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THE ECONOMIC THEORY OF POLITICS AND LEGAL INTERPRETATION IN THE UNITED STATES

By Jack M. Beermann, Boston*

The influence of interest groups on government has long been a source of controversy. Recently, Law and Economics scholars have joined with political scientists and economists in elaborating the theory of Public Choice. In an analysis designed to challenge mainstream scholarly views, both as to the realities of the political system and the proper methods of legal interpretation, Public Choice applies basic law and economics assumptions about human behavior to the political realm and concludes that people act, in politics as elsewhere, to perpetuate their own interests. Under these assumptions, legislators and other government officials formulate policy with their own interests, and not the public interest, in mind. Further, interest groups will promise government actors benefits so long as the legislation they are seeking is worth more than the price they must pay for it. Finally, individuals will participate in politics only rarely because, in most cases, the costs of participation will exceed the foreseeable benefits. A single voter's actions, whether by contributing money or withholding a vote, are unlikely to make any difference at all.

Recently, a small group of legal scholars in the United States have begun to examine the interest group phenomenon and the theorize concerning the appropriate legal response to interest group influence. This has led to a reevaluation of the political system with special focus on the effect that a more accurate understanding of the actual process of law making should have on legal interpretation. Put bluntly, the questions is how judges should treat statutes whose drafting and passage bear signs that they are designed to satisfy interest group desires rather than fulfill the public interest. While still a minority view, Public Choice analysis has created an entirely new vocabulary for discussing statutory interpretation.

This essay proceeds as follows. The first section focuses closely on Public Choice's portrayal of the legislative arena as a market for law and on why Public Choice predicts that most people will not be able to organize, will not find it worthwhile to participate in politics and on what these predictions mean for the quality of legislation. The next section addresses the interpre-

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tive issues raised by the Public Choice critique of the political process – how should judges treat statutes produced by an allegedly undemocratic and private regarding system. The final section questions the usefulness of reforms that depend on interpretive theories and proposes structural reforms designed to address more directly the defects raised by Public Choice. The conclusion warns that Public Choice's hostility to interest group politics carries with it an undercurrent of pessimism about large-scale democracy and that such pessimism is dangerous in light of the alternatives.

I. Law Making as a Market Activity

1. The Basics of Public Choice

Public Choice views the law making process as a market in which favorable law is bought and sold.[1] The participants in this market are legislators, administrative officials (especially those engaged in drafting regulations), interest groups and the general public. First let's take a closer look at one actor, interest groups.

Interest groups participate in the law making process by lobbying for favorable legislation or regulation. Interest groups influence the process with promises of political or other support.[2] Political support can take the form of votes, money that the politician can use for reelection campaigning or communication of favorable appraisals of programs to other important political actors. Other support might include employment after the politician's term or contributions to the politician's favored charitable institution.

It is possible to portray the influence of interest groups as a generally positive phenomenon, one that helps society control government. One could argue that given how easy it is to join interest groups, and how widespread participation in such groups appears to be, interest group politics might be the most effective method of democratic participation in a large-scale democracy.[3] Further, groups help politicians measure public opinion, and groups can provide valuable technical assistance and input on the policy implications of various proposals.

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[1] For a general discussion of the difference between public choice theory and more traditional views of legislative motives, see *Frank Michelman,* Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy, 53 Indiana L. J. 145, 148 - 49 (1977).

[2] There is substantial controversy over the actual degree of interest group influence over the political process. For a discussion, and useful citations, see *Daniel Farber/ Philip Frickey,* The Jurisprudence of Public Choice, 65 Texas L. Rev. 873, 897 - 901 (1987). It has also been argued that characteristics of the legislation at issue are important to the degree of interest group influence. See *William Eskridge,* Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Virginia L. Rev. 275, 295 - 301 (1988).

[3] See *R. Booth Fowler/Jeffrey Orenstein,* Contemporary Issues in Political Theory 35 - 36 (1977). See also *Mancur Olson,* The Logic of Collective Action: Public Goods and the Theory of Groups 111 - 25 (Expanded ed. 1971).

The optimistic portrayal of interest group politics sketched above depends on two assumptions, first that money does not distort the process excessively and second that participation is widespread so that interest group views reflect somewhat accurately the views of society at large.

Public Choice theorists generally dispute both of these assumptions. Here the first will be discussed briefly: the second is addressed in more detail below.

As noted above, interest groups influence the law making process because they can promise either monetary benefits or votes in an election or both. For example, large labor unions might be able to channel money into a Political Action Committee to support a campaign and might also be able to influence the votes of members. Political actors will weigh the offers from affected interests, and legislate in accord with the wishes of the group that makes the best offer. If the ability of interest groups to win the bidding war reflects, at least roughly, the number of votes that interest group might be able to deliver, then interest group activity looks at least somewhat consistent with norms of democracy. If, however, money becomes overly important, so that the groups with more money have influence disproportionate to their numbers, interest group influence begins to look like a perversion of the democratic system rather than a tool for greater participation. What follows attempts to explain why Public Choice theorists by and large believe that interest groups distort, rather than advance, democracy.

2. Interest Groups as Advancing Only Narrow Interests

Public Choice predicts that most people will not organize into groups to advance their interests and that the groups that will succeed in organizing will tend to be small and advance only narrow interests.[4] Assuming that self-interest motivates people to engage in political activity, Public Choice theorists argue that for most people, incentives to engage in political activity are nonexistent because they are unlikely to enjoy any benefits from such activity.

The reasons that most people will not gain from their political activity are two-fold. First, most people simply do not have the resources to have any influence on political outcomes. Interests with less money will constantly be "outvoted" by more heavily moneyed interests. While large groups of people with relatively little money could theoretically pool their resources to defeat the wealthier interests, the costs of organizing will often outweigh the potential benefits of the influence sought.

The second impediment to organizing affects most groups but is felt most acutely by interests composed of numerous individuals with relatively little

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[4] The following discussion of the groups likely to organize and the motivations for political action relies heavily on *Mancur Olson,* The Logic of Collective Action: Public Goods and the Theory of Groups (Expanded ed. 1971). Olson argues strongly that group activity, sue to the distortions discussed in text, will not reflect the desires of society generally.

at stake. Most public policies are public goods, i. e. once a policy is produced, everyone, not just participants in the political process, is free to enjoy the benefits of the policy. For example, all victims of discrimination, not only members of civil rights lobbying groups, benefit from increased statutory protection against discrimination. In many situations, it is impossible or impractical to exclude nonparticipants from the benefits of favorable government action.

The public goods nature of most government action destroys the incentive for participation because nonparticipants know that they will enjoy the benefits of group activity without joining the group. So even if the individual would gain from the reform sought, the incentive to contribute to the joint effort is not measured by the amount at stake but rather by the amount, if any, of the benefit that would be enjoyed exclusively by participants. Often, that amount will be zero, and therefore there will be no incentive to participate. For example, people would not voluntarily contribute to the national defense budget because they know that it is impossible to exclude anyone from the benefits of a strong national defense.

Following from these observations, Public Choice predicts that voluntary groups will not organize around policies that affect large numbers of individuals each with a relatively small stake in the policies. Group membership will not, therefore, represent democracy in any relevant sense, but will instead reflect interests that happen to be able to overcome the impediments to organizing.

The next question is what characteristics are common to groups that are able to organize despite public goods problems. Public Choice theorists argue that groups that are able to form and engage in lobbying activity tend to have one of the following characteristics: some are very small, so that one or more members finds it worthwhile to engage in the activity regardless of what others do; some are able to penalize non-members such as through boycotts or barring non-members from holding jobs (mandatory labor unions); some offer exclusive access to alternative products that make it worthwhile for people to join because they value the product at least as much as the dues.[5] The important point from the standpoint of democracy is that nothing indicates that these groups are likely to reflect more than a narrow spectrum of the interests in society – the vast majority of people and interests are likely to remain unrepresented in the interest group process because they are unlikely to be able to overcome the costs of organizing. In fact, because many groups organize not because of agreement on policy goals but because of coercion or alternative private goods, the leaders even of interest groups that are able to form may not truly represent the members' interests.

[5] See *Olson* (note 4), 132 - 167.

3. The Quality of Law Produced Under the Influence of Interest Groups

The inability of broad based interests to organize effectively and to influence the law making process has important implications for the quality of law produced. If groups that are able to organize have influence that transcends the number of votes they have (in crude terms if dollars that are unevenly distributed can trump votes that are equally distributed) then legislation will reflect the narrow interests of the interest groups.[6] In other words, legislation will be bought by powerful interests.[7] And the losers in the market for legislation will be the losers in any market – the people with less money and power. Legislation, predicts the public choice model, will redistribute wealth from the relatively poor and powerless to the relatively wealthy and powerful.

The type of legislation that Public Choice theorists might point to as examples of this sort of activity include legislation granting a professional monopoly over certain goods or legislation allowing an administrative body to fix prices for transportation or some other service.[8] For example, pharmacists in some countries have a monopoly over the sale of aspirin, and aspirin in those countries tends to be more expensive than in countries where its sale is unregulated. While legislators would always explain such legislation in terms of the public interest, such as safety concerns or the need to support research into new drugs with high drug prices, the Public Choice theorist would point to the ability of a relatively small group of pharmacists and drug companies to organize and the inability of the general public to organize to combat this wealth transfer to pharmacists.

Legislation produced in an interest group system is thus bad on two counts. First, as a matter of democracy, the legislation does not reflect the wishes of the electorate. Rather, it reflects the wishes of a small number of powerful people. Second, the legislation creates inefficiencies – it grants economic benefits that the interest group could not achieve in the market.[9] The very fact that government coercion is needed to achieve the interest group's goals is thought to be evidence that the group could not have done as well in the market.

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[6] See *Jonathan Macey,* Promoting Public Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Columbia L. Rev. 223 (1986).

[7] For a skeptical look at the empirical claims of Public Choice analysis, see *Mark Kelman,* On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement, 74 Virginia L. Rev. 199 (1988).

[8] Professor Macy cites the example of milk price supports – even though milk consumers are hurt by higher prices, the small group of milk producers is able to procure legislation at the expense of consumers. See *Macey* (note 6), 230 - 33.

[9] It should be noted here that success of the interest group's plan to keep prices high depends on the group's ability to coerce its members. Often, the same coercion that convinces people to join and support the group in the first place will enable to group maintain discipline despite the strong incentive that individual members have to defect. A detailed look at the conditions under which groups can achieve this is beyond the scope of this lecture.

4. Political Checks on Interest Group Influence[10]

The primary check on Members of Congress in the United States is the fact that they must stand for reelection. This should be an especially effective check on Members of the House of Representatives since they must stand for reelection every two years. However, the reelection rate for Members of Congress is incredibly high. If Congress is producing large quantities of bad legislation, there must be some explanation for the ability of Members of Congress to keep getting reelected.[11]

There are several related Public Choice explanations for the high reelection rate that confirm the worst fears of the Public Choice theorist. They all go back to the reasons why it is inefficient for most people to engage in political activity at all – most people will never recoup the costs of their political activity. First, incumbents are able to use their positions to create power bases that make it much easier to raise money from interests groups and constituents than challengers. Even if constituents have problems with the performance of an incumbent, they may find it safer to keep the devil they know (and the one with positions on key committees of interest to the district) than to vote for a relatively unknown and powerless challenger. Second, incumbents are able to win loyalty through casework that benefits constituents economically but which is unrelated to legislative matters. Congress has voted for itself large staffs that engage in casework for constituents, such as helping private citizens obtain government benefits or procure substitutes for a missing social security check. This type of casework wins loyal support and may present a much more realistic possibility of gain to constituents than legislative activity. Third, even when constituents become interested in legislative matters they may be much more concerned with "pork barrel" legislation, i. e. legislation that brings specific benefits to the district like federally funded water treatment plants, military bases or highways, than with with the general public interest. Ordinary voters have little incentive to inform themselves about national legislative matters since they are unlikely to be individually affected to a great extent and their political activity is unlikely to have any appreciable consequences. Each voter's share of the bad effects of interest group legislation is likely to be too small to make it worthwhile to engage in political activity to stop it. Just as interest groups worry about legislation that affects their interests, voters worry about legislation that affects their district.[12]

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[10] There is substantial disagreement as to whether the United States' political system promotes or deters interest group activity. The classic work on the subject, *Charles Beard,* An Economic Interpretation of the Constitution of the United States (1913), stands for the proposition that the U.S. Constitution promotes interest group activity. Professor Macey disagrees, and builds his body of work on the theory that the Constitution was designed to lessen interest group influence. See *Jonathan Macey,* Transaction Costs and The Normative Elements of The Public Choice Model: An Application to Constitutional Theory, 74 Virginia L. Rev. 471 (1988); *Jonathan Macey,* Competing Economic Views of the Constitution, 56 George Washington L. Rev. 50 (1987).

[11] For a discussion of this high rate of reelection, and some efforts to explain it, see *Morris Fiorina,* Congress: Keystone of the Washington Establishment (2d ed. 1989).

[12] See generally *Fiorina* (note 10).

The money that incumbents receive from interest groups for campaigning appears even more important when placed in context of the realities of voting behavior in the United States. Voters do not perceive much of a difference between the major political parties, and they often vote for candidates of different parties for different offices. The image of the candidate, as presented in expensive television advertisements, is very important. Money can buy television time and able consultants, and the candidate with greater resources has a distinct advantage in the election.

The ineffectiveness of elections as a check on interest group influence over legislation does not mean that an interest group can simply walk into the halls of Congress waving money and get whatever it wants. There are often interest groups with opposing interests, and Congress acts as a sort of broker among the groups. Each Member of Congress wants to maximize gains in support from interest groups and minimize losses. Sometimes this may involve simply measuring the relative strength of various groups and voting with the strongest, but often this will involve forging compromises to minimize unhappiness among groups and thus retain their support. Thus, Public Choice theorists often view legislation as a deal worked out among all interested groups and the legislature, with the Members of Congress maximizing their gains in support and minimizing their losses.

5. The Iron Triangle

Much law making occurs at the administrative level, and Public Choice theory also argues that administrative officials are subject to the same sorts of pressures as elected officials. The relationship among interest groups, Congress, and administrative officials has been described as an "Iron Triangle".[13] Very simply stated, administrative officials depend on Members of Congress for support, whether for program funding or for sponsorship for advancement in government employment. Interest groups use this dependence to their advantage, because they can threaten that if agents do not respond to their pressure, they will go to the sponsoring Member of Congress and complain so that either funding for the program will be reduced or the agent will not receive the necessary support from the Member of Congress to achieve advancement in employment. This relationship between Members of Congress and administrative officials means that law making at the regulatory level is also open to interest group influence.

II. Interpretation of Interest Group Statutes

For a variety of reasons, the United States Congress produces many statutes that require extensive interpretation, sometimes directly in the courts and sometimes initially by an administrative agency. In either case, the courts have the ultimate responsibility with regard to the meaning of the statute since they have authority to overrule regulations found to be inconsistent with the statute under which the regulations were promulgated.[14]

[13] See *G. Adams,* The Iron Triangle (1981).

Public Choice has thus devoted significant energy to discussing how judges should interpret statutes passed not with regard to the public interest but rather with regard to the private interests of interest groups.

1. Narrow Interpretation

The earliest response among legal Public Choice theorists was to argue that the interest group bargaining nature of the legislature meant that statutes should be very narrowly construed.[15] Traditionally, courts interpret statutes against a background of legislative intent.[16] When the statutory language is insufficient to resolve an issue, courts would look to larger purposes such as ensuring economic stability or protecting workers from on the job injury. Some Public Choice theorists have argued that it is improper for courts to engage in this purpose-based statutory interpretation because the purpose is really only attached to the legislation to fool the voting public into believing that more is happening than a bargain among interest groups. Further, the theorists argued that the bargain as struck among the interest groups would be upset because the court would be giving one party more than it won in the market for legislation.

For example, suppose legislation was passed requiring employers to adopt certain safety procedures in the work place. Assume further that a worker raises a claim that is analogous to those covered in the statute but that is not specifically addressed in the statutory language. Under some traditional theories of statutory interpretation, a judge believing that the overriding legislative purpose was to protect workers might extend the protection of the statute to the unanticipated situation.[17] The Public Choice theorist would argue against this result on the ground that had the legislation, when proposed, actually contained the additional prohibition, it might not have passed because interest groups representing labor could not have paid for it as against employers groups' objections. In short, any departure from the words of the statute as passed might have raised objections from one or more interest groups, and therefore might not have passed. The best indication of what the interest groups agreed to is contained in the statute, and any additional protection results in a windfall to one side.[18]

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[14] See The Administrative Procedure Act §§ 701 - 706, Title 5 United States Code §§ 701 - 706 (1988).

[15] See *Richard Posner,* Economics, Politics and the Reading of Statutes and the Constitution, 49 U. Chicago L. Rev. 263 (1982); *William Landes / Richard Posner,* The Independent Judiciary in an Interest Group Perspective, 18 J. Law & Economics 875 (1975); *Frank Easterbrook,* The Supreme Court, 1983 Term – Foreword: The Court and the Economic System, 98 Harvard L. Rev. 4 (1984); *Frank Easterbrook,* Statutes' Domains, 50 U. Chicago L. Rev. 533 (1983).

[16] For a discussion and critique of traditional methods of statutory interpretation, see *William Eskridge,* Jr., Dynamic Statutory Interpretation, 135 U. Pennsylvania L. Rev. 1479 (1979).

[17] See, e.g., Johnson v. Southern Pacific Co., 196 U.S. 1 (1904).

[18] See *Posner,* Economics (note 15), 263; *Landes / Posner* (note 15), 875.

It is ironic that after establishing that the legislature is terribly undemocratic, Public Choice theorists argue that it is illegitimate for courts to frustrate the intent of the legislature through policy based statutory construction. There are various possible reasons behind the preference for this narrow statutory interpretation. First, the theorist might believe in the principle of legislative supremacy. This may lead them to a rather formalistic preference for whatever the legislature intends, whether or not the legislature functions democratically. Second, there might be a distrust of judges – the theorists might believe that judicial policy making will tend to be even worse than legislative policy making or that however undemocratic the legislature might be, the judiciary is even less democratic. Third, the interest group market for legislation might actually be viewed as desirable, since it tends to deliver resources (here legislation) where they are most highly valued. This would mirror a preference for the results in the private market, where transactions costs problems similar to those identified by Public Choice theory are often ignored or downplayed by supporters of free market policies, and where the intensity of preferences, as demonstrated by willingness (and ability) to pay is thought to maximize free choice. Fourth, a substantive preference for less regulation might lead one to favor a narrow construction of legislation. The reasoning here could be that even if the legislature were trying to act in the public interest, legislation is usually a failure and therefore the narrower judges confine legislation the better.

2. Public Interest Interpretation

A competing, and more recent, theory argues that in light of Public Choice's empirical observations, the courts should take seriously the public interest justifications that Congress attaches to legislation and engage in more traditional purpose-based interpretation.[19] This argument depends on the Constitutional view that the independent judiciary was created to serve as an obstacle to legislative transfers to interest groups.[20] The United States Constitution grants judges life tenure with removal only by the seldom used procedure of impeachment by Congress. Under this view, the Constitution grants judges the power to combat the tendency of the other branches to fall prey to factions. The independence of judges means they need not answer to factions, and can advance more publicly-oriented norms through statutory interpretation.

According to this theory, statutory construction with regard to public purposes could help ameliorate the undesirable effects of interest group politics. Because interest groups could not count on their legislation being enforced as they intended, interest group activity loses some of its value, making it less likely to occur in the first place. The idea here is that if interest groups are less certain to gain through interest group activity, they are less likely to engage in the activity in the first place. Since the money spent on lobbying is viewed as a social waste, the hope is that they will then use their resources to engage in more productive economic activity.

[19] This is the theory of Professor Jonathan Macey. See *Macey* (note 6).

[20] See *Macey,* Transaction Costs (note 10), 471; *Macey* (note 10).

There are additional positive effects that public oriented statutory construction might entail. Insofar as the public purposes the legislature attaches to legislation constitute good policy, those purposes would be advanced by aggressive judicial construction. Further, this theory avoids difficulties inherent in attempting to distinguish public regarding legislation from interest group transfers, as some theories of construction might require. This is very difficult to do, this theory escapes this problem by treating all legislation as if it were passed with the public interest in mind.

3. Underlying Constitutional Theories

It is important to note again the differences in underlying constitutional theories implicit in the different approaches to statutory construction. The narrow construction theory is, at least facially, consistent with the widely accepted view that in statutory matters the legislature is supreme and the courts should attempt, as best as possible, to follow the intent of the legislature. Thus, judges have no business applying public purposes when the legislature had private, interest group purposes, in mind. However, a competing constitutional theory, and the more traditional statutory construction view, holds that judges should advance the public interest through application of underlying policy in statutory cases. The traditional view, it should be noted, does not accept Public Choice's empirical view that there is no public purpose to legislation. Under this theory, the independence of judges from the political process allows them to make better decisions. A more extreme statement of this view holds that judges should use their independence to combat interest group politics because that is the role the constitution assigns them.

4. Critique of the Public Interest Interpretation

Assuming that a substantial proportion of legislation passed under current conditions results in inefficient wealth transfers to the politically powerful, even though public interest interpretation is preferable to the extremely narrow interpretation of early Public Choice theorists, there are reasons to doubt that the public interest interpretation proposal would alter the political system very much. There are two primary reasons to doubt that purpose-based interpretation would discourage unproductive interest group activity and replace it with productive activity. First, it is quite uncertain both how much more expensive interest group activity would have to become before resources would be shifted and how much more expensive such activity would become under this interpretive regime. Second, it is unclear that the best alternative to lobbying for interest groups is productive activity.

On the first point, it appears that this interpretive proposal is unlikely to have a significant effect on the amount of interest group activity. Even if all federal judges cooperated, there would be little or no effect in areas where statutory interpretation was not important, such as direct subsidies through government spending programs or relatively clear provisions such as the

specification of income tax brackets, import tariffs or excise tax amounts. Further, to the extent that judicial practice became uniform, Congress and interest groups could adjust their legislative drafting practices to avoid pitfalls, just as private parties adjust contract drafting to prevailing doctrine. Perhaps only if statutory construction was made random and unprincipled would significant insecurity arise. Finally, in truth, most judges have always engaged in purpose-based interpretation, and interest group activity continues to thrive.

On the second point, resources will shift away from lobbying only if there exists a more attractive use for those resources. It may be that interest groups would respond to the increased costs of redistributive activity simply by spending more on that activity. This would occur if the cost of gaining wealth through interest group activity remained less than the cost of gaining wealth through production. Thus, the possibility exists that the result of the interpretive reform would be increased interest group investment in the same activity.

It is also not clear that production is the best alternative to interest group activity. It may be that consumption, not production, lies at the margin. Wealth created through illegal activity, such as dumping of toxic waste, fraudulent financial practices or pollution might also be a substitute for interest group wealth. Where resources diverted from interest group activity would end up is simply unknown.

A final point involves the uncertainty regarding the incentives that operate on judicial behavior. Something must motivate judges to decide cases one way rather than another, however it is very difficult to get a handle on the influences operating on judges. A few factors that might motivate judges include the desire for prestige, the desire to increase their influence, the desire to be promoted to a higher court, the desire to maximize leisure time and the desire to impose their own values on society.[21] The important point here is that there is no reason to believe tha these incentives will necessarily lead judges to make decisions that coincide with the public interest.

It is not difficult to imagine that public opinion, or at least the opinion of the bar and legal academics, could have a powerful effect on judicial behavior. Only the rare person has the fortitude and strength of conviction to be the maverick or renegade. Judges must derive satisfaction from the respect they earn through decisions that are accepted by their colleagues and critics. Bar associations honor judges, invite them to meetings in warm climates to make speeches and generally enhance their prestige through approval. Academics increase the stock of judges by praising their decisions in the law journals and by also inviting the judges to make speeches and be honored at law school functions. There is a social system at work here, and most judges would suffer if they were left out.

I find it ironic that the great believers in incentives spend so little energy figuring out whether the targets of their criticism have any incentive to listen to what they have to say. Many Public Choice theorists make proposals

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[21] Professor Macey suggest some of these in *Macey* (note 10), 70.

aimed at judges without considering whether judges have any incentive to act in accordance with their suggestions. Perhaps there is an implicit belief that judges have a great incentive to gain approval in the legal community by following academic theories. This belief is not supported by any rigorous looking Public Choice explanation.

III. Structural Reform Alternatives

It seems quite unlikely that judicial interpretation alone can significantly reduce the amount of interest group activity. There are, however, structural reforms that could reduce the ability of interest groups to influence the electoral and law making processes. One interesting proposal that has been under discussion recently involves limiting the number of years a person would be allowed to serve in Congress. Without the possibility of becoming a "permanent" Member of Congress, the hope is that representative would remain more independent of interest groups.

The system of campaign finance could also be reformed either to eliminate all but individual contributions to campaigns or to publicly finance all campaigns. There are several difficult problems that would have to be worked out including how to provide balance against the incumbency advantage and how to reconcile restrictions on political activity with constitutional free speech concerns. It seems clear, however, that the monetary influence of interest groups could be reduced by reforms in campaign finance.

The incumbency advantage could be counteracted with a variety of reforms. For one, the amount of casework the congressional staff do could be reduced or eliminated by creating an independent agency to deal with such problems and reducing the size of congressional staff. Further, the relationship between the administrators and Members of Congress could be weakened by increasing the civil service aspects of agency employment. This would reduce the ability of Members of Congress to influence agencies and thus reduce the power of Members so that a district would not suffer such a great loss by electing a challenger. Finally, all candidates could be granted access to television and radio so that constituents could become familiar with challengers and what they stood for.

There are also details concerning the internal workings of Congress that could be addressed such as the committee system which tends to place great power in the hands of committee and subcommittee chairpersons.[22] When a few Members of Congress have effective control over a subject, interest groups find it easier to buy influence. Further, the workings of committees and subcommittees tend to be further from the public eye where public opposition could hamper interest group activity.

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[22] See *Fiorina* (note 11).

IV. Conclusion – Politics Without Interest Groups?

Throughout this essay, in line with Public Choice teachings, interest groups politics has been portrayed as the enemy, both of democracy and good government. While acknowledging that interest group politics often appears ugly and excessive, it should not be uncritically accepted as wholly evil. We still need to pay attention to the behavior of lawmakers and other government officials. We cannot suddenly abandon the basic premise of Public Choice theory – that political actors are motivated to act by their own interests. The Public Choice assumption seems to be that if interest group activity were eliminated, legislators would automatically begin to legislate the public good. This assumption completely ignores questions about the incentives operating on legislators. Therefore, the interests that would motivate lawmakers if they were largely freed from interest group pressure must be investigated.

Obviously, reelection would remain a substantial motivating factor for legislators. However, collective action problems would still hinder the expression of the wishes of the average voter. Further, the increased costs of organizing that defeated the interest groups might work in the same way against voters. At a minimum, elected officials might have to spend more time and money figuring out what voters want, if they were interested.

It is worthwhile to step back and think about legislative incentives in the context of the constitutional separation of powers among the three branches of the United States Government. The thesis here is that government officials are, and were thought of by the framers, as one of the most powerful interest groups. Government officials, as rational actors, tend to use the office of government for their own gain, rather than for the maximization of the public interest. Two instruments counteract this tendency, pressure from people and groups outside of government and competition among government organs as created by separation of powers.

Separation of powers counteracts the tendency of government officials to use their power for their own purposes by forcing government officials to look both inward and outward for support.[23] If all power inhered in one person or in one relatively small branch of government, checking that power would be difficult. In a system of separated powers, outside influence tends to increase because there are more avenues for influence on government. Further, by dividing power and giving each branch (or division within a branch) the means to fight the other branch for power, internal forces are deployed against concentrations of power. These constraints on power depend, to some extent, on the existence of outside forces to check (along with internal forces) concentrations of power. While frequent election for the House of Representatives is an important check, interest group pressure acts similarly as a check on the ability of politicians to abuse their power. Without the necessity to please interest groups, and with a voting public

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[23] For a discussion of separation of powers and statutory interpretation, see *Cynthia Farina,* Statutory Interpretation and the Balance of Power in the Administrative State, 89 Columbia L. Rev. 453 (1989).

generally unable to organize, public choice theorists should expect government officials to be freer to use government for *their own* purposes. Thus, removing the interest group check on government action is only in the public interest if the remaining influences on government action are more closely aligned with the public interest than interest group desires.

In conclusion, the clearest picture one can draw from the Public Choice view of government is one of substantial uncertainty both over the viability of reform and its desirability. There is no question that interest groups, within the current system, have the ability to suppress the voices of people without the money or organization of the groups. However, before going all out to eliminate interest groups, some energy should be devoted to enhancing the ability of the unorganized voter to have his or her voice heard.

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