1991

Interest Group Politics and Judicial Behavior: Macey's Public Choice

Jack M. Beermann
Boston University School of Law

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The economic theory of government has lately gained the acceptance in legal circles that it has long enjoyed in political science and economics. The economic theory, also known as "public choice," analyzes and explains government action and private political activity according to the basic assumption of economics, that individuals respond to economic incentives in their environments in a self-interested manner. The economic theory is thus useful descriptively, to explain diverse political phenomena, and prescriptively, to help formulate reform strategy.

In accord with the assumption of self-interest, public choice theorists have described political activity, including government itself, as a market in which officials sell favorable action in return for votes, money (which may help in reelection bids), postgovernment employment, other support, or a combination of these. Members of Congress, for example, sell favorable legislation to organizations that promise to deliver the most votes or the most campaign support.[1] Appointed officials, who are also assumed to be acting primarily out of self-interest, seek to maximize the budgets for their programs, entrench their position within the bureaucracy, or advance their postgovernment career opportunities.[2]

The inducement for private individuals to become involved in politics is the prospect of a positive return on their investment in

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* Professor of Law, Boston University School of Law. Boston University School of Law provided financial support for this Article. Thanks to James Boyle, Debra Korman, Ron Cass, Bill Eskridge, Günter Frankenberg, Clay Gillette, Avi Soifer, and Joe Singer for comments on drafts and other valuable assistance. Barbara Melamed provided invaluable research assistance. Special thanks to Jon Macey for discussing an earlier draft at length.

1 Concern with reelection, in fact, can help explain many recent changes in the structure of government and the perquisites enjoyed by Members of Congress. *See* M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989).

2 *See* Cass & Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257, 320-35 (1991) (discussing various public choice explanations for behavior of administrative officials); *see also* W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (discussed in Cass & Gillette, *supra*).

voting, lobbying, or other political activity. The model predicts that people will become involved in politics only when the expected returns from political activity exceed the costs incurred, including foregone expected returns from other activity such as participation in the market or leisure.[3]

Public choice predicts that even if, in the aggregate, "average people" have significant economic interests at stake in the political process, the costs of organizing, including free-rider problems inherent in large, noncoercive, organizations, will ensure that it is only rarely, if ever, worthwhile for the average person to participate in political activity. Therefore, the political world is likely to be dominated by small groups composed of large, relatively wealthy, institutions that, because of their high intensity of interest and small numbers, are able to overcome collective action problems and organize.[4] This raises the most corrosive implication of public choice theory: because the interests of the groups that find it worthwhile to engage in political activity are not likely to represent the public interest or the interests of people not able to participate, the outcomes of the political process are likely to be skewed away from the general interest and toward the interests of the groups that happen to be able to organize.

But public choice is not necessarily all darkness and gloom. If people or groups representing diverse interests have sufficient incentives to participate in the political sphere, the implications of the economic model are not so unambiguously bad. For one, as in any well-functioning market, single actors will not have sufficient wealth to capture all goods for themselves. As the cost of defeating opposing interests increases, parties are pushed toward compromise. Indeed, officials may also encourage compromise as a way of maximizing payments from diverse interests, especially since elected officials depend on votes from a great number of people. While public choice predicts that the results of the political process will continue to be skewed toward the interests of those that actually participate, the broader the spectrum of interests represented, the closer political outputs will reflect the general will.

The pluralist model of politics, in which all interests are represented in the market for legislation, is not the dominant image

3 *See* Stigler, *Economic Competition and Political Competition*, 13 PUB. CHOICE 91 (1972).

4 The reason the average person will not benefit from political activity is that one individual's actions, whether by voting or letter writing or visiting a Member of Congress' office, are unlikely to influence the outcome of any political debate.

of the proponents of public choice. Legal theorists have been convinced that the market for legislation is a failure because collective action problems, and not the preferences of citizens, explain the outcome of many lawmaking transactions. Therefore, analysts have concentrated on the dark side of public choice and addressed the implications of interest group capture. Stated broadly, the issue has been how to understand our constitutional structure in light of the potential for interest group capture. More narrowly, the question has been how judges should treat statutes if the enacting legislature did not intend to advance any conception of public interests but instead aimed to transfer wealth from the political losers to the political winners.

The early answer to how judges should treat statutes produced in a system dominated by interest groups seems to have been that judges should enforce the interest group bargain exactly as written, without any allowance for creative interpretation in line with the overall purposes of the legislation.[5] Deviation from the bargain in one direction or another, it was argued, would award a windfall to one of the interests that the interest could not afford to purchase in the political arena.

This preference for enforcing interest group deals has been attacked on two fronts—democracy and efficiency. First, if democracy is understood as connoting broadly the notion that government action should reflect the will of society, and if collective action problems interfere significantly in many people's ability to influence political outcomes, then a strong principle of enforcement of legislation as written is not necessarily consistent with democracy. The efficiency objections to enforcing interest group deals are less obvious but, if true, potentially equally powerful. Jonathan Macey,[6] relying heavily on the work of Mancur Olson,[7]

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5 *See* Landes & Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J. L. & ECON. 875 (1975).

6 Macey has written several articles applying public choice theory to law. I focus mainly on his more general articles, that is, his articles that make broad points about public choice and constitutional or statutory interpretation, rather than on his articles on specific legal issues. The principal articles I examine are Macey, *Transaction Costs and The Normative Elements of The Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988) [hereinafter Macey, *Transaction Costs and Normative Elements*]; Macey, *Promoting Public Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) [hereinafter Macey, *Promoting Public Regarding*]; Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50 (1987) [hereinafter Macey, *Competing Economic Views*]; and Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43 (1988). To a lesser extent, I also

has argued that interest group activity is inefficient for two related reasons. First, legislation consists of government ordered wealth transfers. Since wealth transfers through government action are coercive, they are much less likely to be efficient than private, voluntary transactions which would occur in the market absent government regulation.[8] Second, wealth transfers through government action are just that, naked transfers with no increase in overall wealth. These transfers might result in a net social loss because the resources spent procuring wealth through politics might have been employed productively in the private market in transactions that would increase social wealth. This is a problem of opportunity costs: by spending resources in the political sphere, interest groups give up the opportunity to make productive investments.

Macey attempts, through an economically based constitutional theory, to confront the inefficiencies that public choice theory reveals. Macey's economic constitutional theory proceeds from two basic premises: First, that the role of the Constitution is to establish the ground rules of the market for law, and second, that, as noted above, the availability of wealth transfers through government action is destructive and should therefore be limited through constitutional rules. In a nutshell, Macey believes that the Constitution was designed to raise the cost to interest groups of favorable legislation so that resources will not be wasted on purchasing wealth transfers through politics.

Macey envisions a positive role for the independent judiciary in the minimization of interest group activity in government. He disagrees with public choice theorists who have argued that judges should passively enforce the terms of the interest group bargains made in other branches of government. Instead, Macey proposes

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examine Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673 (1988) [hereinafter Macey, *The Missing Element*]; Macey, *Special Interest Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall*, 33 EMORY L.J. 1 (1984) [hereinafter Macey, *Glass-Steagall*]; Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990) [hereinafter Macey, *Federal Deference*]; and Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989).

7 Especially M. OLSON, THE RISE AND DECLINE OF NATIONS (1982) [hereinafter M. OLSON, RISE AND DECLINE]. *See also*, M. OLSON, THE LOGIC OF COLLECTIVE ACTION, (1971) [hereinafter M. OLSON, LOGIC].

8 See Macey, *Transactions Costs and Normative Elements*, *supra* note 6, at 516, where he states that it is "axiomatic" that private transactions are efficient. He must mean private transactions free from private coercion and third party effects.

that judges construe statutes in a more traditional manner: judges should use the public purposes that legislatures often attach to interest group legislation for public consumption as guidelines for interpreting the statutes. Macey argues this would be constructive for two reasons. First, it would destabilize interest group legislation, thus increasing its costs and thereby decreasing its frequency. Second, it would serve the public interest goals that legislators attached to the legislation.

Macey's work is important because it attempts to construct a constitutional theory out of the empirical observations of public choice and because it suggests methods of combatting the negative implications of public choice theory. However, I am skeptical of Macey's project on several fronts. This Article focuses on four specific shortcomings in Macey's analysis, against the background of the broader question of the economic value of regulation. The first two are related to Macey's view that reform should be directed at making it more expensive for interest groups to procure legislation so that they will concentrate their efforts on more productive pursuits. First, Macey makes no effort to relate the magnitude of the effects of his proposals to the point at which it is no longer worthwhile for interest groups to engage in activity designed to achieve government sponsored wealth transfers. In other words, we have no idea whether Macey's reforms would result in a massive shift of resources to production or simply increased spending on lobbying and related activities to overcome the new barriers to such activity. Second, Macey does not address how the removal of interest groups from the political landscape would affect the behavior of government officials. The economic model indicates that as constraints on the behavior of government officials are removed, government officials may be freer to use government power for their own purposes. Macey does not identify the incentives that would lead officials free of interest group pressure to act in the public, rather than self, interest, or why the self-interest of public officials would suddenly coincide with the public interest.

The third problem addressed concerns Macey's argument that the Constitution is a public-regarding document. I argue that Macey does not succeed in demonstrating that rational economic actors would have framed a public-regarding constitution or that the conditions at the time of the making of the Constitution were conducive to the formation of such a constitution. Finally, the fourth problem discussed is a missing piece of much public choice theory—the economic influences on *judicial* behavior. I propose to

show that without a more comprehensive theory of judicial behavior, public choice theorists are not true to their own theories when they propose reforms or interpretive strategies that depend on judicial action. Public choice theorists may not know what to make of the independent judiciary's role in the political system.

I. PUBLIC CHOICE AND THE INSTITUTIONS OF GOVERNMENT

Public choice theory depends most fundamentally on the assumption that government officials, parties regulated by government, and all private citizens, when they engage in political activity, are acting out of self-interest and not altruistically. Political participation, under this assumption of economic rationality, occurs only when the expected gains from such participation exceed the expected costs. Although most public choice theorists believe that only a narrow group of people will participate, it is not necessarily the case. In fact, it is possible, under an assumption of economic rationality, that participation in political matters will be widespread. However, it is also possible that incentives for participation are generally so low (and organizing costs so high) that only narrow interests will be reflected in political outcomes.

A. Pluralism and Democracy

The brighter side of public choice, often referred to as "pluralism," portrays the ability of people to band together and press their interests to government as a strength of an open and democratic system.[9] In a large, industrialized country, direct individual participation is an unrealistic method of democratic control of government. Further, representatives are few relative to the number of issues that come before government, so voting cannot adequately reflect the preferences of the voters over the large range of issues. Group pressure, in an open society in which everyone is free to join groups, is the most practical and effective strategy for democratic control.

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9 *See* R. FOWLER & J. ORENSTEIN, CONTEMPORARY ISSUES IN POLITICAL THEORY 35-37 (1977). Fowler and Orenstein identify three advantages that proponents ascribe to pluralism. First, pluralists claim that groups provide the only meaningful chance at participation for most people in contemporary society. Second, pluralism is the only practical form of democracy today. Finally, pluralism provides for change within a generally stable context—the pressure to compromise will temper any radical desires held by a single group. *See also* references collected in M. OLSON, LOGIC, *supra* note 7, at 111-25.

Inexpensive means of mass communication make participation realistic for almost all members of society. In our own political system, we see the average person's interests represented through organizations such as consumer advocacy groups, although public choice would argue that only a narrow band of consumer interests are likely to be represented. Still, casual observation indicates that there is relatively widespread participation in interest groups representing the interests of great numbers of people.

Because it is so easy to join a group, it may also be easy to start one. Public choice theorists may view the formation of interest groups as an entrepreneurial activity.[10] Founding, directing, and working within an interest group presents an economic opportunity. The easier it is for people to join groups, the more likely that potential entrepreneurs will find it worthwhile to found them and direct them.

The question remains, why do people join groups? It would be unrealistic to suppose that everyone who sends in a membership fee expects that group pressure on government will produce policy change worth the membership fee.[11] This is even more unrealistic when one realizes that most benefits produced by groups are public goods, that is, enjoyment of the benefit cannot be reserved to members of the group. Some groups provide other incentives to join, such as magazines, calendars, or various other products.[12] The directors will try to lure contributors by making membership and additional support look attractive, perhaps by promising effectiveness or by offering products like newsletters that make the membership cost worthwhile. But many people donate money to groups or pay membership dues far in excess of the value of any tangible products included.

People may join groups because even though the average person has no rational hope of influencing political decision making by joining, the satisfaction gained from contributing may provide a sufficient incentive. For many people, participation may be a consumption good rather than a means to a political end. In

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10 *See* M. OLSON, LOGIC, *supra* note 7, at 175; Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 370 (J. Wilson ed. 1980).

11 Real economic incentives may sometimes exist. *See infra* text following note 11.

12 If people joined groups to receive a product rather than to indicate support for the group policies, it would not necessarily be democratic for such groups to influence government action. I do not understand, however, why such groups would survive, because other producers could offer the goods at lower prices since they would not include a premium to support group political activity.

the course of convincing people of the worthiness of their causes, the directors of groups may convince people that they have a civic duty to donate to important causes. People may then contribute so that they can feel that they are a participating member of society.

I want to distance myself from these public choice explanations for why people join or lead interest groups. While the explanations ring true for business oriented associations, they do not explain, except in a tautological fashion, the existence of groups that depend on volunteerism, where members and leaders lose economically in order to further deeply held beliefs. The assumption of self-interest leads to the tautology that group activity is a consumption good. This does not explain why people spend the money or pass up higher paying employment in order to work in interest groups; it merely recharacterizes the phenomenon.

The influence of money on political outcomes is viewed as negative if the guiding principle is one person, one vote. However, if the amount of financial support that a group is able to garner reflects the degree of societal support for a group's positions, then group pressure provides a constructive outlet for political activity. On the other hand, if group resources are not related to societal support for their positions, for example because wealthier members of society disproportionately support a particular group or because members are attracted to the group by a product like a magazine rather than the group's political positions, then money, insofar as it aids a group's efforts to gain political influence, is a distorting factor.[13]

13 I am glossing over two related and important problems here. First, I have not clearly adopted a baseline against which to measure whether the influence of money, or other factors such as collective action problems, distort the political process. In other words, I have not attempted to construct an image of the ideal political system in terms of democracy. This is very difficult in light of the second issue I am glossing over, the degree to which intensity of preference should affect political outcomes. In the market for goods and services, intensity of preference, as signified by willingness to pay, has a significant effect, and it is not normally viewed as a distortion but rather as the beauty of the market. If everyone votes, and voting is the only political activity engaged in by nonpublic servants, then the economic and political markets may be different with regard to the reflection of intensity of preferences with the political market much less likely to reflect them. In the actual political market, intensity of preferences is important, and without a definition of democracy it is unclear that this is necessarily a bad thing. *See* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962). Nonetheless, public choice argues that collective action problems mean that the ability of interests to have influence does not necessarily reflect the intensity of preferences of members of society.

The next issue is why groups, once formed, have influence. The dynamic of group pressure is not altogether clear. In an idealized view, representatives would measure the will of the people as expressed through groups and direct public policy in accordance with their best estimate of overall societal sentiment. Understanding this dynamic from a public choice perspective, however, requires analysis of incentives—what incentives do representatives (or other government actors) have to act according to, or listen at all to, the will of people as expressed through groups? The attempt to understand this process, together with analysis of the formation and maintenance of groups, is at the heart of public choice.

The most obvious incentive operating on Members of Congress is the desire to be reelected. With House Members this is an almost constant struggle since they must stand for reelection every two years. The reelection incentive will lead to responsiveness to group pressure for two reasons. First, groups that represent large numbers of voters and can claim credibly to be able to influence the votes of those members can threaten the reelection prospects of uncooperative representatives. Second, because candidates need money to finance reelection campaigns, groups with substantial assets available for campaign-related contributions can use the threat of withholding those funds, or directing them to opponents, to win cooperation. If, and this is a big if, these tools available to groups reflect the will of the electorate at large, then group pressure is a tool of democracy that should be welcome in a large society with little chance for effective individual pressure.

The beauty of a well-functioning political system is its consistency with norms of equality. Voting can be an equalizing activity because votes are distributed equally to all members of society.[14] Voters can combat market inequities through the political system because the power of the vote takes no account of the wealth of the voter. However, if not everybody votes, then voters (or likely voters in the eyes of politicians), are likely to have greater influence than nonvoters. Further, when voting is not the only political activity, inequality of political influence may occur because some

14 For an economic analysis of voting and the ways in which intensities of preferences show up in the political system, see J. BUCHANAN & G. TULLOCK, *supra* note 13. Buchanan and Tullock analyze how different voting rules and different rules regarding the trading of votes affects the efficiency of political outcomes.

people will participate in other activity, such as lobbying, more than others.

The interaction between groups and nonelected officials is more complicated and deserves special attention. What incentives exist for appointed officials, for example, officials in administrative agencies, to listen to groups? It has been suggested that bureaucrats pursue four related goals: they seek to maximize the budgets of their programs, advance the goals of their programs, service clients (e.g., interest groups, unorganized constituents), and advance their personal positions.[15] Because pursuit of these goals usually requires cooperation from Congress, administrative officials will find it in their interests to please any interest groups with influence in Congress, so the interest groups will use their pull in Congress to help the agencies.[16] This relationship among Congress, agencies, and groups has been referred to as an "Iron Triangle."[17] Again, if the groups are representative of the desires of society at large, then this interaction is just a mechanism for ensuring democratic control of the agencies.[18]

Interest group politics, in which all interested groups have voices, tends to be a politics of compromise,[19] partly to avoid excessive lobbying costs and partly because voters' positions tend toward the middle.[20] Compromise occurs because as the costs to

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15 *See* Cass & Gillette, *supra* note 2. The first three goals may be means to attain the fourth goal—a bureaucrat may find that her interests are advanced when the program is successful, has a large budget, and keeps constituencies happy.

16 *See* G. ADAMS, THE POLITICS OF DEFENSE CONTRACTING: THE IRON TRIANGLE 24-26 (1981); Note, *Begging to Defer: OSHA and the Problem of Interpretive Authority*, 73 MINN. L. REV. 1336 (1989).

17 *See* G. ADAMS, *supra* note 16.

18 Another way in which interest groups may influence regulators is much more difficult to portray as consistent with democracy. Government officials, including Members of Congress and appointed officials, may need jobs from regulated parties after their term in government. They may, therefore, treat potential employers more favorably than the public at large would want. The ability of officials to get away with this type of behavior depends on whether the behavior is successfully monitored by other interested parties who can alert other Members of Congress to the problems caused by favoritism.

19 Politicians must balance gains from interest group favoring action against potential losses in votes from broad, unorganized constituencies. Therefore, they cannot favor interest group desires to the exclusion of other factors. *See* Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976).

20 Mancur Olson has argued that collective action problems mean no society can achieve the kind of equilibrium of interest group influence described here. *See* M. OLSON, RISE AND DECLINE, *supra* note 7, at implication 1, ch. 3. William Eskridge and Gary Peller have noted that theorists in the 1950s believed that equilibrium was possible but that this view was abandoned in the 1960s. The normative justification for interest group politics then shifted to its tendency to stabilize society and moderate conflict. *See*

a group of a potential policy rise, the group will spend more resources fighting the policy. Legislators act as brokers, maximizing support and minimizing opposition among voters, so if powerful groups are on opposite sides, middle positions may be the best overall political strategy. Further, the various groups have an incentive to compromise to avoid excessive lobbying costs.

In reality, all of these effects are much more complicated than this simplistic portrayal. The ways in which interest groups influence government, and the interactions among different parts of government are very complicated. Unorganized voters may sometimes play an important role, since elected officials are obviously answerable to the electorate at large. One point that seems important but about which it is difficult to get a clear picture involves the more intangible ways that political support influences government action. On some issues, votes (enough to influence an election) or jobs of administrators may not be at stake, yet general political support appears important. Government officials may need cooperation from each other and from the public to make a proposed policy feasible. If the prospects for cooperation are dim, then even without the raw assertion of power involved in elections or funding cuts, the voices of groups may influence the governmental process.

It would be nice to know just how much influence narrow interest groups have in the political system, and whether that influence is on the rise or decline. I would not have much confidence in any estimation I make here, but there is at least cause for hope that interest group excesses are subject to some constraint. The constraint is competition among groups. Morris Fiorina has observed that the proliferation of Congressional subcommittees has spawned jurisdictional fights in which Members of Congress fight for control over issues that affect their pet groups.[21] This, in turn, has directed more issues to the floor of Congress, where they receive a more public airing than if they were resolved at the committee level.[22] Competition among inter-

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Eskridge & Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 738, 741-43 (1991). Buchanan and Tullock argue that equilibrium is unlikely to occur under any decision making rule other than unanimity because of differences in the intensities of participants' preferences and the ability to externalize costs of government action. *See* J. BUCHANAN & G. TULLOCK, *supra* note 13, at 287-89.

21 M. FIORINA, *supra* note 1, at 121-24.

22 For an interesting discussion of the committee system, and whether committees reflect the will of the general membership of Congress, see Krehbiel, *Are Congressional*

est groups might thus provide a check against the ability of narrow interests to prevail.

B. Public Choice and Capture

Most public choice theorists who apply the economic theory of government to law do not accept the rosy picture of interest group politics presented above. Rather, public choice theorists take each of the activities described above—interest group participation, formation and influence—and argue that economic realities cause each to occur antidemocratically, and that regulation produced tends toward inefficiency.[23]

Mancur Olson's landmark work on collective action argues that economic theory predicts that the average person is unlikely to engage in political activity and that the political world is likely to be dominated by relatively narrow interests.[24] 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.[25]

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 relatively impecunious individuals might theoretically pool their resources to defeat the wealthier interests, the costs of organizing will usually outweigh the potential benefits of the influence sought.[26]

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

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Committees Composed of Preference Outliers?, 84 AM. POL. SCI. REV. 149 (1990).

23 For a discussion of the relationship between political processes and efficiency, see J. BUCHANAN & G. TULLOCK, *supra* note 13, at 265-81.

24 *See* M. OLSON, LOGIC, *supra* note 7. Much of my analysis of incentives to engage in collective activity is drawn from Olson's work.

25 *See* Horn & Shepsle, *Commentary on 'Administrative Arrangements and the Political Control of Agencies': Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 500 (1989).

26 The one political activity in which everyone is equal is voting—every vote is worth the same as every other vote. However, because no one voter can have a significant effect on the outcome of an election, and voting costs something, many people have no incentive to vote. Further, to the extent that factors other than voters' desires influence government behavior, equal voting rights do not solve the problems of insufficient means of recourse and costly organization.

with relatively little at stake. Most public policies are public goods, that is, 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.

The implications of the impediments to participation discussed above should be obvious. Because of the costs of organizing and the free-rider problem, 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.

Mancur Olson attempts to explain the characteristics of groups that are able to organize despite public goods problems. His theories grow directly out of his description of the impediments to group formation and are worth a closer look than I give them here.[27] 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 nonmembers such as through boycotts or barring nonmembers from holding jobs (mandatory labor unions);[28]

27 *See* M. OLSON, LOGIC, *supra* note 7, at 132-67.

28 Mandatory labor unions have long been controversial in legal and political opinion in the United States. Recently the Supreme Court has placed strict limits on the use of mandatory union dues for political activity on the ground that involuntary members' free speech rights were violated. *See* Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); *see also* Keller v. State Bar of California, 110 S. Ct. 2228 (1990) (placing first amendment restrictions on the use of bar dues for political purposes).

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. The important point here is that the success with which interests are taken into account in the political process is unlikely to reflect the general societal distribution of interests. Many widely held interests are likely to remain unrepresented or at least unsuccessful in the interest group process because they are unlikely to overcome the impediments to effective organizing.

The inability of broad based interests to organize effectively and to have much influence on the political scene has important implications for the nature of the product of the lawmaking process. 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.[29] In other words, legislation will be bought by powerful interests.[30] And the losers in the market for legislation will be the losers in any market—the people with less money and power. Legislation, under the public choice model, will redistribute wealth from the relatively poor and powerless to the relatively wealthy and powerful.[31]

Elections are not sufficient to combat these problems for a variety of reasons. Money is very important for a successful campaign, and incumbents find it much easier to raise money from

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29 Substantial uncertainty exists regarding the degree of influence interest groups actually have on the votes of legislators. Some studies have indicated that ideology appears to be the most important determinant of congressional voting. See the discussion and citations in Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 897-901 (1987). On the other hand, it has been argued that interest groups are more successful at blocking unfavorable legislation than at procuring favorable legislation. *See id.* at 887, (citing K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 314-15, 395-96, 398 (1986)).

30 The narrow interests' ability to procure favorable legislation will depend in part on the strength of opposition. For example, it should be difficult for even a narrow interest to procure legislation that will hurt another well-organized interest. But in many situations, the same impediments to organizing around a positive program make it difficult to organize to prevent unfavorable legislation. For a breakdown of legislation along these lines, see Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 295-301 (1988).

31 It has been argued that government redistributes wealth from the wealthiest and poorest to the middle, because politicians find it most advantageous to attract the support of the median voter. *See* Stigler, *Directors Law of Public Income Redistribution*, 13 J. L. & ECON. 1 (1970).

interest groups and constituents than do challengers.[32] Incumbency itself is a great advantage, because Members of Congress have voted themselves privileges, like free mailing of literature and large staffs to help with constituent services. These privileges help their campaigns because they use their positions in Congress to do casework, which wins loyal support.[33] These and many other factors have made it very unusual for incumbents to lose congressional elections.[34]

II. JONATHAN MACEY: THE ECONOMICS OF CAPTURE AND CONSTITUTIONAL POLITICS

Professor Jonathan Macey has built a theory of judicial power and interpretation based on his acceptance of the public choice model of government action. In an impressive series of articles, he has described the effects interest groups have on the political system, explored inefficiencies created through interest group politics, proposed judicial strategies for combatting the excesses of interest group politics, and provided a constitutional theory to justify his proposed reforms. Macey's work is important because it attacks prior public choice theory from within its own premises and because it suggests reforms aimed at ameliorating the effects of interest group politics. However, there are significant problems with Macey's theory, most of which derive directly from his economics. All of this is amplified below.

A. The Economics of Capture

The economic implications of public choice depend heavily on how representative interest groups are, because the more skewed the political marketplace is, the less likely that legislation will reflect the preferences of the polity at large.[35] In other words, if the market for legislation functioned well, so that all preferences were taken into account in roughly the same measure as in the economic marketplace, then the results in the legislative marketplace might mirror the results of the economic market-

32 M. FIORINA, *supra* note 1, at 100.

33 *Id.* at 53-66, 112-21.

34 *Id.* at 7-13.

35 For example, see Macey's discussion of constitutional formation in Macey, *Competing Economic Views*, *supra* note 6, in which he advocates a much more optimistic view in part due to widespread participation. See also my discussion of this aspect of Macey's theory *infra* Part II(B) and accompanying notes.

place.[36] However, if the situation is as bad as most public choice theorists seem to believe, then the market is a failure that begs for correction, lest it produce more massive inefficiencies through redistributive programs under which the politically powerful seize resources from the unorganized masses.[37]

Macey identifies two primary economic problems growing out of interest group politics, the inefficiency of interest group transfers and the diversion of resources to lobbying activity. In what follows, I present each of Macey's ideas and some comments on them. As I noted at the outset, Macey's theory is attractive because of its optimism that the legal system can do something to combat the excesses of interest group politics. On the other hand, Macey's analysis often turns out to be quite extreme, largely because Macey does not make an effort to distinguish desirable from undesirable government action. This raises the suspicion that lurking behind Macey's theory is a highly antiregulatory political agenda.

1. Interest Group Inefficiencies

Interest group transfers are inefficient, according to Macey, because they are by nature coercive and thus unlikely to reflect the preferences of the *losers* in the interest group game. Producers of a product or service will go to government for a subsidy because they cannot obtain a higher price in the market. Consumers would balk at paying the higher price in the market as they would find substitutes or would consume less. Nevertheless, if producers have something valuable to offer legislators, can overcome collective action problems and organize, and if consumers cannot overcome the impediments to organizing, then producers might be able accomplish through law what they were unable to achieve in the market.

Macey's argument here should seem familiar—it is a classic law and economics objection to government intervention into the marketplace. However, it is unclear whether Macey intends to indict all government intervention or merely interest-group motivated activity. On the one hand, Macey's analysis can be read as

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36 Mancur Olson argues that equilibrium among all interests in society is impossible. *See* M. OLSON, RISE AND DECLINE, *supra* note 7, at 37.

37 Macey describes the process in Macey, *Promoting Public Regarding*, *supra* note 6, at 230-33. He uses the example of milk price supports—even though all milk drinkers are hurt by price supports, milk producers are able to procure price supports because they are a "small cohesive lobby." *Id.* at 232.

an attempt to release government officials from interest group pressures so they are free to devote themselves to working for the public good. On the other hand, Macey's analysis appears dubious as to whether government regulation is ever efficient. He expresses the view that government regulation is inefficient so confidently and so absolutely that his analysis could be read as extremely antiregulatory. For example, he states that it is axiomatic that market transactions are efficient,[38] and he proposes that administrative agencies, because they are easy targets for interest groups, be abolished.[39]

The assumptions implicit in Macey's analysis here prevent it from being useful. Macey's baseline is a perfectly functioning market with no transactions costs or third party problems interfering with the efficiency of the market. In such a world, government action that interferes with the market is per se undesirable because it is always inefficient. In the real world, regulation is often desirable on efficiency grounds. Without regulation, transaction costs prevent efficient market transactions and third party effects render transactions, efficient between the parties, inefficient socially. Now I might be over reading Macey on this point because he does envision a role for government freed from interest group pressure, but it is unclear whether that role can be consistent with his criticisms of the interest-group-dominated government.

Casual observation of the substance of legislation casts doubt on the notion that redistribution always runs from the politically powerless to the powerful. Antidiscrimination laws, public welfare programs, and statutes lowering the tax burden on the poorest members of society are hard to explain along the lines of shifts to the powerful, although public choice theorists might attempt to do so, perhaps by pointing out that the providers of the services are attempting to entrench their bureaucratic positions or by identifying powerful interest groups that benefit from the programs. Of course, there are plenty of counter-examples, but my point is not that all legislation is benevolent...only that enough of it favors relatively weak and unorganized interests to call into question claims that legislative outcomes are dominated by wealth transfers to the powerful.

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38 *See* Macey, *Transactions Costs and Normative Elements*, *supra* note 6, at 513.

39 *Id.*

The possibility that some legislation redistributes wealth to large groups of relatively poor individuals raises an interesting aspect of the political system. Even though interest group support helps, politicians still depend on large numbers of voters for their political lives. Because votes are distributed one to a person while wealth in the marketplace is distributed unequally, voters' interests may sometimes prevail over special interests.[40] No doubt wealth plays an important role in the political realm, but in the end each voter has equal power in an election, and candidates may sometimes find it advantageous to bypass interest groups in favor of a populist appeal. In such a situation, the results of inequality in the marketplace may be ameliorated in the political realm.

This equality of votes may make it difficult to make an efficiency claim about the results of the legislative process. To the extent that outcomes in the market are influenced by wealth effects, the market may not be efficient, in that ability to pay may not be an accurate measure of the intensity of preferences.[41] Legislation may sometimes counteract the inefficiencies produced by inequalities in the marketplace. To a great extent, this effect depends on what ground rules one accepts for a market—that is, whether unequal power in the market created by unequal wealth should be treated as a defect or a given.

The problem of selecting ground rules for the market calls into question the entire project of evaluating social programs under an efficiency measure. Selecting such rules is a value-laden enterprise, often involving competing conceptions of the good life or the good society.[42] Government rules and programs establish the ground rules for the market, and the Constitution establishes the ground rules for political competition.[43] The usefulness of

40 Ultimately, politicians, no matter how much money they have in their campaign funds, must garner enough votes to win elections. "Government sometimes acts to benefit large, diffuse, modestly interested groups that, according to special interest focused public choice writings, would seem ill suited to command government's favor." Cass, *Privatization; Politics, Law and Theory*, 71 MARQ. L. REV. 449, 475 (1988). Presumably, votes are what drives this legislative behavior.

41 My colleague Joe Singer and I have argued that wealth may be like a transaction cost in that it distorts outcomes as compared to a perfectly functioning market which would move goods where they are most highly valued. With wealth inequality, goods may disproportionately end up in the hands of the wealthy. *See* Beermann & Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911 (1989).

42 *See generally id.*

43 Macey, *Competing Economic Views*, *supra* note 6.

efficiency as a normative criterion is limited when there is controversy over the ground rules for economic activity.

2. Interest Group Opportunity Costs

The second problem Macey attributes to interest group politics is the diversion of resources from production to lobbying, a societal case of opportunity costs, here the opportunity to employ lobbying resources in more productive pursuits. This diversion will occur as long as the expected gains from a dollar spent on lobbying are greater than the expected gains from a dollar spent on production. The impediments to organizing that public choice theorists claim make the system undemocratic ensure that for most people the choice between production and lobbying will clearly be for production. But for the few groups lucky enough to overcome the impediments to organizing, the availability of wealth transfers through government will discourage other, more productive, activity.

Macey argues that judges, through public interest oriented statutory interpretation, can make interest group activity less attractive, and thus redirect resources toward activity more productive than interest group politics. On this point, Macey's brand of public choice theory is constructive and interesting, and marks a substantial step forward from Chicago-school law and economics public choice analysis. Several commentators took the insights of public choice as support for extremely narrow statutory construction.[44] Under traditional interpretation, judges construed statutes to advance an underlying public purpose.[45] This traditional statutory interpretation was said to be inconsistent with the realities of the legislative process because many pieces of legislation resulted from interest group pressure and/or compromise, and thus had no underlying public purpose.[46] Moving a statute beyond its bare terms toward advancing more effectively an underlying statutory

44 *See* Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (arguing, on public choice grounds, that the domain of a statute be construed narrowly); *see also*, Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Landes & Posner, *supra* note 5; Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982).

45 The classic case for purpose-based statutory construction is Heydon's Case, 76 Eng. Rep. 634 (Ex. 1584). *See also* Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U.L. REV. 401 (1968).

46 *See, e.g.*, Posner, *supra* note 44, at 276 (discussing the lack of "sincere efforts" at achieving public purpose in interest group legislation).

purpose was thus portrayed as inconsistent with the legislature's intent.[47]

This preference for narrow statutory interpretation has several possible bases.[48] First, a rather formalistic preference for whatever the legislature intends, based perhaps on a principle of legislative supremacy, might be at work. Second, 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 private market results, where transaction cost 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. Third, 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 acting in the public interest, legislation is usually a failure, and therefore, the narrower judges confine legislation the better.[49]

Macey agrees that judges should combat inefficiencies and social waste, but apparently he thinks that the overall waste created by interest group activity is greater than that arising from judicial extension of misguided legislation. For Macey, construing statutes to achieve their interest group related purposes would only encourage interest groups to spend more resources on lobbying for government sponsored redistributive programs. Macey believes that the independent judiciary was created to serve as an obstacle to rent-seeking behavior by interest groups.[50] Because he views lobbying for such redistributions as a waste, Macey would prefer that judges work to destabilize interest group deals.

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47 Public choice teaches that had the legislature gone one step further, aggrieved parties (e.g., other interest groups, unorganized voters) might have fought the legislation and won. In an extreme case, a previously unorganized group might have found it worthwhile to organize to fight the extension. *Id.* at 266, 278-79.

48 Macey accuses Easterbrook of being "dismayingly vague" regarding the normative bases for the notion that judges should merely enforce interest group bargains. *See* Macey, *Promoting Public Regarding*, *supra* note 6, at 235-36 n.56.

49 Notice the similarity to two canons of statutory interpretation, statutes in derogation of common law should be strictly construed and *expressio unis exclusio alterus*. The empirical assumption leading public choice theorists to adopt *expressio unis* is that with competing interest groups actively fighting unfavorable aspects of pending legislation, the legislature is presumed to have rejected, at the insistence of potentially adversely affected interest groups, anything not explicitly included in the statute.

50 Macey, *Competing Economic Views*, *supra* note 6.

Destabilization would make legislation less valuable, so interest groups would spend less money on lobbying.

Macey thus believes that judges, in order to destabilize interest group deals, should construe all legislation as if it were framed in the public interest. In other words, judges should use traditional tools of statutory interpretation to advance the public interest goals that the legislature, in order to fool the public, attaches to all legislation, even the most blatant interest group transfer. Macey is unconcerned with his proposal's fidelity to legislative intent or notions of legislative supremacy generally. He reasons that the Constitution grants judges the power to combat the tendency of the other branches to fall prey to factions. Judicial independence means that judges need not answer to factions. This, to Macey, is the genius of the Constitution.[51]

Macey's proposals potentially entail two desirable side-effects. First, insofar as the public purposes the legislature attaches to legislation constitute good policy, those purposes would be advanced by aggressive judicial construction.[52] Second, Macey's theory avoids difficulties inherent in attempting to distinguish public-regarding legislation from interest group transfers, as constructions of some public choice theories seem to require. Under some theories, judges would be required to distinguish public interest from interest group legislation, and construe the former broadly while construing the latter narrowly.[53] Such a distinction is very difficult to make, and Macey's theory escapes this problem by treating all legislation as if it were passed with the public interest in mind.

Macey recognizes that the legitimacy of judicial interpretation of statutes as fulfilling a public interest is questionable since that is not what Congress intended. His construction conflicts with "the

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51 Macey has an elaborate explanation for why the framers of the Constitution were able to overcome collective action problems and transcend private interest to create a public regarding constitution. In a nutshell, he believed that there existed a competitive market for constitutions and that the people would not have accepted a private-regarding constitution. For a more detailed discussion of this aspect of Macey's theory, see *infra* Part II(B) and accompanying notes.

52 I am unsure about Macey's attitude toward whether public choice theory allows for legislation with a good public purpose. Theorists, like Easterbrook, seem pretty confident that most legislation, even legislation that looks like public interest legislation, is bad. Judicial extension of such legislation would only compound the bad effects. If public choice's empirical claims are accurate, and legislation tends to be produced to serve private rather than public purposes, then extending sham public purposes may only add to the problem rather than ameliorate it.

53 *See* Posner, *supra* note 44, at 269, 272-82.

basic constitutional premise, embodied in article I, that the legislature has the power to make law."[54] Macey announces two principles for interpretive legitimacy which he recognizes appear to be in irreconcilable conflict: "the interpretive act must (1) result in making legislation more public-regarding by serving as a check on legislative excess, and it must (2) not intrude on the constitutional authority of the legislature to make law."[55] Macey believes that the judicial role he envisions is legitimate because the Framers assigned to judges the power to employ traditional statutory construction to combat the private-regarding nature of legislation.[56] He derives this assignment largely from the fact that judges were made independent of the other branches by life tenure and protection from diminished compensation, and from accepted features of traditional interpretation under which judges use the legislatively-announced public-regarding statutory purposes as interpretive guides.[57]

I agree with Macey that traditional statutory interpretation tends to destabilize interest group bargains, largely because I believe that judicial interpretation often tends to undercut whatever the legislature does. There is really no unified approach to interpretation such as Macey's "traditional statutory interpretation." Instead there is sharp disagreement about the proper judicial attitude toward statutes, and there is relative indeterminacy in the actual operation of statutory interpretation.[58] Macey thinks that the practice of writing reasoned opinions constrains judges to interpret statutes with regard to the public interest.[59] But judges are certainly just as able as legislators to cover interest group transfers with public interest language. Further, the existence of a

54 Macey, *Promoting Public Regarding*, *supra* note 6, at 225.

55 *Id.*

56 *Id.* at 225-26, 250-52.

57 *Id.* at 225-26. *See also* Macey, *Competing Economic Views*, *supra* note 6, at 70 & n.59. Macey acknowledges that if the private regarding nature of legislation is apparent from its terms, courts have a duty to enforce it as written and thus further the legislation's inefficient results. *See* Macey, *Promoting Public Regarding*, *supra* note 6, at 239.

58 See, for example, my exposition of the construction and application of 42 U.S.C. § 1983 in Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1988).

59 *See* Macey, *Promoting Public Regarding*, *supra* note 6, at 253-54 ("The chance that special interest goals, disguised by the legislature, will survive interpretation by the third branch is diminished further by the judiciary's traditional insistence in reason, analytical coherence, and principled judgment in the judicial process. This historical commitment to neutral principles is reinforced by the tradition that judges issue written opinions that justify and explain their decisions.").

tradition of intent-based interpretation[60] alongside the counter-tradition of public-regarding policy-based interpretation,[61] leaves judges with the tools to enforce, rather than frustrate, interest group deals.[62]

B. The Economics of Constitutional Politics

If the Constitution was designed to thwart, rather than further, interest group activity, and if public choice's description of the political landscape is accurate, then the Constitution has been a colossal failure. Despite the glaring failure of the Constitution to contain interest group politics, Macey bucks the trend of economic theories and argues that the proper economic understanding of the Constitution is that it is a public-regarding document, designed to channel economic activity into private markets and away from government. Macey explains that important constitutional features are designed to frustrate the ability of interest groups to achieve wealth transfers through government.

The Framers' possible failure to achieve their aims would not usually be a significant criticism of a theory of what their aims were, because what they were trying to do and whether they accomplished it are somewhat distinct questions. This is not to say that the actual operation of the Constitution is not circumstantial evidence of what the Framers intended—the law often presumes that people intend the "natural and probable" consequences of their actions. Because Macey all but ignores history, and because he refutes competing theories by pointing out that they are inconsistent with the actual operation of the Constitution, the Constitution's failure to contain interest group activity presents a serious challenge to Macey's economic theory. Macey holds competing theories to a standard his own cannot meet.

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60 For a description of the recent resurgence in text-based interpretation, see Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

61 For a defense of policy-oriented interpretation, see Eskridge, *Dynamic Statutory Interpretation*, 146 U. PA. L. REV. 1479 (1979).

62 For an illustration of the disparate methods of construction available to judges, and used to interpret a single statute, see Beermann, *supra* note 58.

1. Macey's Economic Competitors[63]

Two theories, that of Charles Beard[64] and of the law and economics movement,[65] hold that the Constitution was designed to protect powerful economic interests, either by shielding against popular redistribution[66] or by facilitating "countermajoritarian wealth transfers desired by special interest groups."[67] Macey does not resort to history to try to disprove the competing theories. Perhaps he believes that constitutional theory is inevitably normative because it is impossible to draw firm conclusions from the Constitution's incomplete historical record, or perhaps he believes that constitutional theory *should* be normative rather than descriptive. In any case, Macey's arguments against the competing theories make no historical claims—the Framers' expressed intentions or the social context within which they acted are presumably irrelevant.

Macey's disagreements with Beard are surprisingly small, and I suspect that Macey actually agrees with Beard's conclusion that the Constitution was designed to "slow[] the pace of progressive change and stifle[] the political expression of the popular will."[68] Macey criticizes the competing theories on two levels: First, for their views of the Constitution's operation, and next for their views of the incentives facing the Framers when constructing the Constitution.

On the Constitution's operation, Macey faults Beard for "erroneously [thinking] that agricultural interests were being stamped out by the new Constitution,"[69] and for believing that banking and creditor interests would always prevail over debtor interests.[70] Macey recognizes that these criticisms do not touch Beard's basic point, one shared with the law and economics movement, that the

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63 Macey recounts these theories in detail and subjects them to criticism in Macey, *Competing Economic Views*, *supra* note 6, at 50-71. I will go into as little detail as possible here to avoid repeating what has already been written.

64 *See* C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

65 *See, e.g.*, Landes & Posner, *supra* note 5.

66 *See* C. BEARD, *supra* note 64, at 63, *cited in* Macey, *Competing Economic Views*, *supra* note 6, at 52 n.9.

67 Macey, *Competing Economic Views*, *supra* note 6, at 51.

68 *Id.* at 65 (discussing Beard's view of separation of powers).

69 *Id.* at 64.

70 *Id.* at 65.

Constitution is a "set of rules that reflect interest group pressures."[71]

Macey's criticisms of earlier public choice theories involve the importance of the separation of powers to the durability of interest group bargains struck through legislation. Earlier commentators argued that the separation of powers[72] increases the value of special interest legislation by making it more durable. The gain from certainty, it is argued, outweighs the increased cost of passing the legislation in the first place.[73] Macey's response to this line of argument is quite unconvincing. Macey points out that politicians need support over time (for example in the next election which may be two, four, or six years away), and that if they consistently repealed interest group legislation shortly after it was passed, interest groups would not provide the necessary support. Macey strengthens this point by noting that durability may not be important in many situations where interest groups receive a one shot subsidy.[74] From this, Macey concludes that separation of powers is not "essential" (as Landes and Posner claim) to the interest group theory of government, and therefore, I gather, the interest group theory of government does not explain separation of powers.

Macey's criticisms here are curious for several reasons. By pointing out that the interest group theory works fine without separation of powers, he appears at best to have won the battle by conceding the war. He has refuted the idea that separation of powers facilitates interest group activity by establishing that other aspects of the legislative process, most significantly the persistent and frequent need to stand for reelection, facilitate such activity without help from separation of powers. He is therefore apparently admitting that the legislative structure established by the Constitution, by providing adequate mechanisms to safeguard against easy repeal of interest group deals, facilitates, rather than retards, interest group activity. He might argue in response that the Framers did not intend it that way, but for this argument to be convincing he would have to delve into the Framers' expressed intent rather than intent revealed by the effects of the various Constitu-

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71 *Id.*

72 The specific features Macey mentions here are the executive veto and the independent judiciary. *See id.* at 66-68.

73 *Id.* at 67 & n.80 and citations therein.

74 I argue below that this point undercuts Macey's claim that statutory construction reforms are likely to affect significantly the amount of interest group activity. *See infra* notes 85-86 and accompanying text.

tional features. In fact, he is unwise to rely on effects since, as public choice theory reveals, interest group pressure is alive and well under a Constitution Macey claims was designed to combat such pressure.

His argument that separation of powers is not necessary to prevent legislators from reneging on interest group bargains by repealing legislation is similarly unconvincing. The fact that separation of powers might be cumulative of other mechanisms for enforcing interest group bargains does not prove anything about the role separation of powers plays regarding interest group bargains. In private contract, parties that deal together repeatedly often enter into binding agreements to add security both against short-term temptation to renege and against the dislocation that might occur if one partner decides to end the relationship without warning. Reputation plays an important role in parties' willingness to continue dealing with one another, but that fact does not establish what role contracts play in the relationship.

2. Macey's Positive Economic Theory

The other major point of disagreement Macey sees between his analysis on the one hand and the analyses of Beard and other public choice theorists on the other is on their predictions of the outcome of constitutional politics. Macey argues that the competing theorists believe that because constitutional politics was affected by the same impediments to organization as other politics, the powerful interest groups found it to their advantage to establish a constitution that facilitated interest group transfers through government. The competing theories would thus explain each feature of the constitutional structure by its contribution to interest group bargaining.[75] Macey, to the contrary, concludes that rational groups would want a constitution that hampered group activity because "most groups expect to be net losers from a pervasive system of special interest group activit[y]."[76] While Macey's point here is interesting, for several reasons, his analysis is not very persuasive.

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75 For example, Landes and Posner argue that the independent judiciary advances interest group activity by enforcing the bargains made through the legislature. *See* Landes & Posner, *supra* note 5; *see also* Crain & Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555 (1979), *as discussed in* Macey, *Competing Economic Views*, *supra* note 6, at 67-68.

76 Macey, *Competing Economic Views*, *supra* note 6, at 73.

A major difficulty for Macey's theory is explaining the apparent contradiction between the private-regarding tendencies of legislation and the public-regarding nature of the Constitution. Macey has a fairly elaborate argument for why the Constitution is public-regarding and therefore why other public choice theorists who argued that the Constitution establishes, rather than combats, interest group politics, were wrong. To Macey, the establishment of a constitution is a special moment in the history of a polity, not because people suddenly abandon private interest for public concern but because the private incentives that guide everyday action point toward establishing a public-regarding constitution.

One relatively minor error Macey commits is lumping Beard together with the other theorists. Macey and Beard actually agree that the Constitution was designed to make it difficult to pass redistributive legislation. As Macey writes, the independent judiciary "was seen by Beard as the primary bulwark of the capitalists against encroachment by subsequent legislatures bent on altering the structure of society. . . . Other aspects of the system of checks and balances, especially the bicameral legislature and the executive veto, also enforce the status quo in Beard's view."[77] They just disagree about the reasons the Framers made it so. While Macey thinks it was because all of society realized it would be better off if redistribution was difficult, Beard thought that the Framers were protecting their own interests from popular redistributive efforts. Since the Framers were from a relatively well-off segment of society, they might have been willing to give up potential gains from interest group transfers in order to safeguard their dominant position in society. They had more to lose from redistribution than others and acted out of an understandable risk aversion.

This error is compounded by Macey's ahistorical view of the drafting and ratification of the Constitution. In order for a body politic to adopt a public-regarding (rent-seeking inhibiting) constitution, Macey's theory requires that the likely "losers in future rent-seeking activity be included in the process of constitutional formation."[78] This is necessary because a public-regarding constitution will be adopted only when likely losers from such activity participate in constitutional formation and pay the likely winners to forego the right to engage in rent-seeking.[79] The losers are

77 *Id.* at 60 (citing C. BEARD, *supra* note 64, at 161-64) (footnotes omitted).

78 Macey, *Competing Economic Views*, *supra* note 6, at 76.

79 *See, e.g.*, *id.* at 74.

able and willing to pay because, according to Macey, the transaction costs of constitutional bargaining are smaller than the transaction costs that are likely to be incurred in future rent-seeking.[80]

Macey abandons the critical eye of the public choice theorist in his view of the framing of the Constitution. Under a public choice analysis, because the stakes are higher, more people and groups are likely to participate in constitutional politics than would participate in ordinary politics. This unexceptionable point tells us very little about how widespread such participation actually is. According to Macey, the United States' Constitution was formed with the requisite participation through the simple device of "requiring that the new Constitution 'be submitted to *the people themselves.*'"[81] (This is the only support Macey provides on this point.) Macey thus sees the framing of the Constitution as an example of ideal group politics, in which economic equilibrium was reached through effective participation of all social groups merely because the Constitution was formally submitted to the people through the device of constitutional ratification conventions.[82]

The actual level of participation in the framing of the Constitution belies Macey's conclusion that the potential losers in interest group politics participated in its framing. It takes more than the formal submission of the Constitution to the people, at ratification conventions, to establish that substantially all affected

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80 This point is implicit in Macey's analysis. If it were the other way around, then the parties would prefer rent-seeking to constitutional bargaining.

81 Macey, *Competing Economic Views*, *supra* note 6, at 79 (quoting THE FEDERALIST No. 40 (J. Madison)) (emphasis in original).

82 Macey sets out three criteria for the formation of a public regarding (anti-rent-seeking) constitution. They are: 1. "[R]elevant interest groups be aware of the costs and benefits of postconstitutional rent seeking so that they have an incentive to design a constitution that impedes such behavior." 2. "[I]nterest groups have the technical ability to prepare a constitution that minimizes the costs associated with the prisoner's dilemma that faces the citizenry of the postconstitutional world." [The prisoner's dilemma is that all interest groups will have an incentive to defect from the agreement that led to an anti-rent-seeking constitution.] 3. "[T]hose groups . . . who have a possibility of being net losers in the wealth transfer game be included in the process of Constitutional formation." *See* Macey, *Competing Economic Views*, *supra* note 6, at 76. These requirements make sense, because the knowledge, participation, and ability they entail appear to be necessary for rational economic behavior. Although the discussion in the text focuses on the weakness of the third criterion, Macey does not persuasively establish the first two either. On the first, although it is true that the framers were worried about factions, Macey has not shown that there was anything approaching the precision of understanding that would allow participants to make the sorts of calculation he uses as an example. *See id.* at 74. On the second, experience, as revealed by public choice theorists like Macey, has shown that the framers did not know how to inhibit rent-seeking, or that if they did know how they chose not to use such knowledge.

groups' interests were taken into account in the Constitution. Macey provides no specifics about the convention-ratification process that might persuasively establish that the conventions were not dominated by the same types of groups that find it easiest to organize in normal political life. Large segments of society were not allowed to participate at all, such as women and slaves,[83] and many important aspects of economic policy, especially before the commerce clause expansions of the twentieth century, were left to state governments that might also have restricted participation. It is inconsistent with Macey's general approach to politics for him to conclude so lightly that all interests were represented and taken into account in the framing of the Constitution.

The importance of the possibility that large segments of society were not represented at the framing cannot be underestimated. If important segments of society did not participate, then we have no way of knowing whether likely losers were able to pay the winners to forego constitutional structures that facilitate rent-seeking behavior. The groups that were present would have no reason to act as surrogates for absent groups because no group would have an incentive to pay more than it personally expected to lose from rent-seeking behavior. Therefore, unless Macey can establish that no significant interests likely to be adversely affected by rent-seeking politics were left out of the constitutional framing, he has not built a persuasive argument for his theory that the Constitution was designed to inhibit rent-seeking behavior.

Macey's emphasis on the importance of competing constitutional visions to constitutional politics is worth revisiting because it may be a light in the darkness of public choice. One of the reasons Macey is confident that the body politic was able to force the Framers to offer a public-regarding constitution is that there were competing constitutional structures available, and the Framers had to convince the people that theirs was best for the overall public

83 Women and slaves had important interests at stake in the Constitution. The very legitimacy of slavery was up for discussion, and if the slaves had been allowed to participate the results might have been different. As far as women were concerned, although most laws disabling them economically were state laws, their interests were somewhat adverse to those of the men that were allowed to participate in the framing. Macey's willingness to ignore the fact that large segments of society were disenfranchised at the framing of the Constitution, especially when his own theory requires that the likely "losers in future rent-seeking activities be included in the process of constitutional formation," casts serious doubt on the rigor of his economic analysis. *See* Macey, *Competing Economic Views*, *supra* note 6, at 79.

good. This type of situation, however, may have existed other times in the United States' history in addition to the framing of the Constitution. For example, the Civil War and the Great Depression produced massive legislative (and in the case of the Civil War, constitutional) changes in a political climate that may have similarly involved large scale popular participation and social unrest in which leaders were forced to act in the public interest or lose their positions of leadership. With cheap mass communication and hotly contested political issues, "constitutional moments," in which leaders must satisfy the popular will, may be less infrequent than might be imagined.

III. EFFICIENCY AND PUBLIC CHOICE IMPLICATIONS OF MACEY'S THEORY

In this Section, I assume that Macey is correct, that the Constitution should be read to discourage rent-seeking activity. I look at Macey's proposals for reform to realize the Framers' objectives and subject them to two sets of related criticisms. First, I discuss the conclusion that inefficient wealth transfers and spending on lobbying are likely to decrease if Macey's proposals are adopted, and that the resources saved are likely to be shifted to productive activity. Second, I discuss potential effects of the proposals that Macey apparently ignores. The basic thrust of these comments involves analyzing the incentives on lawmakers and judges if a substantial amount of interest group activity were eliminated. The question is whether we should be confident that lawmakers and judges are more likely to act in the public interest after they are freed from the effects of interest group pressure.

A. Reduction of Inefficient Transfers and Lobbying Expenditures

Despite doubts raised above, let us assume that a substantial proportion of legislation passed under current conditions results in inefficient wealth transfers to the politically powerful. Let us assume also that resources spent on lobbying are generally a social loss, because if lobbying were not an available tool to capture wealth, the resources *could* be spent on more productive pursuits. The question addressed in this subsection is whether Macey's primary proposal, the destabilization of interest group deals through statutory interpretation, is likely to move us in the right direction.

In addition, I will consider the abolition of administrative agencies.

Two primary reasons exist to doubt Macey's conclusions. First, Macey does not attempt to establish the magnitude of the shift that his proposals would create. He provides nothing about how much more expensive interest group activity would have to become (or how much less it would have to be worth) before resources would be shifted, and he does not address the actual effects his proposals would have. Second, Macey assumes, without really attempting to prove, that the best alternative to lobbying for interest groups is productive activity.[84]

Macey's interpretation proposal is unlikely to have a significant impact on the amount of interest group activity. When compared to other possible methods, such as campaign finance rules, legal restrictions on the use of corporate money, and limits on the duration of service for Members of Congress, this is a very indirect way to combat 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.[85] 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, the fact that Macey is proposing only that judges employ "traditional statutory interpretation" reveals the ultimate irony in Macey's theory—if judges have been doing all along what Macey proposes, agreeing with Macey should not change anything.

Even if Macey were proposing something new, the very real possibility that groups could adjust to the new interpretive regime raises the question of the location of the margin. There are two ways in which public interest interpretation could tend to make

84 *See* Macey, *Transaction Costs and Normative Elements*, *supra* note 6.

85 Macey recognizes that groups are likely to prefer "self-enforcing" interest group transfers to avoid "costly litigation." Macey, *Competing Economic Views*, *supra* note 6, at 69. *See also* Macey, *Glass-Steagall*, *supra* note 6, at 39 (if courts defer to administrative agencies, interest groups will attempt to avoid the necessity of persuading agencies by having statutes written to bypass the agencies).

interest group activity more expensive. First, it might cost more to avoid or adjust to the new method of construction.[86] Second, to the extent that uncertainty exists over whether avoidance efforts have succeeded, the interest group deal is worth less to the parties and thus a less worthy subject of investment of resources. But the existence of these tendencies tells us nothing about their magnitudes and nothing about how much movement would be necessary to accomplish anything worthwhile.

Resources will only shift away from lobbying 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. The contrary may also be true, but Macey makes no attempt to address this problem. Thus, the possibility exists that an interpretive reform could result in increased interest group investment in the same activity.

Another problem is that Macey has not established 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. We just do not know where resources diverted from interest group activity would be allocated.

Macey's more radical proposal, the elimination of administrative agencies, is fraught with even greater uncertainty, largely because he makes no realistic suggestion for replacement of the publicly interested programs that agencies carry out.[87] In general,

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86 For example, more attention might have to be paid to drafting. Further, it might be more difficult to achieve a nonconstruction sensitive subsidy, perhaps because the potential political fallout is greater or perhaps because such a subsidy might be more difficult to construct.

87 The proposal to eliminate administrative agencies may reveal an antiregulatory bias that casts doubt on the seriousness with which Macey puts forward the proposal that judges construe statutes in line with the public interest. He makes this suggestion without attempting to analyze the costs of deregulation. If collective action problems are so corrosive in the political realm, they might also prevent the market from realizing efficient outcomes. Regulation might be necessary to correct market failures, and in some cases administrative agencies might be the most desirable regulatory tool. Further, in so far as Macey expects states to pick up some of the regulatory slack, he needs to analyze whether states are more or less efficient regulators than federal agencies. The lack of serious analysis of these questions may mean that Macey lacks confidence in regulation generally, a position that is somewhat inconsistent with favoring liberal judicial interpretation of

this type of direct, structural reform should have a greater effect than the indirect statutory interpretation device.[88] Macey's only suggestion to replace the work of the agencies is to leave issues to the states.[89] Elementary economics teaches that state regulation over matters with interstate effects is not an adequate substitute for federal control.[90] Further, state governments might also fall victim to interest group pressure, and if such activity is still the best way to attain wealth, the costs may increase substantially if lobbying has to be reproduced in many state legislatures or agencies.[91]

The political pressure on federal legislators to find other means to attack the problems abandoned by the elimination of administrative agencies might redirect them to executive branch administration.[92] (Eliminating executive branch administration of government programs could not be accomplished without radical

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regulatory statutes in line with the public interest purposes attached in the legislature.

88 More realistically, as far as having an effect is concerned, he proposes a strict ban on delegation of legislative power to administrative agencies, on the ground that the agencies are more open to interest group influence than Congress, and perhaps also because delegation allows Congress to avoid difficult choices and thus perpetuates interest group politics when without delegation no legislation might have been passed. *See* Macey, *Transaction Costs and Normative Elements*, *supra* note 6, at 513. I find Macey's argument on this point very difficult to pin down, because I cannot tell whether he is arguing against delegation or against the very existence of the agencies. He also makes some confusing comments about the tendency of agencies to be subject to influence by interest groups. He states that interest group capture of agencies is "unusual" but he goes on to characterize the exercise of administrative discretion as a lottery in which the highest interest group bidder prevails. *Id.* Further, he characterizes the "very existence of such agencies [as] a glaring contradiction of the carefully constructed lawmaking procedures articulated in article I." *Id.* at 514. Obviously, his analysis is not sufficient to settle one of the more controversial issues in constitutional law, especially given Macey's glaring failure to distinguish independent from executive agencies.

89 *See id.* at 514 n.134.

90 *See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1984). States are indifferent between externalization of negative effects and elimination of the negative effects. If externalization costs less than elimination, other states will suffer.

91 In fact, Macey has recognized that federal allocation of authority to the states is driven by the same political forces that operate on the federal government generally. *See* Macey, *Federal Deference*, *supra* note 6. Therefore, under Macey's theory, "for [some] issues, Congress and administrative agencies will find that they can maximize political support by refraining from regulating—even when they know that regulators at the state level will step in and regulate in their stead." *Id.* at 267 (emphasis in original). He also argues that one of the conditions under which states are likely to regulate is where "interest groups have made an expropriable investment in a particular set of local regulations." *Id.* at 274-75. Thus, Macey knows that allocating regulatory responsibility to state governments does not contribute to solving the problems public choice reveals.

92 For example, victims of interstate pollution would still presumably elect Members of Congress who favor federal regulation.

constitutional change. Thus, I do not think Macey is proposing anything of this sort.) Interest group activity would continue at the congressional level. Even with substantially tightened antidelegation norms, executive branch administrative procedures would probably be similar to current agency procedure, especially those of current executive branch agencies, thereby replicating the problems Macey wants to eliminate.

Because it is painted with such a broad brush, it is difficult to take seriously the suggestion that the agencies be eliminated. One missing element is an attempt to construct a theory to distinguish agencies that are more susceptible to interest group pressure. This proposal also highlights the tension in Macey's attitude toward regulation. Macey's statutory interpretation proposal, by providing a constitutional justification for purpose-based construction of regulatory statutes, seems nicely proregulation, especially when compared to the attitudes revealed in the public choice inspired works of Richard Posner and Frank Easterbrook.[93] But Macey makes no effort to distinguish agencies that successfully administer important federal programs from agencies that are tools of inefficient wealth redistribution. Even under the most purely economic theory, at least some regulation is justifiable as preventing externalities and countering the effects of transaction costs.

Therefore, even if it were desirable to raise the costs of interest group activity, it is unclear whether Macey's suggestions would have that effect. Too many devices around the interpretive proposal exist, and the elimination of administrative agencies is too far-fetched and unrealistic. Perhaps Macey hopes that as interest groups become less important, the overall demand for regulation will decrease, because the unorganized will have no voice to express their concerns. That would be a curious position for an efficiency theorist to take, as it glorifies the blocking power of transaction costs.

B. Separation of Powers and the Incentives on Lawmakers

It is very difficult to imagine politics in the United States without a heavy dose of interest group influence. Let us assume, however, that interest group activity became much more expensive,

93 It fits into William Eskridge and Gary Peller's characterization of the New Public Law. *See* Eskridge & Peller, *supra* note 20.

and that, therefore, it lessened substantially. This is not an automatic solution to the problem of private-regarding legislation, because 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. Macey assumes that the result of removing opportunities to interest group pressure would be a shift from private-regarding to public interest legislation.[94] This assumption completely ignores questions about the incentives operating on legislators. Therefore, we need to investigate what interests would motivate lawmakers if they were largely freed from interest group pressure.[95]

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, interested elected officials might have to spend more time and money figuring out what voters want.

It is worthwhile to step back and think about legislative incentives in the context of separation of powers. My 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.[96] 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. If

94 With less pressure, the overall volume of legislation might also diminish. This would be a good thing to anyone who thinks that regulation is generally undesirable.

95 Professor Fred McChesney has argued that politicians may find the demise of interest group politics undesirable because politicians, by threatening regulation, are able to extract benefits from interest groups. *See* McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987). In a subsequent article, McChesney argues that groups might be better off not organizing, because legislators might find it easier to extract rents from an organized group since transactions costs are lower than with a large number of unorganized individuals. *See* McChesney, *Rent Extraction and Interest-Group Organization in a Cosean Model of Regulation*, 20 J. LEGAL STUD. 73 (1991). Perhaps if interest groups did not exist, legislators would create them.

96 *See* Cass, *supra* note 40, at 477.

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.[97] Separation of powers, understood this way, means assignments of power with uncertain boundaries—the uncertainty of the boundaries and the overlap between the branches create conditions of conflict over authority and, thus, over political power.[98]

The 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 generally unable to organize, public choice theorists should expect government officials to be freer to use government for *their own* purposes. While elected and appointed officials are certainly subject to substantial political pressure, as they grow more insulated from external pressure from interest groups, they might become more like federal judges:

> [I]t is difficult to predict the nature of the incentives to which judges are likely to respond. In light of the fact that Article III judges cannot affect their wealth by deciding cases in particular ways or by favoring certain groups, it seems plausible that some judges will decide cases so as to maximize their prestige with certain constituents, such as liberals, conservatives, or academics. Other judges will care little for prestige and simply maximize their leisure time. Still other judges will decide cases so as to impose their own values—their own personal vision of the good—upon society. Judges simply have no incentive to substitute the enforcement of a set of bargains between interest groups and legislators for their own set of preferences regarding the outcome of a case.[99]

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97 *See* THE FEDERALIST Nos. 37, 47, 48, 50, 51, 52 (J. Madison).

98 *See* Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 453, 495-99 (1989); Beermann, *Bad Judicial Activism and Liberal Federal Courts Doctrine: A Comment on Professor Redish and Professor Doernberg*, 40 CASE W. RES. L. REV. 1053, 1061-66 (1990).

99 Macey, *Competing Economic Views*, *supra* note 6, at 70.

Fighting among the branches might still suppress this tendency to some extent, but one important check on government abuse would be removed. 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.

Perhaps the idea is that with interest group pressure removed, legislators would be more responsive to the wishes of their constituents.[100] This might be good in terms of democracy, but it would not solve the tendency of legislation to reflect narrow, private interests. Each member of the House of Representatives represents about 1/435 of the population, and the member's ability to get reelected will turn on the ability to please that small group. That group's incentive is to maximize gain to itself and externalize the cost on everyone else. Senators and the President have less ability to do this because they represent larger percentages of the population and thus their own supporters are more likely to feel the negative effects of legislation along with the benefits to themselves.[101] Legislators' ability to bring federal money home (pork-barrel legislation) and help constituents deal with government may be very important to reelection prospects.[102] These activities will not necessarily coincide with the public interest.

One theory is that freed from interest group constraint, legislators will pursue their own ideological agendas.[103] Macey argues that politicians that act in this fashion will not survive, although he acknowledges that studies dispute this point.[104] The studies purport to show that the best predictor of the votes of Members of Congress is their ideologies. These studies control for the eco-

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100 This argument assumes that the impediments to interest group organizing would not also increase the costs of participation to individuals. The removal of interest group pressure would probably have one positive effect; the cost of participation would decline somewhat because the probability of success for individuals would increase due to the lack of competition from interest groups. However, the magnitude of this effect is quite uncertain.

101 *See* M. OLSON, RISE AND DECLINE, *supra* note 7, at 47-53 (discusses encompassing groups).

102 *See* M. FIORINA, *supra* note 1. Fiorina chronicles the changes in the operation of Congress that have facilitated a significant growth in constituent services. Incumbent Members of Congress are thus able to use taxpayer money to further their reelection prospects, a blatant use of government power for their own, rather than the public's benefit.

103 *See* Kalt & Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J. L. & ECON. 103 (1990).

104 *See* Macey, *Competing Economic Views*, *supra* note 6, at 63 n.56.

nomic interests of constituents and other factors that might call their conclusions into doubt.[105] These studies and other factors led Fiorina to conclude that constituent services are incredibly important, perhaps more important than any vote a legislator makes.[106]

The elimination of administrative agencies is also unlikely to lessen the divergence between the public interest and the interests of legislators and their constituents. Unless it meant that government was less likely to regulate at all, concentrating all administrative power within hierarchies headed by the President could shift the balance of power to the executive branch, and loosen political constraints on the President and other executive officials. This could result in abuse of power within the executive branch in favor of the private interests of executive officials. The question here would be whether executive officials would be more or less constrained than independent agencies. Within government, I suspect that in some cases, independent agencies are subject to more congressional control, because independent agencies have no independent political legitimacy and depend on Congress for budgeting and jurisdiction.[107] The President might be subject to greater outside constraint because the President needs support from more people than any other elected official and is therefore less able to externalize costs of unwise government action.

The major intragovernmental restraint on abuse of power is, according to Macey, the independent judiciary.[108] His theory stands in sharp contrast to that of Landes and Posner, who posit that, since an independent judiciary is not subject to pressure to revise the terms of previously reached accommodations, it is an ideal enforcement mechanism for interest group deals.[109] Macey

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105 *See* Kalt & Zupan, *supra* note 103, at 116-24.

106 *See* M. FIORINA, *supra* note 1, at 39-47.

107 The dynamic of congressional control over agency action is extremely complicated. Congress' control is obviously not complete, but it might be greater than any control Congress might have over executive branch action, because the President's political power is then involved. If presidential input is freer from Congress' influence, then the President's (or another executive official's) private interest might dominate.

Because a detailed examination of the degree of influence Congress has over various agencies and executive branch departments is beyond the scope of this Article, I am completely ignoring differences in congressional influence (and interest group influence) among executive branch departments and independent agencies. These differences may be significant. *See* Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 68 B.U.L. REV. 1 (1986).

108 *See* Macey, *Promoting Public Regarding*, *supra* note 6; *see also* Macey, *Competing Economic Views*, *supra* note 6.

109 *See* Landes & Posner, *supra* note 5, *as discussed in* Macey, *Competing Economic Views*,

argues that politicians' need for continued support for reelection purposes and for maintaining a reputation for reliability means that an independent judiciary is not necessary to ensure the durability of interest group deals.[110] As noted, this argument is unpersuasive as a proof that judges do not further interest group politics, because the fact that judicial enforcement might be cumulative of other enforcement methods does not mean that judges do not behave in the way Landes and Posner assert. Macey further argues, much more persuasively in my opinion, that Landes and Posner do not "explain why . . . judges have any rational *incentive* to act as the enforcers of the contract between special interest groups and legislators."[111] It is inconsistent with public choice theory to assert that officials are likely to behave in certain ways without identifying incentives for them to do so.

That very failure is what leaves so many questions in Macey's approach to combating interest group influence in the political system. I have already discussed the lack of attention to the incentives on legislators freed from interest group politics. Even more glaring is the failure to address seriously the incentives facing judges.[112] Something must motivate judges to decide cases one way rather than another. One reason little is written about judicial behavior from a public choice perspective is that it is very difficult to get a handle on the influences operating on judges.[113] While acknowledging uncertainty over the influences judges feel,[114] Macey mentions a few factors that might motivate judges: the desire for prestige, the desire to increase their influence, the desire to be promoted to a higher court, the desire to maximize

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supra note 6, at 66-71.

110 Macey, *Competing Economic Views*, *supra* note 6, at 68-69.

111 *Id.* at 69.

112 *See supra* note 99 and accompanying text.

113 For an excellent treatment of judicial behavior from a phenomonological point of view, see Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1988). The article is a first person account of the mental processes of judging a case in which the judge's initial assessment of the case is that the law is contrary to how the judge would like the case to come out. In the course of his discussion, Kennedy suggests several influences on the judge's behavior, including the desire to further one's general political outlook, worry about how others will view the decision, how the decision fits in with the judge's self-image, the judge's desire to maximize legal reform possibilities, the judge's sense of justice, the judge's sense of obligation to the public, the possibility of sanctions from the community, and the desire to minimize the work required to do the job. *See id.* at 520, 521, 526-27.

114 He has made this point several times. *E.g.*, Macey, *Promoting Public Regarding*, *supra* note 6, at 260-61; Macey, *Competing Economic Views*, *supra* note 6, at 70.

leisure time, and the desire to impose their own values on society.[115] (Presumably Macey believes that these influences will lead judges to make decisions that coincide with the public interest. Landes and Posner, on the other hand, believe that judges will attempt to uphold legislatively intended interest group deals because of judicial custom and professionalism.[116]) Macey states further that judges are worried about chastisement from colleagues and academics.[117] Macey believes that congressional control over wages (in the form of pay increases) and working conditions (in the form of appropriations) does not significantly affect judicial behavior because appropriations and raises are done *en masse* rather than one judge at a time.[118] In such a situation, judges each have an incentive to maximize their personal utility, because they will bear only a small percentage of the cost of any punishment at the hands of Congress.[119]

Public opinion and the ideology of the judge may be important explanatory factors. For example, one study indicated that on civil liberties cases, the preconfirmation views of a nominee to the United States Supreme Court were highly correlated to the votes the nominee cast after confirmation.[120] Another showed that sentences for marijuana related crimes correlated with public opinion.[121] Extensive literature also exists on the relationship between

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115 Macey, *Competing Economic Views*, *supra* note 6, at 70; Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 63, 94 (1989).

116 *See* Landes & Posner, *supra* note 5.

117 Macey, *Competing Economic Views*, *supra* note 6. The incompleteness of Macey's views on judicial behavior is further illustrated by the comment that judges will not defer to the intent behind old enactments because there is "nothing to gain by preserving" what a bygone Congress wanted. Macey, *Transactions Costs and Normative Elements*, *supra* note 6, at 497. There are many examples in which courts at least purport to be following the intent of a past Congress, sometimes a distantly past Congress. *See* Beermann, *supra* note 58, at 66-73 (describing cases in which the intent of the 1871 Congress is identified by the Supreme Court as the touchstone of the construction of 42 U.S.C. § 1983 (1988)). Legislative intent is a powerful legitimating factor in our legal system, and it is used as such, even when the court has no idea what the legislative intent really is.

118 *See* Macey, *Transactions Costs and Normative Elements*, *supra* note 6, at 498.

119 At the Supreme Court level, the effect of punishment to each Justice is much higher because there are so few Justices. Thus, Congress might potentially have greater influence at the highest level.

120 *See* Segal & Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). The study covered all members of the Court from Earl Warren through Anthony Kennedy, and relied on preconfirmation newspaper accounts of the Justice's views. Another study showed that the sentences U.S. district judges gave to Vietnam-era draft resistors varied directly with the casualty rate in Vietnam. *See* Kritzer, *Political Correlator of the Behavior of Federal District Judges: A Best Case Analysis*, 40 J. POL. 25 (1978).

121 *See* Kuklinski & Stanga, *Political Participation and Government Responsiveness: The*

social background and judicial decisions.[122] Finally, there is even evidence that the behavior of interest groups might have some influence on the United States Supreme Court.[123]

It is not difficult to see how 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. A social system is at work here, and most judges would suffer if they were left out.

Ironically, the great believers in incentives spend 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 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.

Applying the public choice model to judicial decision making appears to be very difficult. As Macey acknowledges, it seems that the less judges are constrained by outside forces, the more likely they are to use their positions for their own ends.[124] Just what those ends are may vary from judge to judge, but Macey cannot persuasively rely on judicial construction and other judicial reforms without demonstrating that the incentives on judges are likely to coincide with the public interest.[125]

Behavior of California Superior Courts, 73 AM. POL. SCI. REV. 1090 (1979).

122 *See* Grossman, *Social Backgrounds and Judicial Decisions: Notes For a Theory*, 29 J. POL. 534 (1967).

123 One study indicates that the Court is more likely to grant certiorari when interest groups participate as amicus curiae. *See* Caldeira & Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988).

124 *See supra* note 113 and accompanying text. If we assume that judges have some obligation to "the law" or to Congress, then judges who decide based on their own views would be shirking. *See* Kalt & Zupan, *supra* note 103 at 105.

125 *See* Caldeira, *The Incentives of Trial Judges and the Administration of Justice*, 3 JUST. SYS. J. 163 (1977). Caldeira describes different types of judges and the ways they derive

C. *Macey's (Lack of a) Political Vision*

As I noted at the outset, there is much in Macey's vision of good government that I find instinctively appealing. The interest group inhibiting role Macey envisions for judges and other features of the political structure are quite attractive because they appeal to the desire to raise politics to a higher level than naked economic preference and "channel those interests towards the public good."[126] But while Macey does an excellent job of illustrating the features of government that perform the negative function of restraining interest groups, he presents no positive image of government. That is, he does not contrast his negative analysis with discussion of the appropriate influences on government or the appropriate circumstances for government action.

Macey's decidedly negative view of human nature may account, at least in part, for his failure to discuss the positive aspects of government. Macey goes beyond the economist's *assumption* of self-interest as the motivating factor for government action and claims that the assumption is accurate as an empirical matter.[127] Macey may be so pessimistic about the prospects for postconstitutional public-regarding political action that he cannot even talk about it. Thus, because the republican tradition does not share his distrust of the state, he implies that a society living under a theory of civic virtue would be unable to resist a government's desire to carry out genocide against a minority.[128] No wonder Macey allows for no positive government role—he is too afraid of it.

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satisfaction.

126 *See* Macey, *The Missing Element*, *supra* note 6, at 1683. Macey has this interest in common with theorists trying to revive the notion of civic virtue as the organizing principle of legal and political theory. *Id.*

127 *See id.* at 1673. Macey argues that the Framers of the Constitution shared his view of human nature. *Id.* Unquestionably, Macey's argument here is correct insofar as it is true that the Framers described one of their goals as restraining the tendency of people to look after their own interests in politics. *See* THE FEDERALIST NO. 10 (J. Madison). On the other hand, the Framers repeatedly referred to the need to balance this against government effectiveness. *See, e.g.*, THE FEDERALIST NO. 37 (J. Madison) ("Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form.") Macey seems to have lost the second part of this balance.

128 *See* Macey, *The Missing Element*, *supra* note 6, at 1675 (quoting favorably an explanation of Italian aid to Italian Jews that relies on a distrust of government and lack of civic virtue in Lytterton, *La Forza del Destino*, N.Y. REV. BOOKS, Mar. 31, 1988, at 3.8).

It is thus ironic that Macey considers himself a "pluralist."[129] I had always thought a "pluralist" to be someone who believes that the path to democracy in a large, complex society is through groups.[130] Macey is in reality an antipluralist, hoping to defeat the ability of interest groups to affect politics at every turn. But he leaves nothing in place of group influence. Because most people face great impediments to political participation and incumbents can garner advantages for themselves through government, rather than the interests of groups, government officials might be free, under Macey's ideas, to relentlessly pursue their own interests. This would be to our collective detriment.

D. Structural Reform Alternatives

In light of my doubts that the interpretation-focused reforms Macey proposes are likely to have much of an effect, and the dangers I find inherent in lessening the ability of interest groups to exercise pressure on legislators, the next question is whether anything can or should be done to combat the tendency for legislation to be directed to benefiting narrow interests. I want to focus in this subsection on two sets of possible reforms: those aimed at enhancing the openness of the interest group process and those aimed at lessening the ability of interest groups to have influence.

In general, reforms that increase the ability of all groups to participate in the political process are preferable to ones that impede interest activity for two reasons. First, as discussed above, leaving legislators with no interest groups to answer to raises questions concerning what constraints are left on purely self-regarding behavior by legislators. Second, in line with pluralist thought, more political activity is preferable to less. Therefore, reforms designed to increase the ability of people to participate in politics are preferable as well.

The discussion that follows should be approached with one reservation. I have made no effort to identify the actual groups whose activities might be stimulated by the specific reforms discussed. Therefore, any conclusions regarding the nature or degree of the changes that might come about if the specific reforms were adopted would be somewhat speculative. It should be understood

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129 *See* Macey, *The Missing Element*, *supra* note 6, at 1682.

130 *See supra* notes 9-22 and accompanying text.

that my purpose here is limited to suggesting possibilities rather than advocating particular changes.

As discussed above, one of the biggest problems with the political process is that some interest groups may have disproportionate influence simply because they are able to overcome collective action problems. If the ability to overcome collective action problems is unrelated to the general social support for these interest groups' agendas, the political process will appear defective. One way to combat this might be to facilitate the organization of interests that might not be able to organize otherwise. These groups could then counteract the strength of preexisting groups.

Government subsidies or tax deductions for interest groups might help more interests become viable players in politics.[131] Government could use its control over the radio and television airwaves to allow groups without substantial finances time to express their opinions and solicit members, and require that small party candidates be allowed to participate in broadcast presidential debates.[132] Government funding could establish advisory boards or institutes composed of many different viewpoints and could establish a process under which the views of these groups could be brought before Congress and the public.

Making voting easier would also be a positive step. Voter registration at the polls, and holding elections over the weekend rather than on a workday might increase participation. Public financing of the campaigns of candidates or parties with relatively low levels of support might also increase the interest of people who are not satisfied with the positions of the two major political parties.

Macey would probably argue that opening the political system to more interest group activity would only compound the twin problems of wasteful lobbying expenditures and diversion of resources away from more productive alternatives. Here it is important to consider whether money spent on politics is truly wasteful.

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131 Businesses can already deduct expenses related to lobbying for legislation and contributions to interest groups as business expenses, so long as the interest group does not use the money for a political campaign or for convincing the public of a position. *See* 16 U.S.C. § 162(e) (1988). Individuals, on the other hand, are not allowed to deduct contributions to groups engaged in lobbying, because charitable organizations lose their tax-exempt status if they engage in political activity. *See* I.R.C. §§ 170(c), 501(c)(3) (1991).

132 For a discussion of legal and policy aspects of what the author terms "speech equalization," see Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1484-90 (1987).

True, at the end of a day of lobbying or other group activity no interest group has produced a product to sell on the market. However, the expressive and associational activities may be valuable in and of themselves to people, and efforts to curb such activities might be seen as repressive in a free society. I prefer to encourage more activity, just as many believe that the best antidote to bad speech is more speech and not censorship.

The second type of reform, efforts to close the political system to improper influences, should also be pursued, but only if they do not threaten the general vitality of the political process. The legislative process could be reformed to make it less amenable to narrow interest group pressure. For example, analysts have long pointed to the committee system as in need of reform.[133] Rotating committee membership, and multiple committee jurisdiction over the same subject matter might mitigate the ability of committee members to disproportionately influence matters within committee jurisdiction.[134]

Strict regulation of business relationships between Members of Congress and regulated parties,[135] requirements that policy discussions be placed on the public record[136] and limits on direct campaign financing by interest groups might enhance the openness of the political process. Recently, limitations on the terms of Congress have been discussed—such limitations would reduce the value of incumbency and lessen the incentive for incumbents to amass large campaign funds, thereby making money less influential in the election process.[137] In addition, the entire system of cam-

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133 *See* Shepsle & Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987). *But see* Krehbiel, *supra* note 22, at 149 (suggesting that research does not support the hypothesis that committee members are unrepresentative of views held in the legislative body at large).

134 *See* M. FIORINA, *supra* note 1, at 121-24 (overlapping committee jurisdiction forces more matters to the floors of Congress where they receive a more open hearing).

135 For example, limitations on outside income help prevent schemes to get around restrictions on campaign finance and bribery. *See* McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451 (1990) (discussing limits on honoraria, gifts, and outside income for Members of Congress).

136 This would be a fairly significant change from current practice, which does not restrict the ability of Members of Congress to hold confidential discussions on matters of policy with potential regulated parties. In administrative law, some off the record discussions between regulators and interested parties must be placed on the administrative record. *See* Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); Administrative Procedure Act § 557(d), 5 U.S.C. § 557(d) (1988).

137 *See* Payne, *Limiting Government by Limiting Congressional Terms*, PUBLIC INTEREST, Spring 1991, at 106; *see also* Mitchell, *Limiting Congressional Terms: A Return to Fundamental*

paign finance seems ripe for review. Legitimate questions exist concerning the desirability of millions of dollars of public action committee money playing an important role in elections.

In line with Macey's view of the importance of the independent judiciary to restraining legislative excesses, some judicially enforceable limitations on the substance of legislation might be in order. For example, many state constitutions contain bans on special legislation.[138] These clauses potentially prohibit legislation narrowly framed to benefit special interests. Buchanan and Tullock suggest a requirement that the costs of legislation benefitting a narrow class be borne by the benefitted class.[139] While reforms along these lines might require constitutional amendment, or at least substantial reinterpretation of existing constitutional provisions, they are worth considering.[140]

IV. CONCLUSION

Public choice theory has much to offer as a way to understand the political system. Potentially, it could help to design legal reforms that would maximize democracy and minimize the opportunity for government officials to use government for their own private purposes. Public choice would accomplish something important if it could help the legal system redirect the political system toward acting more in the public interest.

Jonathan Macey's focus on the public interest is refreshing and provides a counterpoint to earlier public choice influenced

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Democracy, 7 J. L. & POL. 733 (1991).

138 *See, e.g.*, ILL. CONST. art. IV, § 13. Special legislation clauses are the flip side of equal protection clauses—rather than prohibiting arbitrary discrimination, they prohibit arbitrary granting of benefits. *See* Illinois Polygraph Soc'y v. Pellicano, 83 Ill. 2d 130, 137-38, 414 N.E.2d 458, 462 (1980) ("Special legislation confers a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated. It arbitrarily, and without a sound, reasonable basis, discriminates *in favor* of a select group.") (citations omitted).

139 *See* J. BUCHANAN & G. TULLOCK, *supra* note 13, at 293. They acknowledge that this would not work with much social welfare legislation where the point is to redistribute wealth to relatively poor individuals or communities, but this idea has worked, for example, at the municipal level, where neighboring landowners often pay extra taxes for street and sidewalk improvements.

140 Buchanan and Tullock thought, in 1962, that interest groups might consent to constitutional changes designed to make their activity more difficult because the costs of bad legislation were being felt so widely that everyone might realize that they would be better off without interest group legislation. *See id.* at 290. This is similar to the understanding that Macey argues motivated the framers to adopt such provisions at the time of the framing. There is no indication that this has come to pass.

legal theories that would have made judges into agents of interest group politics. Macey's theory, however, does not succeed, because his suggestions for statutory interpretation lack bite and because he does not apply the assumption of self-interest to the behavior of unconstrained legislators and judges.

In light of all the uncertainty concerning the magnitudes of the effects involved, and the lack of a discussion of when government action is desirable, Macey's willingness to suggest that administrative agencies be abolished points up a disturbing aspect of public choice theory. Seemingly, public choice theorists are so convinced of interest group domination that nothing government does could possibly be in the public interest.[141] There is very little in Macey's work that shows any confidence in Congress' ability to do anything right. A persuasive theory of political behavior will have to explain the good as well as the bad.

Economic analysis such as Macey's is very good at revealing logical tendencies under the assumption of self-interest. In other words, his analysis helps predict in which direction a reform might lead us. On the other hand, it tells us very little about the magnitude of those effects, and it tells us nothing about the desirability of those effects from perspectives other than the purely economic. The only way to learn about these issues is through empirical and philosophical investigations.

Burning political and philosophical issues remain at large concerning the proper judicial role and the degree to which legislators should be free from interest group pressure under our constitutional structure. The economist's fantasy is to resolve these questions through calculations and formulae. It is a different project to choose from among plausible theories, a project that must transcend cold economic calculations.

The seeds of a richer theory lie in Macey's description of the conditions that led to the framing of a public-regarding constitution. As the United States becomes a more inclusive society, and as it faces more and more serious social and economic problems, the incentives to abandon interest group absolutism in favor of publicly oriented compromise may recreate moments like the framing of the Constitution. This, coupled with the growth of interest groups representing greater numbers of previously voiceless

141 *See* Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).

interests, might democratize the process much more than statutory construction ever could.