

Legislation may be said to be public-regarding if it serves some purpose other than obtaining for particular legislators the pecuniary advantage of the political support of some narrow interest group, even if this purpose is the transfer of wealth from one group to another. Public-regardingness is best thought of in procedural terms. *If the statute in question is the result of a reified, deliberative congressional process in which conceptions of the public good were considered, then the statute is public-regarding.* If, however, the statute simply represents legislative acquiescence to raw political power, it is not public-regarding.⁵⁷

Thus, when applying Public Choice Theory to international trade in cultural goods and services, the conclusion whether the behavior of the parties to a dispute is rent-seeking or public-regarding is outcome determinative because how one labels the negotiating posture of the parties largely determines how their behavior is defined by Public Choice theorists.

C. *Public Choice and the Executive Branch*

The Public Choice literature deals mostly with the legislative branch within the context of domestic politics. However, international economic relations are largely the province of the Executive Branch. At most, the Executive Branch needs explicit statutory authority to conduct foreign policy; at the least, it operates without legislative interference.⁵⁸ The attempt to transfer a theory of rent-seeking behavior from the legislative branch to the Executive Branch in order to understand the Public Choice implications of international economic relations is difficult.

"In economic terms, the problem of 'factions' described by [James] Madison and [Alexander] Hamilton is a problem of rent-seeking"⁵⁹ The presence of factionalism in the legislative branch, however, arguably does not aptly characterize the institutional structure of the Executive Branch. The drafters of the U.S. Constitution believed the President's national constituency made him less susceptible to factional capture than the legislators and, thus, created the presidential veto power as a check on rent-seeking activity by legislators.⁶⁰ Nonetheless, the institution of a large and complex administrative agency regime within the Executive

57. *Id.* (emphasis added).

58. See Stephan, *supra* note 39, at 755-57 (discussing four approaches interpreting presidential authority to conduct foreign policy).

59. Turley, *supra* note 39, at 241.

60. *Id.* at 246.

Branch has led to "the classic form of rent-seeking" behavior known as "agency capture."⁶¹

Rent-seeking does not solely involve administrative agencies, but may "occur[] entirely at the White House."⁶² Multinational corporations are the interest groups most likely to rent-seek in the Executive Branch, and have a long and successful history of doing so, especially on foreign policy matters.⁶³ Presidents have long defined foreign policy objectives in terms of multinational corporations' interests and have often secured those interests through the use of military force.⁶⁴ Of course, negotiating a multilateral agreement like the GATT is neither rulemaking nor military intervention, but rather is treaty-making. It has been suggested, though, that dealing with the Executive Branch engenders high transaction and information costs which may make rent-seeking easier to accomplish through treaties.⁶⁵

IV. PUBLIC CHOICE AND THE AUDIOVISUAL PRODUCTS DISPUTE AT THE GATT TALKS

Reaching final agreement on the GATT was beneficial for society as a whole in both the U.S. and France, that is, it was a Kaldor-Hicks efficient outcome.⁶⁶ Thus, the critical factor in applying a Public Choice analysis to the GATT dispute over audiovisual products is to determine who was rent-seeking, and who was advancing a public-regarding bargaining position. The paramount goal of the GATT was the removal of trade barriers in order to facilitate increased international trade. Trade barriers have historically been erected by governments to protect the economic interests of powerful groups in society and to enable them, at times, to capture monopoly rents for their goods. Those who have sup-

61. *Id.* at 247 (stating that "special interest groups gradually co-opt their regulators").

62. *Id.* at 248. As the most recent example of rent-seeking in the White House, Professor Turley points to President Bush's Council on Competitiveness, formed in 1989 and chaired by Vice President Quayle. The Council used the rule-making power to enact changes favored by industry after the passage of the Clean Air Act in 1990 that were directly counter to the legislation. *Id.*

63. *See id.* at 251-54.

64. *Id.*

65. *Id.* at 255.

66. While this article posits that there were worldwide economic benefits to be gained from GATT, this article's purpose is not to give short shrift to the arguments against GATT by those in the labor, environmental, and consumer movements. The author acknowledges the valid criticisms of the GATT and agrees with many of those criticisms. Nonetheless, the economic benefits of increased international trade, which the GATT agreement was intended to promote, are undeniable.

ported legislation to pass trade barriers, usually tariffs, have attempted to disguise their rent-seeking activity by arguing that they are promoting the public welfare by, for example, preserving jobs or the tax base. Trade barriers, then, are a classic example of rent-seeking behavior.⁶⁷ Thus, with regard to the GATT talks, most Public Choice theorists would agree that one fighting for the elimination of trade barriers would be advancing a public-regarding goal.

This article demonstrates, however, that this is not necessarily true. Fighting, as the American entertainment industry did, for the elimination of trade barriers can in fact be rent-seeking because it can be Kaldor-Hicks inefficient. With regard to the dispute over the treatment of audiovisual products in the GATT, the United States trade negotiators did not necessarily cave in to rent-seeking behavior when they accepted the retention of trade barriers in the final agreement.

This part of the article analyzes the bargaining positions of the parties to the dispute using the concepts developed in Public Choice Theory. Generally, this part seeks to examine to what extent the bargaining positions of France and the United States were the product of rent-seeking activities. In other words, it analyzes the extent to which the bargaining positions were the product of interest group manipulation of transaction costs, capture of executive agencies, and reliance on opaque legislation to transfer wealth. Furthermore, it seeks to examine the extent to which the parties may have been acting in a public-regarding manner.

A. *France: Defense Against Anglo-Saxon Cultural Imperialism*

This part of the article has a two-fold purpose. It demonstrates that France, in its dispute with the United States over audiovisual products, had the capacity to prevent final passage of the GATT because it could bind the EU to withhold GATT approval. This part also argues that France's bargaining position with regard to audiovisual products was not rent-seeking.

The structure of the EU is such that interest groups with the power to capture the government of one EU member usually have the power to bind all EU members with regard to international trade agreements. This is so because the EU has assumed the GATT obligations of its member

67. For example, legislators pass legislation instituting a high tariff on a good to benefit a special interest that contributes to the legislators' political campaigns. The legislators rely on the rational ignorance of the voter who is unaware of the connection between the higher costs of the good and the tariff. Thus, the tariff is opaque legislation which would impose high transaction costs on voters who may wish to learn and understand the implications of the legislation and fight for its repeal or against its enactment.

states,⁶⁸ including the power to bind the member states in commercial agreements such as GATT.⁶⁹

The Council, the decisionmaking body of the EU, represents the interests of the EU's member states and has the authority to direct the GATT negotiations and approve the final agreement.⁷⁰ Voting on most matters is by a qualified majority, which means that member states generally have the power to veto any measure that is "contrary to the vital interest of the State concerned."⁷¹ Because the cultural exception was in the vital interest of France and other EU members, France had virtual veto power over the EU's acceptance of the GATT and could bind the EU to its position.⁷² For the French film industry, transaction costs were considerably lower than they would otherwise have been without the EU. Consequently, to the extent they could manipulate transaction costs to engage in rent-seeking behavior, the French film industry was in a position to capture the legislative body of the entire EU, which was a powerful counterweight against a larger country like the United States.

Was the French film industry, however, engaging in rent-seeking behavior? Was the French Government's insistence on the cultural exception, to use Professor Macey's formulation, "acquiescence to raw political power," or the result of a deliberative process which considered the public good?⁷³

In France, media coverage of the GATT was intense and political discourse was impassioned.⁷⁴ Creative talent in Europe was very much involved in the fight for exclusion of cultural goods from GATT.⁷⁵ Also,

68. See T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 184 (3rd ed. 1994).

69. *Id.* at 166.

70. *Id.* at 17. See also SEYMOUR J. RUBIN & MARK L. JONES, *CONFLICT AND RESOLUTION IN US-EC TRADE RELATIONS* 77 (1989).

71. HARTLEY, *supra* note 68, at 19-23.

72. *But cf.* Grant, *supra* note 4, at 1336 n.36 (noting that British Prime Minister Margaret Thatcher suggested at the time that the EU be ready to accept the GATT without France).

73. See *supra* note 57 and accompanying text.

74. See Grant, *supra* note 4, at 1346.

75. See *supra* notes 32-35 and accompanying text. See also Fox, *supra* note 9 (discussing support for the French position by French director Claude Berri, German director Wim Wenders, French director Coline Serreau, Russian director Andrei Konshalovsky, Belgian director Andre Delvaux, and Spanish director Fernando Trueba); Marr, *supra* note 28 (support by French actor Gerard Depardieu); VIDEO AGE, *supra* note 15 (support by French director Alain Comeau); Cohen, *supra* note 4 (support by French philosopher Regis Debray); David Robinson, *A Case of Hollywood — or Bust?; GATT Squabble Over Film and TV*, *TIMES* (London), Dec. 16, 1993, available in 1993 WL 11431458 (support by Italian director Bernardo Bertolucci); Cohen, *supra* note 28 (support by Wenders,

support by French politicians for the French film industry was bipartisan.⁷⁶ Thus, the argument that the French film industry engaged in interest group capture of their government's trade policy, a predicate act to successful rent-seeking, is not apparent because there was strong approval throughout French society for the bargaining position pursued by the French Government.⁷⁷

Public Choice Theory tells us that legislatures engage in rent-seeking wealth transfers by passing opaque legislation which hides the true costs of the legislation to the average voter.⁷⁸ However, this is not the case in France because French subsidies for their filmmakers are derived from dedicated taxes on movie ticket sales, proceeds from television, and sales of pre-recorded videotapes. Thus, the taxes are transparent because French consumers of films do not incur transaction costs to determine the cost to them of the film subsidies which they are aware of empirically whenever they pay for cinema tickets or other audiovisual products.⁷⁹ Despite these taxes, France's position at the GATT was politically popular at home.⁸⁰

It does not seem, then, that the French film industry had satisfied the necessary indicia for Public Choice theorists to label its actions as rent-seeking.⁸¹ Public choice advocates and their critics both recognize the limitations of measuring all government actions by an efficiency standard. Professor Macey has recognized that some wealth transfers are public-regarding.⁸² Professors Farber and Frickey have stated that "rent-seeking can be justified when it advances other social values."⁸³ They give as an example the issue of public access for the handicapped. Society may find, in the interest of social justice, that this goal is worthwhile

Spanish director Pedro Almodovar, British director David Puttnam, French philosopher Regis Debray).

76. See *supra* notes 32-33 and accompanying text.

77. See Macey, *supra* note 52.

78. See *supra* note 45 and accompanying text.

79. See Grant, *supra* note 4, at 1344. *But cf.* Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1374 (1993) (stating that taxpayers "do not appreciate the link between their municipal tax bills and their legislators' adoption of unfunded mandates").

80. See Grant, *supra* note 4, at 1349.

81. Some Public Choice advocates may likely view the French response to the proposal to include audiovisual products in the GATT agreement as an example of nationalist hysteria and intellectual rationalization, not deliberative policymaking. From this perspective, the French response is not public-regarding at all.

82. See *supra* note 57 and accompanying text.

83. FARBER & FRICKEY, *supra* note 1, at 35.

and, thus, be willing to pay for it with a decrease in societal wealth.⁸⁴ Similarly, the French and other Europeans are willing to pay for the protection of their culture with a decline in their societal wealth, meaning that they are willing to transfer some of their societal wealth to their cultural institutions. Applying Professor Macey's measure of public-regarding behavior, almost all politicians in France rallied to the French film industry's defense, with presumably no politician garnering the "pecuniary advantage of the political support of some narrow interest group."⁸⁵ Thus, France was not surrendering to rent-seeking behavior.

B. *United States: The Entertainment Industry Stands Alone*

The American entertainment industry is one of the most important constituencies for the Democratic Party and President Clinton.⁸⁶ Thus, Public Choice theorists would expect that the entertainment industry engaged in "interest group capture," ensuring that the Clinton Administration would see to it that its interests were promoted at the GATT. However, support for the entertainment industry was bipartisan and broad-based, most likely because of the importance of the industry to the American economy.⁸⁷ Regardless of the actual benefit to the economy, presumably a smaller trade deficit inures to the political benefit of the party in power, whether Democratic or Republican.

Furthermore, much of the political support that President Clinton and the Democrats derive from Hollywood comes from the creative talent, who were largely silent in this dispute. This was a trade issue, and the financial and creative benefits "for performers, writers and directors were elusive."⁸⁸ The business people in the entertainment industry were the ones largely pushing for the inclusion of the audiovisual sector in GATT. Thus, because the entertainment industry as an interest group was not unified, the argument for interest group capture of the Executive Branch is less persuasive.

The analysis of who, if anyone, was engaging in rent-seeking behavior in the United States poses a different problem than the analysis of French political behavior during the GATT audiovisual products dispute. In France, the entertainment industry was advocating the maintenance of

84. *See id.*

85. *See supra* note 57 and accompanying text.

86. *See supra* notes 7-12 and accompanying text.

87. *See supra* notes 29-31 and accompanying text. *See also supra* note 13 and accompanying text (stating that entertainment industry produced a \$4 billion trade surplus in 1992).

88. Weinraub, *supra* note 5. *But see* Fox, *supra* note 9 (stating that Spielberg and Scorsese issued statements against restrictions on works of art).

trade barriers, an economically inefficient position. In the United States, the parties whose interests were adverse to each other were the entertainment industry and all other industries who stood to gain from a final GATT agreement (hereinafter "GATT favoring industries") because, had the U.S. insisted on including the audiovisual sector in the GATT, the likely outcome of the negotiations would have been no agreement at all.⁸⁹ During the GATT dispute, then, the interest of society as a whole was aligned with the interest of the "GATT favoring industries."⁹⁰

Because the general public's interests were aligned with one of the two sides involved in the GATT dispute, the mastery of transaction costs, one of the hallmarks of rent-seeking behavior, was not a factor in determining the outcome of the dispute. In preparation for the GATT talks, the U.S. entertainment industry and the "GATT favoring industries" presumably incurred considerable transaction and information costs. Once the GATT talks reached the point where the choice was between agreement without audiovisual treatment and no agreement, neither the "GATT favoring industries" nor the U.S. film industry was forced to incur additional transaction costs because they would have already incurred the necessary transaction costs to achieve favorable treatment in the final agreement. Thus, transaction costs were arguably close to zero for both the GATT favoring industries and their opposition, the U.S. film industry.⁹¹ In that circumstance, mastery of transaction and information costs would not have given either of these adverse parties a tactical advantage over the other so that one party could "capture" the machinery of the negotiations.⁹²

A further barrier to "interest group capture" of the GATT negotiations was the method by which the GATT agreement was to be ratified by the U.S. Congress. Congressional approval was based on the "Fast Track" statute⁹³ which modified House and Senate rules so that normal amendment procedures were suspended, thereby allowing for a straight up-or-down vote on the GATT.⁹⁴ One of the policies behind Fast Track

89. See Bradsher, *supra* note 4; Sandalow, *supra* note 5; Weinraub, *supra* note 5.

90. See *infra* note 99 and accompanying text.

91. Thus, Coase's Theorem, which states that the most efficient use will prevail where transaction costs are zero, proved true in this circumstance. For a discussion of Coase's Theorem, see A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 11-14 (1989).

92. To elaborate, neither party would have been in a position to take advantage of its mastery of transaction costs to buy the services of the GATT negotiators and thus deliver its desired outcome.

93. Trade Act of 1974, Pub. L. No. 93-168, §§ 151-153, 88 Stat. 1978 (1975), 19 U.S.C. §§ 2191-2193 (1988 & West Supp. 1997).

94. See Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18

authority is to control the ability of special interests to block GATT approval.⁹⁵ The Fast Track rules are, thus, an obstacle to legislators' ability to trade political support for legislation favored by special interests opposed to GATT. While there may be some question whether the Fast Track approach is in fact transparent,⁹⁶ had the U.S. film industry been so inclined, the industry would have had to urge a "no vote" in Congress to block the GATT. To that extent, the procedure was transparent because the film industry's congressional allies could not have resorted to the usual obfuscatory tactics to kill unwanted legislation.⁹⁷

C. *Rent-seeking at the GATT: The Paradox of Competing Efficient Outcomes*

A Public Choice analysis of whether the French Government's audiovisual products agenda at the GATT was rent-seeking poses a simple problem. They advocated an inefficient market outcome, which was the maintenance of a trade barrier. Thus, if the French Government's bargaining position was the result of a deliberative decisionmaking process based on concepts of the public good, then it advocated a public-regarding position. On the other hand, if its bargaining position was based on the pecuniary interest of political actors, it was rent-seeking. The question of whether an economically inefficient outcome may still be public-regarding is a common problem considered in the Public Choice literature.⁹⁸

A different problem is presented, however, when one attempts to formulate a baseline definition of rent-seeking behavior while considering more complex political issues such as the choices faced by the U.S. negotiators at the GATT. If only the U.S. film industry's behavior is examined to determine whether it was rent-seeking, one would conclude that it was not because the industry advocated an efficient market solution without attempting to achieve wealth transfers or engage in "agency capture" of the U.S. negotiators. However, an analysis of the U.S. film industry's behavior in the larger context of the GATT negotiations is far more complex than the simple problem posed above regarding the French Government's actions. If one merely concludes that the U.S. film indus-

BROOK. J. INT'L L. 143, 147 (1992).

95. See *id.* at 148. But cf. Macey, *Theory of the Firm*, *supra* note 44, at 52 ("Consistent with public choice theory, Congress' organizational rules are designed to further the rational self-interest of the legislators themselves.").

96. See Koh, *supra* note 94, at 166.

97. See *id.* at 166-67.

98. See, e.g., FARBER & FRICKEY, *supra* note 1, at 34-35.

try was not rent-seeking without considering the larger context, then Public Choice Theory offers little to explain or predict the behavior of the political actors involved in the dispute.

The likely outcome if the United States had insisted on the inclusion of audiovisual products would have been no agreement at all. In that event, the U.S. film industry would have achieved only the status quo. Had their GATT agenda been successful, the U.S. film industry's gains would not have increased their wealth by more than what all of the other industries stood to lose if the GATT talks had failed.⁹⁹ Furthermore, unlike the French film industry which feared extinction, the U.S. film industry was advancing no comparable social value supported by the American public that could arguably trump efficiency interests.¹⁰⁰ Thus, while the U.S. film industry's GATT fight for free trade in cultural products would normally be characterized as public-regarding, in the larger context of the final showdown at the GATT, it flunked the Kaldor-Hicks test and, thus, in reality was rent-seeking behavior.¹⁰¹

Even if the United States film industry had been successful in its agenda, it would still have exhibited rent-seeking behavior. If political actors enact a seemingly public-regarding policy, but negative public reaction over it leads to the enactment of economically inefficient legislation eliminating the economic benefits of the earlier policy, then should not the original policy be rendered rent-seeking because of the political actors' failure to consider the consequences? For example, there was evidence that the harder Jack Valenti and the United States pushed the audiovisual issue, the stronger the support became among other countries in

99. See Bradsher, *supra* note 4 (stating that U.S. output, as a result of the GATT agreement, was expected to probably increase by \$100 billion to \$200 billion per year); Barbara Benham, *Film Flop at GATT Trade Talks No 'Last Picture Show' for U.S.*, INVESTOR'S BUSINESS DAILY, Dec. 23, 1993, at 2 ("Had U.S. negotiators gotten what they wanted, such as a share of the levies that countries like France place on tickets to U.S. movies, Hollywood would be better off. But only slightly."); Weinraub, *supra* note 5 (stating that because of the tremendous dominance of the U.S. entertainment industry in the EU, there was general agreement that it would not be hurt by the failure of its GATT agenda).

100. See Grant, *supra* note 4, at 1357 nn.236-38 (stating that the public was largely indifferent to what was happening under the GATT). See also *supra* note 88 and accompanying text (U.S. creative talent silent in GATT fight).

101. Some critics of Public Choice Theory have recognized that using an economic efficiency standard where economically efficient actors have competing interests is of limited use as a means of evaluating the behavior of political actors. See FARBER & FRICKEY, *supra* note 1, at 34 (discussing the problem of choosing between two economically efficient states where improving the welfare of one state harms the welfare of the other state).

the EU for its exclusion.¹⁰² Thus, even if the EU had capitulated and the final agreement had included the audiovisual sector, it is possible that such a victory could have been outweighed by the damage to the relations between the EU and the U.S. It is conceivable that an outraged EU populace might have rendered future multilateral or bilateral trade talks too politically controversial for EU officials to engage in for a long time.¹⁰³ Had such a consequence resulted from the inclusion of the audiovisual sector in the GATT, then this outcome might still have been Kaldor-Hicks inefficient in light of the meager expected economic benefits to the U.S. film industry.

D. *Rent-Seeking in Domestic Policy: The National Labor Relations Act*

While the GATT audiovisual products dispute presents an unusual problem for Public Choice theorists, this problem should not be seen as arising only in the context of international trade relations. Domestic policy can present similar problems. Consider the National Labor Relations Act (NLRA),¹⁰⁴ which some Public Choice theorists consider a rent-seeking piece of legislation.¹⁰⁵ To view the NLRA as simply a statute which transfers wealth from employers to unions and employees ignores the more complex reality that informed its passage.

The NLRA was passed during the Depression at a time of labor militancy when strikes were common and interfered with the country's economic recovery. Had the NLRA not passed, labor militancy and social unrest could have escalated leading to more radical changes or even a complete transformation of the social order.¹⁰⁶ Although more revolutionary change did not occur, if it had, later legislative efforts to curb the social unrest could have led to labor legislation that American business interests found even more draconian and inefficient than the NLRA. Compared to the status quo under the NLRA, such an outcome clearly

102. See Kessler, *supra* note 13, at 603 n.209.

103. President Clinton's current difficulties in securing Fast-Track approval to admit Chile to NAFTA demonstrates that this is not a theoretical problem. See David E. Sanger, *Clinton Puts Off Effort on Trade Accords.*, N.Y. TIMES, May 23, 1997, at D13.

104. 29 U.S.C. §§ 151-169 (1970 & West Supp. 1997).

105. See Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 708 n.313 (1996).

106. See, e.g., THE COLUMBIA HISTORY OF THE WORLD 1012 (John A. Garraty & Peter Gay eds. 1972) ("The breakdown of the market system [during the Great Depression] and the social irresponsibility of business leaders produced a loud chorus of disapproval. The Methodists condemned the American industrial order as 'unchristian, unethical, and antisocial'; the Episcopal *Churchman* pronounced capitalism 'rotten to the core'; and the editor of the *Catholic World* denounced capital's treatment of labor as 'worse than that accorded an animal.'").

would have been less economically efficient to society; thus, the efforts to block passage of the NLRA should be labeled as rent-seeking.

V. CONCLUSION

People will always demand legislation or some other forms of government action whenever they perceive that there is a problem that needs to be addressed. Most of the pressure for government action will come from organized interest groups, which is to be expected in a democracy that respects freedom of association and the right to petition the government for redress. Interest groups will have competing interests and make contrary demands on government. When government does act, its action can be expected to have an impact on the market and often that action will have an economically inefficient impact compared to the status quo.

Thus, Public Choice Theory's greatest failure may be that it focuses on how a government action will affect the status quo without considering the larger political and social milieu in which such action is taken. Rarely are government actors faced with the choice between the status quo and a single proposal to change it. Rather, the choice usually is between many proposals to change the status quo, with consideration being given to the future ramifications of maintaining the status quo. Government actors' choices are between very economically efficient solutions, moderately efficient solutions, moderately inefficient solutions, and very inefficient solutions. Public Choice Theory must develop a more sophisticated measure of what is rent-seeking behavior that reflects this reality before its normative implications can be accepted.

As this article has demonstrated, Public Choice Theory has proven to be an unreliable predictor of government action at the GATT. The theory's inability to evaluate complex policymaking questions renders it an ineffective predictor of political behavior in all but the most basic of circumstances. Contrary to the predictions of Public Choice Theory, at the GATT, rent-seeking special interest groups acting contrary to societal wishes and interests did not prevent public-regarding outcomes in either France or the United States.¹⁰⁷ Rather, constitutional and governmental structures in the EU and the U.S. better explain the outcome of the GATT audiovisual products dispute.

The constitutional structure of the EU accomplished its intended purpose, which is to protect the national interests of individual member states when those interests are in conflict with the majority of member

107. See Stephan, *supra* note 39, at 756-57 (suggesting "that international lawmaking reflects contractual rather than legislative processes, . . . [which] makes international law less prone to interest group capture.").

states. That France's interest in preserving its cultural identity carried the day should have come as no surprise to anyone familiar with the structure of the EU. In the United States, in contrast, "[t]he system of checks and balances within the federal structure was intended to operate as a check against self-interested representation and factional tyranny in the event that national officials failed to fulfill their responsibilities."¹⁰⁸

Because Congress has the power to modify and eliminate tariffs, both of which are major goals of the GATT, whereas the President only has the constitutional authority to negotiate international agreements, it was necessary for Congress to give the President "Fast Track" authority to successfully conclude the GATT agreement.¹⁰⁹ The ability of the President to act without the interference of Congress, and presumably its rent-seeking tendencies, was so critical that the negotiation timetable for conclusion of the Uruguay Round of the GATT revolved around the availability of the President's Fast Track authority.¹¹⁰

When the Fast Track authority was due to expire on December 15, 1993, President Clinton agreed to remove audiovisual products from the final agreement, rather than allowing the GATT talks to fail.¹¹¹ Though the entertainment industry executives admitted that Clinton was right not to sacrifice the GATT, they still expressed disappointment in him.¹¹² Thus, Clinton fulfilled the role the Framers of the U.S. Constitution had envisioned for the President of the United States,¹¹³ acting in the national interest rather than at the behest of a rent-seeking interest group.

108. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 44 (1985).

109. See Koh, *supra* note 94, at 148, 152, 158-59.

110. *Id.* at 152.

111. See Cohen, *supra* note 4 ("President Clinton told reporters that he was disappointed that the audio-visual portions of the agreement remained unresolved, but that no one 'thought it was worth bringing the whole thing down over [the audiovisual dispute].'").

112. See Weinraub, *supra* note 5.

113. See *supra* note 55 and accompanying text discussing public-regarding legislation, which is legislation that benefits society as a whole and not specific interest groups.