Jurisprudence of Public Choice

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I. Introduction

"Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all the people?" A University of Michigan research institute has been asking Americans that question for over two decades.1 In 1964, less than a third of the respondents adopted the "interest group" theory of politics by answering that government was operated by and for "a few big interests."2 By 1982, however, over sixty percent had adopted that theory.3

Not surprisingly, the work of some legal scholars has begun to reflect this increasingly negative view of government.4 These scholars have been influenced not only by the public mood, but also by a substantial body of social science literature concerning legislative conduct.5 This

2. Id.
3. Id.; see also Sorauf, Caught in a Political Thicket: The Supreme Court and Campaign Finance, 3 CONST. COMMENTARY 97, 114 (1986) (using the University of Michigan Research Institute results to show a loss of confidence in politics and the government).
5. See infra subparts III(A)-(B); see also Tushnet, Conservative Constitutional Theory, 59 TUL.

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"public choice" literature is indeed rich and suggestive. Nevertheless, a simplistic reading of that literature threatens to distort public law.

Much of public law is premised on the assumption of legislative competence to resolve social conflict. In constitutional law, for example, courts generally defer to the legislature's judgment, except when a claim is made that some specific constitutional value is threatened. Growing concern about the influence of special interests in the legislature may translate into less judicial deference, and hence stricter scrutiny of all legislation. Yet, despite the forceful arguments of some leading scholars, we do not believe that more stringent judicial review of legislation is an effective or appropriate method of eliminating special interest statutes. Nor do we believe that a comprehensive reading of the social science literature supports the deep distrust of legislatures implicit in much of this legal scholarship.

Although much of the discussion in this Article focuses on special interest groups, the ultimate issue is more fundamental. It is simply whether legislatures can claim to formulate public policy legitimately. Some of the public choice literature suggests that legislatures speak only for well-organized groups, and not for the general public. Other literature suggests that legislators passively reflect the public's interests and are incapable of playing any active role in formulating public policy; rather than pursuing their own views of the public interest, legislators are merely passive gauges of public opinion. Still other studies suggest that legislatures simply are incapable of coherent behavior; indeed some formal models suggest that legislatures are wholly chaotic and unpredictable. Each of these views has influenced some important legal scholarship.

Our goal is not simply to provide a survey of the voluminous literature relating to legislatures and interest groups. Rather, in considering


6. For an explanation of public choice theory, see infra text accompanying notes 33-37.
8. See, e.g., B. Siegan, Economic Liberties and the Constitution (1980) (arguing that the Court should evaluate economic regulations more carefully); Epstein, supra note 4, at 715-16 (arguing that checks and balances between branches of the government are intended to control legislative abuses, including excessive influence of special interest groups); Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 68-85 (1985) (arguing for stricter enforcement of the equal protection, due process, contract, and eminent domain clauses so as to revive Madisonian Republicanism).
9. See infra subpart IV(A).
10. See infra notes 59-62 and accompanying text.
11. See infra notes 90-97 and accompanying text.
12. See infra notes 170-85 and accompanying text.
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each area of the literature, we find a common pattern. In each area, early works presented bold theories of the political process based on highly simplified but, partly for that reason, powerful models. Later work in each area casts doubt on the usefulness of those models. The legal literature, however, has not always advanced beyond the early models.

The later research not only reveals the inadequacy of the early literature as a basis for public law theory, but also has implications of its own for public law. Because of the reductionism of the early research, its public law implications were too simplistic. Even the more sophisticated recent literature, however, suggests that the flaws in the legislative process are sufficiently serious to warrant cautious judicial intervention.

Part II of this Article sketches the impact of public choice literature on contemporary thought about public law. Part III considers the research by some political scientists who are not public choice theorists, but whose studies of the legislative process lead to similar conclusions. The Article then turns to the economic theory of legislation and to an analysis of formal theories of social choice. Part IV considers the legal implications of the current social science literature concerning legislatures.

II. Conceptions of Legislation in Public Law Theory

Public law theory cannot be divorced from a conception of the representative process. The constitutional structure of separation of powers can be traced to the Madisonian effort to mediate the problem of faction—the influence of interest groups in the political process. In the modern world as well, contrasting visions of the representative process, as seen in pluralist, deliberative, and public choice theories, animate significantly different versions of public law.

Under the view of the political process that often is called "pluralism," legislative outcomes simply reflect the equilibrium of private political power. Although mechanical and disheartening, the view that "[t]he balance of . . . group pressure is the existing state of society" is not new. Public law theorists who accept the empirical accuracy of this conception have two options. They may embrace normatively what they assume happens empirically. Alternatively, they may accept the pluralist con-

13. See Sunstein, supra note 8, at 68-87. Sunstein acknowledges that his reading of Madison differs from that of some other scholars. See id. at 30 n.4.
15. Under this approach, because "[b]oth the variety and the intensity of preferences would be

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ception empirically but not normatively, and advocate an activist judicial strategy to protect those who lose in the political power struggle. To either group of theorists, remanding an issue to the legislature for reconsideration or otherwise attempting to promote legislative deliberation is futile because the mechanistic process of legislation eliminates the possibility of a thoughtful legislative response.

Opposing the pluralists are the proponents of the deliberative view of the political process who believe legislators can operate somewhat autonomously. Advocates of this alternative view face a different menu of theoretical possibilities. Some may find the idea of the “public interest” itself either incoherent or an excuse for tyrannical imposition on dissenters. For them, the proper judicial response includes techniques undercutting legislators’ independence in order to prevent the enactment of “public interest” legislation. Others may embrace the “public interest” as a laudable goal and urge judicial restructuring of the representation process to foster legislative insulation from powerful private interests. To these theorists, legislative deliberation properly may result in the rejection or reformation of “bad” private preferences.

The contemporary Supreme Court has fully embraced neither rigid pluralism nor the deliberative alternative. The Court's various constitutional strategies—sometimes creating rights immune from legislative interference, at other times protecting politically powerless minorities factored into the political pressures imposed on representatives,” the evidence that representatives “respond rather mechanically to those pressures” suggests merely that the hidden hand promotes aggregate social welfare in political as well as in economic markets. Sunstein, supra note 8, at 33-34.

16. They may urge courts to create constitutional rights protecting individuals from certain legislative intrusions and to eliminate barriers preventing politically powerless groups from bargaining effectively in the legislative arena. See id.


18. See Sunstein, supra note 8, at 32-33. Cases overturning legislative efforts to curb the influence of money in political campaigns are one arguable example of judicial undermining of legislators’ autonomy; these cases might make representatives more beholden to economically dominant interests. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating the campaign contribution limits of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441a (1982)). See generally E. DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION (1983) (discussing the inordinate influence of moneyed interests on Congress, which results in public suspicion of Congressmen's motives); G. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS (1980) (same); MONEY AND POLITICS IN THE UNITED STATES (M. Malbin ed. 1984) (same). For further discussion of the Supreme Court's invalidation of legislation designed to curb the influence of special interest groups, see infra text accompanying notes 226-38.

19. See Sunstein, supra note 8, at 49-56 (discussing this theory).


from disadvantageous statutes, occasionally attempting to promote more careful deliberation about public policy, and frequently deferring to the legislature’s judgment—reflect an appreciation of the richness and complexity of public policy formation. One need not agree with the results of all recent Supreme Court decisions to respect the mixture of pluralistic realism and deliberative idealism they reveal. Many decisions reflect a respectful yet practical understanding of the legislative process. The Court realizes, for example, that a representative cannot be expected to understand every bill on which he votes, that the remarks of a sponsor often are useful in construing legislation despite the sponsor’s obvious bias, and that legislation is often the product of compromise. These cases are compatible with decisions invalidating statutes because of demonstrable legislative irrationality or prejudice, and with decisions refusing to adhere to a legislator’s interpretation when that interpretation deviates substantially from the language of the legislation. The


23. See, e.g., Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976) (holding that either Congress or the President, but not the Civil Service Commission, could decide to exclude aliens from the federal civil service). For a discussion of the case, see infra note 245.


The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. When some other independent right is not at stake, and when there is no “reason to infer antipathy,” it is presumed that “even improvident decisions will eventually be rectified by the democratic process.”

442 U.S. 256, 272 (1979) (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

25. See United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (asserting that if each legislator had to be aware of the effects of a bill before voting, few laws would survive judicial review).

26. See Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 n.17 (1976) (“[W]e do not believe that the fact that Senator Milliken represented a State that might have benefited from an expansive reading of the statute ‘blurs [the] probative value . . . of the explanation.’”).

27. See Thornburg v. Gingles, 106 S. Ct. 2752, 2763 n.7 (1986) (refusing to discount a Senate Report merely because the report “represents a compromise among conflicting ‘factions’”); Board of Governors v. Dimension Fin. Corp., 106 S. Ct. 681, 689 (1986) (“Invocation of the ‘plain purpose’ of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of Congressional ‘intent.’”).


29. See, e.g., City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3260 (1985) (invalidating a city ordinance motivated by fear and prejudice against the mentally retarded).

30. See, e.g., Regan v. Wald, 468 U.S. 222, 236-37 (1984) (refusing to accept one congressman’s interpretation of a statutory term when the interpretation conflicted with the broad definition contained in the statutory language). For an interesting example in a lower court, see Monterey Coal Co. v. Federal Mine Safety & Health Review Comm’n, 743 F.2d 589, 597-98 (7th Cir. 1984) (rejecting Congressman Perkins’ view that “walkaround pay rights” had a meaning narrower than that
Supreme Court’s mediating path between the drastic alternatives of rigid pluralism and legislative autonomy indicates at least some appreciation for the problem of faction while maintaining a degree of respect toward Congress and the state legislatures.

Many public choice scholars, however, argue that the Court should abandon this eclecticism in favor of a rigid pluralism. “Public choice [is] the economic study of nonmarket decisionmaking, or simply the application of economics to political science.” The contribution of public choice theory derives from the insights deduced from abstract modelling premised on a few simplified assumptions. Its subject matter is the same as that of political science, the theory of the state, voting rules, voter behavior, party politics, the bureaucracy, and so on. The methodology of public choice is that of economics, however. The basic behavioral postulate of public choice, as for economics, is that man is an egoistic, rational, utility maximizer.

Public choice models often treat the legislative process as a microeconomic system in which “actual political choices are determined by the efforts of individuals and groups to further their own interests”; these efforts have been labeled “rent-seeking.” Thus, “[t]he basic assumption is that taxes, subsidies, regulations, and other political instruments are used to raise the welfare of more influential pressure groups.” Although this assumption is obviously simplistic, its very simplicity facilitates the construction of powerful formal models. The similarity between these abstract economic models and the pluralist conception of the political process is obvious; in both, interest groups predominate.

Although public choice and traditional political science share the conveyed by the plain language of the Federal Mine Safety and Health Amendments of 1977, 30 U.S.C. § 813(f) (1982)).

31. But cf. Easterbrook, supra note 4, at 46-51 (arguing that the Court has increasingly adopted a pluralist perspective).

32. The Court's choices between these approaches in particular cases seems ad hoc. A sufficient body of these cases probably now exists to make inductive theory-building feasible, and thus to distill some governing principles from the cases. We have not attempted such a synthesis in this Article.


34. Id.


36. Rent-seeking refers to the attempt to obtain economic rents (i.e., payments for the use of an economic asset in excess of the market price) through government intervention in the market. A classic example of rent-seeking is a corporation's attempt to obtain monopolies granted by government. Such monopolies allow firms to raise prices above competitive levels. The increased income is economic rent from government regulation.

Macey, supra note 4, at 224 n.6.

same subject, their methodologies differ substantially. Political scientists generally have been reluctant to use formal models. Traditionally "[p]icking and choosing from the conceptual stores of sociology and psychology, political scientists have organized their research around concepts such as role, norm, [and] integration."38 Thus, a traditional political scientist assumes that "[t]he environment in which [voters and politicians] interact . . . possess[es] an institutional richness far beyond that implicit in these abstract models. To many political scientists the public choice models seem but a naive caricature of political behavior."39

Yet the strength of public choice—its ability to build a theoretical superstructure—has been the traditional failing of political science. Political science has created "good descriptive information about how certain legislatures work, [but only] a very limited set of theoretical propositions that can help to explain these workings."40 Thus, public choice scholarship's combination of theoretical power and empirical vulnerability contrasts with the empirical strength but theoretical deficiencies of traditional political science.41

Public choice theory has influenced several leading legal scholars. The economic theory of legislation recounted by William Landes and Richard Posner is firmly grounded in that tradition:

In the economists' version of the interest-group theory of government, legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation. The price that the winning group bids is determined both by the value of legislative protection to the group's members and the group's ability to overcome the free-rider problems that plague coalitions. Payments take the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes. In short, legislation is "sold" by the legislature and "bought" by the beneficiaries of the

39. D. MUELLER, supra note 33, at 5.
40. Ferejohn & Fiorina, supra note 38, at 407. For a discussion of the political science literature regarding interest groups, see infra subpart III(A).
41. True believers in each camp have been quick to point out the other's flaws: public choice theorists who complain of "the ad hoc empiricism and casual theorizing of conventional political science," Brennan & Buchanan, Voter Choice, 28 AM. BEHAV. SCIENTIST 185, 200 (1984), can be counterposed with political scientists who urge the avoidance of "economic-reductionist" theories that lose touch with empirical data and institutional constraints on behavior, Eulau & McCluggage, Standing Committees in Legislatures, in HANDBOOK OF LEGISLATIVE RESEARCH 395, 406 (1985). For a largely critical review of the public choice literature concerning legislatures, see Panning, Formal Models of Legislative Processes, in HANDBOOK OF LEGISLATIVE RESEARCH, supra, at 669. See also infra subpart III(C) (applying social-choice theory to the behavior of legislators). For a scholarly attempt to bridge the gap between the two schools, see Sinclair, Purposive Behavior in the U.S. Congress: A Review Essay, 8 LEGIS. STUD. Q. 117 (1983).
A careful reading of Posner's writings, both those published prior to the publication of his article with Landes and those published since his elevation to the bench, suggests considerable restraint in his attitude toward public choice theory. Other scholars, however, have been less cautious in their embrace of the public choice literature. A prime example is Posner's former academic and present judicial colleague, Frank Easterbrook.

Judge Easterbrook has proposed a theory of statutory construction reminiscent of the hoary maxim that statutes in derogation of the common law should be strictly construed. He suggests that "unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process." In addition to being "faithful to the nature of compromise in private interest legislation," the theory "recognizes that courts cannot reconstruct an original meaning because there is none to find." Easterbrook contends that "[b]ecause legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.

Thus, Easterbrook rejects contemporary theories of statutory construction under which a court ordinarily attributes an intelligible or-

42. Landes & Posner, The Independent Judiciary in an Interest Group Perspective, 18 J.L. & ECON. 875, 877 (1975). In describing this article, an economist has commented:

From this behavioral premise [Landes and Posner] go on to argue that an independent judiciary increases the value of the legislation being sold today, by making it somewhat immune from short-run political pressures that might try to thwart or overturn the intent of this legislation in the future. And this is apparently what the founding fathers had in mind when they established an independent judiciary in the Constitution. In the Landes-Posner theory the First Amendment emerges "as a form of protective legislation extracted by an interest group consisting of publishers, journalists, pamphleteers, and others who derive pecuniary and non-pecuniary income from publication and advocacy of various sorts." By such fruit has the dismal science earned its reputation.

D. MUELLER, supra note 33, at 154 (citation omitted) (quoting Landes & Posner, supra, at 893).

43. See, e.g., Posner, Theories of Economic Regulation, 5 BELL J. ECON. & MGMT. SCI. 355, 356 (1974) (evaluating the relative merits of "the traditional public interest theory of regulation and the newer economic theory," and concluding that not only did neither approach have any demonstrated empirical support, but neither had "been refined to the point where it can generate hypotheses sufficiently precise to be verified empirically").

44. For instance, Posner suggests a cautious approach to statutory construction in which a court first should attempt to discern and implement the legislative compromise, and should creatively interpret the statute to reach a reasonable result only if the compromise is not discernible. See R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-93 (1985).


46. Id. at 547.

47. Id.
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organizing purpose to a statute,\(^48\) in favor of an approach whose most notable supporter was William Blackstone.\(^49\) Easterbrook premises his approach in no small part on "the discoveries of public choice theory," which, he notes, reveal the difficulties of aggregating preferences in the legislature, with its majority voting scheme, sequential consideration of proposals, and opportunities for agenda control and logrolling.\(^50\) These factors

are so integral to the legislative process that judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses . . . . Moreover, because control of the agenda and logrolling are accepted parts of the legislative process, a court has no justification for deciding cases as it thinks the legislature would in their absence. It might as well try to decide how the legislature would have acted were there no threat of veto or no need to cater to constituents.\(^51\)

Thus, for Easterbrook, legislatures are incapable of articulating policies, because public choice theory demonstrates that legislatures cannot act

\(^48\) See, e.g., Commissioner v. Engle, 464 U.S. 206, 217 (1984) (stating that courts should adopt the statutory interpretation most harmonious with the statutory scheme); H. Hart & A. Sacks, THE LEGAL PROCESS 1410-17 (tent. ed. 1958) (discussing interpretive techniques based on the context and purpose of the statute); R. Posner, supra note 44, at 286-93 (stating that judges should decide disputes as they believe the legislature would decide them, based on the context of the statute); Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 214-16 (1983) (concluding that the Court currently looks for broad legislative purposes more than it did in the past).

\(^49\) One of Easterbrook's themes is that legislatures are economically inefficient; they sanction private-interest, rent-seeking deals that may be contrary to good public policy. See Easterbrook, supra note 4, at 15. In Easterbrook's view, "the liberal principles underlying our political order" and the understanding of the constitutional framers support the proposition that social relations should be governed largely by "private agreements, customs, and understandings" rather than by legislation. See Easterbrook, supra note 45, at 549. Through strict construction, ordinarily "[t]he statute would become irrelevant, the parties (and court) remitted to whatever other sources of law might be applicable." Id. at 544. One obvious such source of law is the common law, which encapsulates the "customs" and "understandings" to which Easterbrook made reference.

Easterbrook's conclusions are strikingly similar to the common-law formalism of Blackstone. Blackstone saw legislatures as raw, willful, and unprincipled political creatures, and the common law as the embodiment of pure reason. For Blackstone, strictly construing a statute in derogation of the common law was a useful method to preserve as much reason in public policy as possible and to protect individuals from unprincipled and unpredictable interference. See 1 W. Blackstone, Commentaries *63, *68-70, *85-88, *91-92. Although we do not suggest that Easterbrook believes that the common law consists of pure reason, he otherwise seems to agree with the Blackstone formulation.

We leave to others the question how this approach can be reconciled with Easterbrook's later idea that judges sometimes should enforce legislation to further the interest group deals underlying it. See Easterbrook, supra note 4, at 54-58. This theory of statutory construction, thoroughly critiqued by some, see W. Eskridge, Dynamic Statutory Interpretation 40-48 (1987) (unpublished manuscript); Macey, supra note 4, at 233-40, also obviously is based on public choice theory.

\(^50\) See Easterbrook, supra note 45, at 547-48.

\(^51\) Id. at 548; cf. Easterbrook, Ways of Criticizing the Court, 95 HARV. L. REV. 802, 813-32 (1982) (applying public choice theory to judicial decision making in an effort to explain why the Supreme Court often contradicts itself).
purposely.52

Even legal scholars who do not embrace public choice theory nonetheless may be subject to its influence. In an interesting recent article, Cass Sunstein proposed an enhanced judicial role in promoting legislative deliberation insulated from powerful factions.53 One crucial issue, as Sunstein recognized, is whether such legislative deliberation is possible. He stated that although “[t]he state of political and economic theory on legislative behavior] remains surprisingly crude[,] . . . [f]ew would contend that nationally selected representatives have been able to exercise the [deliberative] role.”54 Sunstein further acknowledged the problems of legislative deliberation by admitting the existence of “mounting evidence that the pluralist understanding captures a significant component of the legislative process and that, at the descriptive level, it is far superior to its competitors.”55

Sunstein cited a few political science studies of legislative motivations as the “mounting evidence” that led to his pessimism about the feasibility of getting the legislature to deliberate in the public interest.56 He also alluded to “the economic literature” that attempted “to explain legislative behavior solely by reference to constituent pressures.”57 That


54. Sunstein, supra note 8, at 48.

55. Id.


57. Id. at 49 n.80 (citing Peltzman, Constituent Interest and Congressional Voting, 27 J.L. & ECON. 181 (1984); Peltzman, Toward a More General Theory of Regulation, 19 J.L. & ECON. 211
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literature has pessimistic implications not only for the deliberative qualities of legislatures, but also for the likelihood that voters themselves will be influenced by anything but economic self-interest.\textsuperscript{58}

The next Part of this Article will evaluate the political science literature on the legislative process, the economic theory of legislation, and formal public choice theory. Although Sunstein's forebodings are fully consistent with some of the primary scholarship in each area, the prospects for democracy are not so dim as some theorists would have us believe. Although it is true that legislators are influenced by special interests, and that legislatures are faced with the possibility of incoherence, legislatures need not be mere pawns of special interests, nor are they doomed to chaos.

III. Interest Groups, Ideology, and Legislatures

A variety of scholars have studied the legislative process. Although they may share both a common subject and views regarding interest groups and legislators’ motivations, they use radically different methodologies. Generally, the political scientists favor case studies and inductive generalizations, the economists use traditional microeconomic theory and econometrics, and formal public choice theorists begin with Arrow’s Impossibility Theorem. As a result, the bodies of literature have developed largely independently. Consequently, despite some overlap, this Article considers separately each of these attempts to unravel the legislative process.

A. Interest Groups in Political Science

Despite the apparent importance of interest groups in the political process, their influence has not been the subject of sustained study by political scientists. Instead, attention to special interests has fluctuated rather dramatically in the political science literature.

In 1935, a classic case study by E.E. Schattschneider concluded that interest groups pursuing their own narrow economic objectives profoundly shaped the Smoot-Hawley Tariff of 1930.\textsuperscript{59} By the early 1950s, a

(1976); Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971)). Sunstein remarked that "[t]hese interpretations have been attacked as too reductionist." Sunstein, supra note 8, at 48. Thus, he partially anticipated this Article's argument in infra subpart III(B).

For a related criticism of interest-group theory, see Stewart, Regulation in a Liberal State: The Role of Non-Commodity Values, 92 Yale L.J. 1537, 1548-49 (1983) (arguing that interest-group theory “has great plausibility” but is nevertheless a “gross oversimplification”).

\textsuperscript{58} For a discussion of the economic literature, see infra subpart III(B).

\textsuperscript{59} E. Schattschneider, Politics, Pressures and the Tariff (1935). The notion that legislatures are not self-contained policymaking entities, but rather part of a larger political system in
pluralistic interpretation of politics had emerged, in which legislative outcomes were said simply to mirror the equilibrium of competing group pressures:

[the legislature referees the group struggle, ratifies the victories of the successful coalitions, and records the terms of the surrenders, compromises, and conquests in the form of statutes. Every statute tends to represent compromise because the process of accommodating conflicts of group interest is one of deliberation and consent. The legislative vote on any issue tends to represent the composition of strength, i.e., the balance of power, among contending groups at the time of voting. What may be called public policy is the equilibrium reached in this struggle at any given moment, and it represents a balance which the contending factions of groups constantly strive to weight in their favor.]

Robert Dahl’s famous study of New Haven politics provided important empirical and normative support for this model.

Other political scientists, however, soon challenged the pluralist belief in the political centrality of interest groups. A survey of Washington lobbyists conducted in the late 1950s concluded that interest groups did not dominate the federal political process. A detailed examination of tariff legislation between 1953 and 1962 echoed this finding by describ-
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ing lobbying groups as usually underfinanced, poorly organized, overworked, and often counterbalanced by each other’s efforts. Indeed, the authors concluded that the lobbyist functioned more as a “service bureau” for legislators than as an “agent of direct persuasion.”

These conclusions about the relative unimportance of interest groups became “something approaching a new conventional wisdom” in political science, and empirical research on interest groups declined in that discipline until recently. Some theoretical advances, however, were made by Theodore Lowi, James Q. Wilson, and Michael


66. Id. at 353. Theodore Lowi explained that these conclusions about the impotence of interest groups in influencing tariff legislation of the 1950s could not be compared fairly to Schattschneider’s finding that groups dominated the passage of the 1930 tariff, see supra note 59 and accompanying text, because both studies were time-bound and of modest value for developing generalized group theory. Lowi, AMERICAN BUSINESS, PUBLIC POLICY, CASE-STUDIES, AND POLITICAL THEORY, 16 WORLD POL. 677, 681 (1964). For a brief overview of Lowi’s analysis of the studies, see M. HAYES, LOBBYISTS & LEGISLATORS: A THEORY OF POLITICAL MARKETS 8-10 (1981).

Lowi’s conclusions do not suggest, however, that the Schattschneider study and the Bauer, Pool, and Dexter study are not helpful. Consider the views of two political scientists concerning studies of legislative standing committees:

The single most ineluctable impression left by this survey of studies on legislative standing committees is their substantive perishability. Secular changes, environmental changes, institutional changes, and changes in research fashions tend to make even the best of committee studies obsolete. But obsolescence does not mean uselessness. In the first place, even though they are time- and context-bound, many studies will remain of great evidentiary value to future chroniclers of institutional development. And, in the second place, much can be learned from both their theoretical or methodological failures, as well as successes.

Eulau & McCutlgare, Standing Committees in Legislatures, in HANDBOOK OF LEGISLATIVE RESEARCH, supra note 41, at 460, 461.

67. M. HAYES, supra note 66, at 2; see also id. at 10-17 (discussing the onset and the reason for the new conventional wisdom).


One useful study of interest-group politics in this era is N. ORNSTEIN & S. ELDER, INTEREST GROUPS, LOBBYING AND POLICYMAKING (1978).

69. Lowi, supra note 66. Lowi identified three arenas of power: “distributive,” “regulative,” and “redistributive.” Id. at 689. In the first, epitomized by pork-barrel politics, groups need not conflict because there need be no losers among them—decisions can be made, in the short run, without regard for limited resources. Groups lobbying in this arena presumably would cooperate mutually through logrolling and expect little opposing pressure. In contrast, in the second arena, that of regulation, the adoption of general rules deters the ad hoc accommodations common in the distributive arena, and the concentration of costs on regulated entities causes conflictive politics. When regulation is at issue, groups can be expected to form temporary lobbying alliances of convenience—for example, consumer groups and conservative groups both might favor the deregulation of certain industries. In redistributive politics, Lowi’s third political arena, the lobbying alliances would tend to be stable rather than shifting, and conflict is highly visible and ideological. For critiques of this scheme and other related ones, see M. HAYES, supra note 66, at 21-25; K. SCHLOZMAN & J. TIERNEY, supra note 61, at 282-83.

Hayes, 71 suggesting that interest group activity should differ depending upon the distribution of the costs and benefits of proposed legislation. 72 This work was grounded in the "[c]ommon sense [notion] that groups might well be pivotal to certain kinds of issues and largely peripheral to others." 73 Notwithstanding these insights, one scholar, writing in 1983, complained that interest group studies were "badly in need of empirical research and conceptual development." 74

The rather discouragingly weak political science literature recently received a major boost. In early 1986, Kay Lehman Schlozman and John T. Tierney published the first systematic study of interest group politics in twenty years. 75 A short summary cannot do justice to the rich information and analysis they provide. For present purposes, it is sufficient to note those principal findings most pertinent to public law theory.

Schlozman and Tierney concluded that, despite the recent growth in broadly based groups such as Common Cause, representation through interest group politics is skewed dramatically to upper class and upper

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71. M. HAYES, supra note 66.
72. In briefly providing a highly simplified overview of the analyses of Wilson and Hayes, we borrow from K. SCHLOZMAN & J. TIERNEY, supra note 61, at 83-85.
73. M. HAYES, supra note 66, at 3. Although Hayes' constructs are sophisticated and insightful, he recognized that they "cannot do justice to the full complexity of the legislative process," id. at 159, and are potentially impossible to test empirically, id. at 161.
74. Sinclair, supra note 41, at 126. The publication of Sinclair's complaint coincided with the appearance of two important books on interest groups: INTEREST GROUP POLITICS (A. Cigler & B. Loomis eds. 1983) and A. MCFARLAND, COMMON CAUSE (1984).
75. K. SCHLOZMAN & J. TIERNEY, supra note 61. In addition to examining information collected by others, Schlozman and Tierney interviewed 175 Washington representatives of interest groups and categorized about 7,000 organizations apparently involved in politics and the nearly 3,000 political action committees registered with the Federal Election Commission. Id. at xii-xiii.

Public law theorists who are tempted to accept simple generalizations about interest group politics should consider closely why Schlozman and Tierney attempted such a broadly gauged study:

By undertaking a systematic inquiry across the entire pressure scene we are able to pose questions that would be, quite simply, impossible to answer were we to concentrate on a smaller portion of the whole. The realm of organized interest politics is so vast—encompassing so many different kinds of organizations and so many different avenues of influence—that it is possible to locate an example to illustrate virtually any reasonable generalization one might put forward. Only by taking a more global view can we get a sense of the relative frequencies within this world of astonishing political diversity.

Id. at xiii.
middle class interests.\textsuperscript{76} Moreover, Schlozman and Tierney found little current support for the conclusions of Bauer, Pool, and Dexter about the supposed organizational and political weaknesses of interest groups.\textsuperscript{77} Today, many groups have substantial resources and engage in sophisticated political strategies, including active involvement in electoral politics.\textsuperscript{78} In addition, contrary to another finding of Bauer, Pool, and Dexter, groups are not always active on both sides of an issue.\textsuperscript{79} Moreover, earlier studies underestimated group influence because they focused too broadly on whether Congress enacted statutes the group favored or opposed, and devoted too little attention to whether the group was able to influence the details of legislation.\textsuperscript{80}

Schlozman and Tierney, however, rejected the simple-minded view that groups control congressional outcomes. Instead, they suggested that group influence is likely to be strongest when the group is attempting to block rather than obtain legislation;\textsuperscript{81} when the group's goals are narrow and involve low-visibility issues;\textsuperscript{82} when the group has substantial support from other groups and public officials, who are themselves important figures and not merely referees of the group struggle;\textsuperscript{83} and when the group is able to move the issue to a favorable forum such as a sympathetic congressional committee.\textsuperscript{84} They concluded that, "[d]epending on the configuration of a large number of factors—among them the nature of the issue, the nature of the demand, the structure of political competition, and the distribution of resources—the effects of organized pressure on Congress can range from insignificant to determinative."\textsuperscript{85}

Although Schlozman and Tierney confirmed the frequently central role of interest groups, they also demonstrated that the legislative process is too complex to be amenable to simple predictive modeling. To be sure,

\textsuperscript{76} Id. at 66-87, 107-19.
\textsuperscript{77} See supra note 65 and accompanying text.
\textsuperscript{78} K. Schlozman & J. Tierney, supra note 61, at 8, 88-119, 231-60, 310-17, 391-98.
\textsuperscript{79} Id. at 312-13 (summarizing findings).
\textsuperscript{80} Id. at 8, 163-64, 311, 392, 394-95.
\textsuperscript{81} Id. at 314-15, 395-96, 398.
\textsuperscript{82} Id. at 314-15, 396, 398.
\textsuperscript{83} Id. at 315-16, 396-97, 398.
\textsuperscript{84} Id. at 160, 397, 398.
\textsuperscript{85} Id. at 317. In addition to demonstrating the empirical invalidity of reductionist theories of interest group influence in Congress, Schlozman and Tierney debunked generalized theories that administrative agencies are inevitably captured by the interests they regulate. See id. at 276-78, 339-46; see also Hamm, Legislative Committees, Executive Agencies, and Interest Groups, in Handbook of Legislative Research, supra note 41 (overview of political science studies of the relationships among interest groups, legislative committees, and agencies); Schuck, The Politics of Regulation (Book Review), 90 Yale L.J. 702, 703-16 (1980) (asserting that interest group pressure is not the only factor in the outcome of regulation and that the effectiveness of such pressure varies dramatically).
"[t]he activities of organized interests build into the American political system a minoritarian counterweight to some of its more majoritarian tendencies," and "the minorities thus benefited—while not unanimous in their interests—are disproportionally but not uniformly affluent ones." Yet the less advantaged, Schlozman and Tierney concluded, "are nonetheless heeded in the making of policy." They are somewhat active in group politics and sometimes benefit from the activities of narrower groups. In addition, "electoral and social movements are more hospitable to their interests" and "those in government sometimes take up the cudgel on their behalf." This last point is worth considering at greater length:

The orthodox group theorists erred in ignoring the independent leadership and influence exercised by public officials. Contrary to what the group theorists would have us believe, the government is not some kind of anemometer measuring the force of the prevailing organized interest breezes. At various times and under various circumstances, various governmental institutions and actors have adopted the causes of the less advantaged and broad publics.

The reasons public officials sometimes oppose powerful groups is a different question. Another body of literature, connected with but distinct from the interest group studies discussed above, has addressed legislative behavior. In "one of the most influential essays in recent years," David Mayhew assumed that federal representatives "are interested in getting reelected—indeed, in their role here as abstractions, interested in nothing else." Mayhew acknowledged that "[a]ny such assumption necessarily does some violence to the facts," and that "a complete explanation (if one were possible) of a [representative's] or anyone else's behavior would require attention to more than just one goal." Mayhew nevertheless forcefully argued that the actions of federal legislators profitably could be understood by use of the "simple abstract assumption" that representatives are "single minded seekers of reelection."

As Mayhew noted, this assumption about legislators' motives is not
necessarily inconsistent with democratic norms.95 Responsiveness to broad constituencies is an important aspect of representation, and also, as Schlozman and Tierney indicated,96 helps ameliorate the influence of special interests. Legislators' obsessiveness about reelection does, of course, also have negative consequences. For example, legislators may devote their time to promoting pork-barrel legislation for their districts and engaging in personal contact with and casework for constituents, rather than addressing difficult policy issues.97

Because Mayhew's purposive behavioral model is based on economic methodology, much of the next subpart, which discusses the economic theory of legislation, is applicable to his study. In particular, the demonstrated importance of legislators' ideology98 impairs Mayhew's model. Moreover, empirical studies by political scientists suggest, not surprisingly, that Mayhew's assumption is too simplistic.99

Surely closer to reality is Richard Fenno's suggestion that the behavior of members of Congress is dictated by three basic goals: achieving reelection, gaining influence within the House, and making good public policy.100 In Fenno's view, "[a]ll congressmen probably hold all three goals," but each representative has "his own mix of priorities and intensities—a mix which may, of course, change over time."101 These goals are interconnected: a legislator's primary goal may be obtaining policy-mak-
ing influence, rather than reelection for its own sake, although the for-
mer, of course, requires the latter. This analysis fits well one federal
representative's response when Fenno remarked that "[s]ometimes it
must be hard to connect what you do here [in your district] with what
you do in Washington." The reply was: "I do what I do here so I can
do what I want to do there." Sorting out these conflicting motives is
difficult because many actions serve all three goals simultaneously.

Ultimately, contemporary political science research concerning in-
terest groups and legislator behavior suggests a complex political world
ill-fitting any simple formula. To be sure, the national political process
appears vulnerable on a variety of fronts, including domination by nar-
row economic interests and reelection posturing by representatives.
The political process that emerges from this literature is hardly so free
from suspicion as to suggest abandonment of the judiciary's "sober sec-
ond thought" about legislative outcomes. As is also demonstrated by
economic studies of legislation, there is indeed ground for serious con-
cern about the flaws in the legislative process.

B. The Economic Theory of Legislation

Economists, like political scientists, have held varying views of the
political process. Until about twenty years ago, economists somewhat
naively assumed that politicians were interested solely in furthering the
public interest. Later, like some "pluralist" political scientists, econo-
mists then embraced the belief that legislation is generally a product of
special interest groups. This economic theory, which is most closely

102. See Dodd, Congress and the Quest for Power, in CONGRESS RECONSIDERED 269, 270-71
(1st ed. 1977); see also A. MAASS, CONGRESS AND THE COMMON GOOD 70-71 (1983) (seeing reelec-
tion as a constraint to the achievement of other goals).
104. Id.
105. See J. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 42 (1984). In this
thoughtful work, Professor Kingdon suggests a "garbage can" model of legislative decision making
that is far less reductionist—and far less useful for predictive purposes—than that of Mayhew or of
the 1950s pluralists. Kingdon asserts that elected officials are frequently more important than inter-
group, and that public policy is made in a fluid and unpredictable process in which fortuity plays
a large role. Id. at 215-18. For an outline of the Kingdon thesis, see W. ESKRIDGE & P. FRICKEY,
106. The fragmentation of the congressional process is another impediment to integrated and
coordinated policymaking. See J. KINGDON, supra note 105; R. RIPLEY, CONGRESS: PROCESS AND
POLICY 87-154 (1st ed. 1973) (generally describing the policymaking roles of committees, party lead-
ership, and congressional staffs). We have not dwelt upon such structural factors in presenting an
overview of interest-group influence. We note, however, that this fragmentation further complicates
the prospects for any overall theory of legislation.
108. For an excellent, balanced review of the literature, see Posner, supra note 43. Michael
Hayes states:
associated with George Stigler\textsuperscript{109} and other members of the Chicago school,\textsuperscript{110} has increasingly influenced legal scholars.\textsuperscript{111} In this section, we will sketch the major arguments underlying the economic approach to legislation,\textsuperscript{112} consider the plausibility of the assumptions made by economists, and review the extensive empirical tests of the theory.

The core of the economic models is a revised view of legislative behavior.\textsuperscript{113} In place of their prior assumption that legislators voted to promote their view of the public interest, economists now postulate that legislators must maximize their likelihood of reelection.\textsuperscript{115} A legislator who is not reelected loses all the other possible benefits flowing from office.\textsuperscript{116}

The issue, then, is what legislators must do to win reelection. Economic models can be classified into two groups, depending on their answer to this question.

Models in the first group assume that legislators attempt to maximize their appeal to their constituents.\textsuperscript{117} These constituents, in turn,
vote according to their own economic self-interest.\textsuperscript{118} Thus, these models suggest that legislative votes should be highly predictable on the basis of the economic interests of constituents.\textsuperscript{119}

Models in the second group emphasize the role of special interest groups. To the extent that voters lack perfect information about a legislator's conduct, his financial backing, publicity, and endorsements become more important. These forms of support, as well as other possible benefits,\textsuperscript{120} are provided by organized interest groups, which thereby acquire the ability to affect legislative action.

The economic theory of interest groups can be traced to Mancur Olson's theory of collective action.\textsuperscript{121} Olson pointed out that political action generally confers benefits on large groups. For example, although every American presumably benefits from improved national security, a single individual's actions in support of national security normally has only an infinitesimal effect. Hence, a rational individual will try to "free ride" on the efforts of others, contributing nothing to the national defense while benefiting from other people's actions.

The "free rider" problem suggests that it should be nearly impossible to organize large groups of individuals to seek broadly dispersed public goods. Instead, political activity should be dominated by small groups of individuals seeking to benefit themselves, usually at the public expense.\textsuperscript{122} The easiest groups to organize presumably would consist of a few individuals or firms seeking government benefits that are financed by the general public. Thus, if Olson is correct, politics should be dominated by "rent-seeking" special interest groups.\textsuperscript{123}

\textsuperscript{118} Some empirical evidence suggests that legislators also are influenced by the ideology of their constituents. See Kau, Kennan & Rubin, A General Equilibrium Model of Congressional Voting, 97 Q.J. ECON. 271 (1982) (indicating that the impetus behind the passage of laws with substantial economic implications might come from ideology).


\textsuperscript{120} Such other benefits might include consulting and speaking fees, advantageous business relations, and free campaign workers.

\textsuperscript{121} See M. OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965). Olson attempts to explain the ability of groups to overcome free riding on the basis of their ability to provide direct, nonpolitical services to members. See id. at 132-34. But see infra note 125 (detailing criticisms of, and qualifications to, the Olson thesis).

\textsuperscript{122} See, e.g., Macey, supra note 4, at 231-32 ("The laws that are enacted will tend to benefit whichever small, cohesive special interest groups lobby most effectively."). As Becker points out, most groups involved in politics may suffer from free rider problems. What is important is the relative rather than the absolute degree of free riding, because this determines the relative power of the group. See Becker, supra note 35, at 380.

\textsuperscript{123} See supra notes 35-37 and accompanying text (describing "rent seeking").
The two kinds of economic models of legislation have in common their rejection of ideology as a significant factor in the political process.\textsuperscript{124} They assume that ideology, defined simply as individual beliefs about the public interest, influences neither voters nor legislators. Thus, the heart of the economic approach is the assumption that self-interest is the exclusive causal agent in politics.\textsuperscript{125}

These models identify some important political realities. Clearly, legislators with more affluent constituents often vote differently from those with blue-collar or unemployed constituents, and those from agricultural districts often vote differently from those from manufacturing centers. These differences are consistent with the assumption that legislators represent their constituents' economic interests. Moreover, as the political science literature indicates, special interest groups play a major role in the legislative process.\textsuperscript{126} Thus, the economic models appear to have a certain amount of explanatory power concerning the legislative process.

Some crucial features of the political world, however, do not conform with the economic models.\textsuperscript{127} Most notably, the models do not account for popular voting. Elections provide a classic example of the incentives to free ride. Given the number of voters, the chance that an individual vote will change the outcome is virtually nonexistent.\textsuperscript{128} Being

\textsuperscript{124} Olson conceded that "[t]here is to be sure always some ideologically oriented behavior in any society, and among even the most stable and well-adjusted groups." M. Olson, supra note 121, at 162. He suggests, however, that in the United States this behavior is relatively minor. \textit{Id.}

\textsuperscript{125} This position has been challenged by some economists. For example, Douglass North contends:

\begin{quote}
The private gains to farmers [in a protest movement] from following Mary Lease's directive of raising "less corn and more hell" were negligible. But they did just that because of a deep-seated conviction that the system was unjust. . . . It may be irrational for farmers to ignore the free rider problem in organizing to transfer the gains of lower transportation costs to themselves, but they did so because of fundamental convictions about the injustice of the distribution of income.
\end{quote}


\textsuperscript{126} As Stigler points out, such unquantified empirical evidence should not be ignored for that reason: "[t]ruth was born before modern statistics." G. STIGLER, supra note 109, at 52.

\textsuperscript{127} The chance that a single vote will decide an election decreases rapidly with the number of voters. The exact formula depends on the particular statistical assumptions. Roughly speaking, if a
cause voting is costly in terms of time and inconvenience, no economically rational person would vote, yet millions of people do.129 A theory that cannot even account for people going to the polls,130 let alone explain how they vote once they are there,131 can hardly claim to provide a complete theory of politics.132

Besides failing to explain the behavior of voters, the models also fail to explain the postulated control of voters and interest groups over legislators. In these models, legislators act as agents for other actors. A well-developed theory of agency within the main body of economics strongly suggests that agents achieving perfect compliance with the preferences of
district contains 500,000 voters, the likelihood of such a close election is somewhere between 1/700 and 1/500,000. Using the greater probability, we would expect in any given district to have one such House election every 1400 years; such an election occurs once every million years if we use the other figure. Even then, the identity of only one House member has been changed, which can be expected to have only a tenuous impact on public policy.

129. As Margolis points out, not only do most people vote, but “generally the propensity to vote increases with education,” and “the voters more likely to be aware of the argument that voting is not rational are in fact particularly likely to vote.” H. MARGOLIS, SELFISHNESS, ALTRUISM, AND RATIONALITY: A THEORY OF SOCIAL CHOICE 17 (1982); see Foster, The Performance of Rational Voter Models in Recent Presidential Elections, 78 AM. POL. SCI. REV. 678, 680 (1984) (giving formulas for calculating this probability).

Attempts have been made to reconcile voter behavior with the economic model by postulating a “taste” for voting. This explanation is tautological—anything people do can be “justified” by saying they have a taste for doing it. In response to criticism by Posner, see Posner, supra note 43, at 344, Stigler has taken precisely this tautological position, see G. STIGLER, supra note 109, at 137-38. Of course, an economist does not have to explain why people like ice cream to properly analyze that industry. But the “taste for voting” does not seem to satisfy any consumption desire. Unlike most recreational activities, voting is not motivated by the physical actions involved. Otherwise, amusement arcades could make money by charging a quarter to step into a booth and pull a lever. Even in the electoral setting, few people would vote in an election if they knew in advance that their ballots would not be counted. Rather, the motivation seems to require that the vote be counted in the final result, which means that the action is not purely expressive or recreational, but is in some sense goal oriented. This kind of instrumental behavior, however, has a Kantian element that is difficult to reconcile with the traditional economic concept of rationality. For an extended discussion of the meaning of rationality in this context, see H. MARGOLIS, supra, at 17-25, 36-46.

130. Apart from the common-sense objections to the “rational voter” model, more rigorous empirical studies fail to support it. For example, the model predicts that voter turn out should be strongly related to the closeness of the election because, in close elections, the voter’s “taste” for voting is reinforced by the increased likelihood of affecting the result. The data, however, reveal a rather weak relationship between turnover and closeness. See Foster, supra note 129, at 688. Furthermore, the electoral margin starts to affect turnout when elections are not terribly close and the chance of an individual voter affecting the result is still almost zero. Considerable dispute also exists about whether voters are motivated by self-interest. See infra note 162.

131. No reason exists to believe that the economically irrational forces that propel people to the voting booth cease to operate once they are inside. See Kalt & Zupan, Capture and Ideology in the Economic Theory of Politics, 74 AM. ECON. REV. 279, 282 (1984). Leading public-choice theorists now concede that public choice has nothing to say either about why people vote at all or for what they vote. See Brennan & Buchanan, supra note 41, at 200.

132. Recall the critical assumption concerning legislators’ conduct: they attempt to maximize their likelihood of reelection. See supra text accompanying notes 113-16. This assumption implies that within the theory itself, voter behavior plays a critical role. Yet the economic theory not only fails to explain voter behavior, it gives counterfactual predictions as well. At the least, the economic model seems to be radically incomplete. See J. Mashaw, supra note 52, at 44-51.
their principals is almost impossible. On the basis of general economic theory, then, it seems likely that legislators sometimes will act on the basis of their own preferences, rather than those of the voters or interest groups.

The economic models clearly overlook important aspects of the political process. Nevertheless, a theory that makes unrealistic assumptions also may prove highly useful in making predictions. Even a physicist, when seeking to describe a complex physical system, often will make simplifying assumptions that are known to be, at best, approximations. The basic assumptions of microeconomic theory are notoriously unrealistic, but most economists believe that the predictions are sufficiently accurate to justify the continued use of the assumptions. In short, the ultimate test of an economic model is its predictive ability.

The economic theory of legislation, however, does not perform well empirically, despite the common assumption to the contrary in the legal literature. Most of the empirical evidence supporting the economic theory of legislation is, in fact, quite unconvincing.

Two types of evidence are commonly cited to support the economic theory. The first consists of studies demonstrating that some particular law favors a discrete economic group. For example, environmental regulation may benefit firms owning large plants more than those owning

133. For details concerning this argument and citations to the economics literature on agency, see Kalt & Zupan, supra note 131, at 282-84.
134. As Richard Feynman explains:
Anyone who wants to analyze the properties of matter in a real problem might want to start by writing down the fundamental equations and then try to solve them mathematically. Although there are people who try to use such an approach, these people are the failures in this field; the real successes come to those who start from a physical point of view, people who have a rough idea where they are going and then begin by making the right kind of approximations, knowing what is big and what is small in a given complicated situation. These problems are so complicated that even an elementary understanding, although inaccurate and incomplete, is worth while . . . .
136. Stigler suggests that the economic theory of legislation is true practically by definition. Thus, the only purposes of empirical research are to "identify the purpose of the legislation" and to apply the research to various situations to "provide a testing ground for hypotheses on the factors which govern the political force of a group." G. Stigler, supra note 109, at 140. Testing the validity of the theory, however, is not a purpose of empirical research, according to him. See id. at 139-41.
137. See Easterbrook, supra note 4, at 16 n.16, 45 n.101; Macey, supra note 4, at 224 nn.6-7.
139. See Easterbrook, supra note 4, at 45 n.101; Macey, supra note 4, at 232 n.46.
small plants; this finding has been cited as proving that even legislation apparently in the public interest is really the product of special interests.\textsuperscript{140} Such evidence, however, is unpersuasive. First, a finding of differential impact often can be effectively challenged.\textsuperscript{141} Researchers disagree, for example, over whether trucking regulation benefited owners, drivers, or both.\textsuperscript{142} If economists cannot determine the economic impact of legislation after its implementation, interest groups evaluating proposed legislation presumably suffer far greater uncertainties.\textsuperscript{143} Second, demonstrating that a law benefits a certain group does not establish that passage of the law was due to the group's efforts.\textsuperscript{144} In other words, evidence of a law's differential economic impact does not disprove the influence of ideological forces.\textsuperscript{145}

The other type of empirical study attempts to meet this criticism by using the economic model to predict the votes of individual legislators. Typically, the researcher identifies several rough measures of a law's economic effects on constituents or campaign contributors. The researcher then looks for a statistical correlation between the votes of individual legislators and these economic impacts.\textsuperscript{146} In general, as predicted by the economic model, these studies find positive relationships between legislative behavior and economic variables.\textsuperscript{147} The results fail to establish,

\textsuperscript{140} See Pashigian, \textit{The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares}, 27 J.L. & Econ. 1, 26 (1984); cf. Bartel & Thomas, \textit{Direct and Indirect Effects of Regulation: A New Look at OSHA's Impact}, 28 J.L. & Econ. 1 (1985) (describing a similar study that concluded that, because of a proportionately greater cost impact on smaller firms, OSHA was strongly supported by Congress in the 1970s, despite generally high costs and minimal improvements in workplace injury rates). \textit{But see} Leone & Jackson, \textit{The Political Economy of Federal Regulatory Activity: The Case of Water Pollution Controls}, in \textit{Studies in Public Regulation} 248 (G. Fromm ed. 1981) (finding no significant relationship between legislators' votes and compliance costs for local industry). For a debate on the validity of Pashigian's methodology, see Evans, \textit{The Differential Effect of Regulation Across Plant Size: Comment on Pashigian}, 29 J.L. & Econ. 187 (1986); Pashigian, \textit{Reply to Evans}, 29 J.L. & Econ. 201 (1986). Note that if legislation helps one group of firms at the expense of a second group, either its passage or defeat can be cited as proof of the economic theory; the researcher always can attribute the outcome to the influence of one of the contesting groups.

\textsuperscript{141} See Posner, \textit{supra} note 43, at 355 (pointing out the difficulty of tracing the economic effects of regulation).

\textsuperscript{142} See Kim, \textit{The Beneficiaries of Trucking Regulation, Revisited}, 27 J.L. & Econ. 227, 239 (1984); Rose, \textit{The Incidence of Regulatory Rents in the Motor Carrier Industry}, 16 RAND J. Econ. 299, 300-303 (1985).

\textsuperscript{143} Cf. K. Shlozman & J. Tierney, \textit{supra} note 61, at 18 (finding that physicians who lobbied hard against Medicare legislation received an unanticipated financial windfall from its passage).

\textsuperscript{144} Meteors, for example, are highly beneficial to scientists, but gravity, not scientific lobbying, causes them to fall from the sky.


\textsuperscript{146} One method of doing this is to construct a regression model, in which legislative votes are studied as functions of constituent characteristics or campaign contributions. See \textit{infra} note 148.

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however, that economic factors are more important than noneconomic ones.\textsuperscript{148}

Other studies have focused on noneconomic factors. Such research indicates that ideology, usually measured by the annual ratings given by the Americans for Democratic Action (ADA), is a better predictor of legislator behavior than economics. Even on purely economic matters, ideology is a strong predictor of legislators’ votes.\textsuperscript{149} For example, in analyzing votes on natural gas deregulation legislation, Mitchell found that over ninety percent of the votes, 361 out of 399, could be predicted simply by whether a congressman’s ADA score was greater than forty-


148. Many of the studies are done with statistical techniques (logit or probit analysis) that do not provide a convenient measure of how much of the variation in the dependent variable (here, legislative voting) is explained by the independent economic variables. \textit{See generally} R. PINDYCK & D. RUBINFELD, \textit{ECONOMETRIC MODELS AND ECONOMIC FORECASTS} 273, 318 (2d ed. 1981) (providing an introduction to the variants of regression analysis). Other studies use traditional regression analysis for which $R^2$ provides a measure of how much legislative behavior is left statistically unexplained. These studies have found relatively low $R^2$, indicating either that the data are poor or that much of the legislative voting is left unexplained. \textit{See, e.g.}, G. \textit{STIGLER}, supra note 57, at 15-17 (noting that poor statistical correlations may be a product of using gross measures that encompass factors other than the variable intended to be measured); Frendreis & Waterman, \textit{supra} note 147, at 408 (indicating low $R^2$s for all variables). Thus, all of these studies show that economic factors play some role, perhaps even an important one, in legislation; they do not exclude noneconomic factors. For a fuller explanation of regression analysis, see H. \textit{KELEJIAN} & H. \textit{OATES}, \textit{INTRODUCTION TO ECONOMETRICS} 19-76 (2d ed. 1981).

five percent.\textsuperscript{150}

Given this evidence of the importance of noneconomic factors, validation of the purely economic model requires proof that it performs better than models that include noneconomic factors. The economic model has not done well in such tests. Studies that examine both economic and ideological influences generally conclude that ADA scores are a substantial factor in predicting legislators' votes.\textsuperscript{151} Models that include both ideological and economic factors outperform purely economic models, even when predicting votes on strictly economic legislation.\textsuperscript{152}

One response to these studies is that ADA scores themselves reflect the views of legislators' constituencies. Hence, an ADA score may measure indirectly the composition of a legislator's district, rather than the legislator's own political views.\textsuperscript{153} This argument, although clever, turns out to be ill-founded.\textsuperscript{154} To test its validity, several researchers developed a technique of "cleansing" ADA scores of their association with constituent make-up.\textsuperscript{155} The cleansed scores were still significantly related to legislative votes.\textsuperscript{156}

\textsuperscript{150} Mitchell, supra note 149, at 598; see also Poole \& Daniels, \textit{Ideology, Party, and Voting in the U.S. Congress, 1959-1980}, 79 \textit{Am. Pol. Sci. Rev.} 373, 397 (1985) (showing that a liberal-conservative dimension used by interest groups to rate members of Congress is consistent with much roll call voting). For a related study, see Poole \& Rosenthal, \textit{A Spatial Model for Legislative Roll Call Analysis}, 29 \textit{Am. J. Pol. Sci.} 357 (1985).

\textsuperscript{151} See Bernstein \& Anthony, supra note 149, at 1202-03; Bernstein \& Horn, supra note 149, at 240, 243, 245; Mitchell, supra note 149, at 598-604.

\textsuperscript{152} See supra note 149 and accompanying text; see also infra notes 155-56. Peltzman now concedes that the inclusion of noneconomic factors increases a model's explanatory power. See Peltzman, \textit{An Economic Interpretation of the History of Congressional Voting in the Twentieth Century}, 75 \textit{Am. Econ. Rev.} 656, 663, 666 (1985). But see Coughlin, \textit{Domestic Content Legislation: House Voting and the Economic Theory of Regulation}, 23 \textit{Econ. Inquiry} 437, 446 (1985) (finding ideology to be statistically significant, with liberals slightly more likely to favor protectionism, but concluding that ideology added little to the predictive power of the model). In part Coughlin's findings might reflect the weak ideological content of the issue, or the inclusion of political party as a separate variable.

\textsuperscript{153} See Peltzman, \textit{Constituent Interest and Congressional Voting}, supra note 57, at 210 ("[Ideology measures] turn out to be proxies for something more fundamental: liberals and conservatives tend to appeal to voters with systematically different incomes, education, and occupations, and to draw contributions from different interest groups.").

\textsuperscript{154} Cf. Poole \& Rosenthal, \textit{The Political Economy of Roll-Call Voting in the "Multi-Party" Congress of the United States}, 1 \textit{Eur. J. Pol. Econ.} 45, 56 (1985) (agreeing "with those authors who emphasize that ideology is important even when economic variables have been considered"). Peltzman himself seems to have abandoned this argument, and instead relies on the argument that ideology is a relatively constant factor and therefore unimportant in explaining political changes. See Peltzman, supra note 152, at 666.


\textsuperscript{156} See Carson \& Oppenheimer, supra note 155, at 173, 177; Kalt \& Zupan, supra note 131, at 286-98; Kau \& Rubin, \textit{Self-Interest, Ideology, and Logrolling in Congressional Voting}, 22 \textit{J.L. \& Econ.} 365, 380-84 (1979); Poole \& Rosenthal, supra note 154, at 46; see also Kau, Keenan \& Rubin,
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There are several compelling reasons for believing that the cleansed scores are not the product of undetected economic factors, but instead measure legislators' personal views on public policy. First, the cleansed scores correlate stronger with voting in off years than in election years. Second, for an economic factor to be undetected, it would have to be entirely uncorrelated with the economic factors already considered. Illustratively, an undetected special interest group would have to be equally powerful in urban and rural districts, among union members and nonmembers, and among all income groups. Such an interest group is difficult to imagine. Third, the cleansed scores correlate with votes on a broad range of legislation, including both economic and social issues. Again, it is hard to imagine an economic group with such a diverse constellation of interests. Thus, the cleansed scores strongly indicate that a legislator's own view of the public interest is one factor in determining how that legislator votes.

Indeed, the cleansed score results may well underestimate the importance of ideology. The statistical method essentially assumes that whenever a legislator's ideology correlates with the interests of his constituency, his votes are attributable solely to the constituency's economic interests. It is plausible, however, that the economic makeup of the constituency contributes to constituency ideology, which in turn relates to the choice of legislator, so that constituency economic interest may

supra note 118, at 287 (finding significant effects of constituent ideology after controlling for constituent economic traits). The work of Kau, Keenan, and Rubin, along with related work by Kau and Rubin, are collected in J. KAU & P. RUBIN, CONGRESSMEN, CONSTITUENTS, AND CONTRIBUTORS: DETERMINANTS OF ROLL CALL VOTING IN THE HOUSE OF REPRESENTATIVES (1982) and J. KALT, THE ECONOMICS AND POLITICS OF OIL PRICE REGULATION: FEDERAL POLICY IN THE POST-EMBARGO ERA 253-78 (1981). Another study, using a simultaneous equation model, found that much of the apparent effect of campaign contributions on legislative votes actually was due to the propensity of interest groups to contribute to legislators whose initial positions were sympathetic. Chappell, Campaign Contributions and Voting on the Cargo Preference Bill: A Comparison of Simultaneous Models, 36 PUB. CHOICE 301, 309 (1981).


158. For instance, Kau and Rubin considered per capita income, unionization, racial composition, education, oil production, average age, defense spending, percentage of farmers, and welfare payments. Kau & Rubin, supra note 156, at 370. This list of major economic interests is far from complete, but most other economic factors seem to have some correlation with at least one of these variables.

159. For example, Kalt and Zupan found that votes on legislation to control strip mining are highly correlated with votes on issues such as the death penalty and sex education. Kalt & Zupan, supra note 131, at 291. We are unable to imagine any group with an economic interest in all these issues.

160. A study of abortion and related social issues found only a modest correlation between legislators' votes and their constituents' preferences; on abortion, in particular, a representative's religion and race were powerful explanatory factors. See Page, Shapiro, Gronke & Rosenberg, Constituency, Party and Representation in Congress, 46 PUB. OPINION Q. 741, 752 (1984).

161. For empirical evidence on the significance of constituent ideology in explaining legislative
have little direct effect on legislators' votes. If, as seems likely, the truth lies somewhere between the economic model and this purer ideological model, ideology may play at least as great a role in the political process as economics.

A less grandiose version of the economic theory would simply postulate (1) that reelection is an important motive of legislators; (2) that constituent and contributor interests thus influence legislators; and (3) that small, easily organized interest groups have an influence disproportionate to the size of their membership. In short, the model could be used to identify tendencies within the political system, but not to explain all of politics.

Based on the empirical evidence, this less ambitious version of the theory is far more supportable than the strong version. The weaker version also is supported by the political science literature discussed above. Additionally, although Olson's "free rider" argument fails to explain much behavior that is not "economically rational," it has some degree of explanatory power.

Our best picture of the political process, then, is a mixed model in which constituent interest, special interest groups, and ideology all influence legislative conduct. Even in purely economic matters, ideology


162. It would be interesting to know the extent to which raw self-interest, untainted by ideology, affects legislative outcomes. We have not found any studies inverting the Kau and Rubin technique in order to cleanse ideological correlation from constituency traits. In fact, a substantial body of literature suggests that a voter's economic self-interest does not directly affect his political choices. See Feldman, Economic Self-Interest and Political Behavior, 26 AM. J. POL. SCI. 446 (1982) (summarizing the literature and arguing that a culture of economic individualism leads individuals to attribute their economic woes to their own conduct rather than to political decisions); see also supra note 129 (arguing that voter behavior is not economically rational). See generally Feldman & Jondrow, Congressional Elections and Local Federal Spending, 28 AM. J. POL. SCI. 147 (1984) (finding that votes in House races are unaffected by changes in federal spending in districts). But see Kramer, The Ecological Fallacy Revisited: Aggregate- Versus Individual-Level Findings on Economics and Elections, and Sociotropic Voting, 77 AM. POL. SCI. REV. 92, 93 (1983) (arguing that the research results that indicate noneconomic voting of constituents are statistical artifacts).

163. See supra subpart III(A).

164. See supra notes 121-23 and accompanying text.

165. In addition to the factors listed in the text, political parties and chief executives, among other forces, also influence outcomes. The mixed model seems to be shared by Judge Posner, who, on this issue, is far from being a dogmatic adherent to economic theory. See, e.g., R. POSNER, supra note 44, at 265-67 (1983) (arguing that legislation may be enacted to address public interest, public sentiment, or special interest goals, or a combination of these).

Undoubtedly, many readers will find our conclusion unsurprising and wonder whether any scholar truly believes that economic factors overwhelm all others in the legislative process. Those
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plays some role, and economics may have some impact on social issues. It would be extremely useful to know more about the relative weights of these factors in various situations. Although a few writers have offered explanations about the varying influence of interest groups, the empirical evidence so far is quite inconclusive. Even with a single type of legislation, such as tariffs, the relative influence of special interest groups and ideology has varied over time. For now, the strongest, if still an unsatisfyingly vague, conclusion is simply that these relative weights correlate somewhat with the nature of the legislation.

The implications of this view of politics for public law are mixed. On the one hand, the demonstrated importance of legislators' personal ideology means that statutes often reflect legislators' views of public policy. On the other hand, interest groups can be expected to exert disproportionate influence over outcomes. Any judicial response should insure that genuine legislative policy decisions are respected, while attempting to mitigate undue interest group influence.

Of course, such a response assumes that legislatures behave coherently. This assumption is challenged, however, by some public choice literature, as discussed in the next subpart.

C. Public Choice and Majority Voting Schemes

Some of the literature we have discussed concerned the threat of special interest groups to majority rule. Related literature suggests that majority rule is its own worst enemy. A particularly intriguing branch of public choice scholarship discusses the incoherence of majority voting schemes. Some of this scholarship is highly pessimistic about the viability of majority rule, in legislatures or elsewhere. In particular, this literature suggests that "political processes are fundamentally chaotic and unpredictable, that almost anything can happen." This incoherence who suspect us of creating a straw man out of the economic theory of legislation should see Bias Toward Bad Government?, N.Y. Times, Jan. 19, 1986, § 3, at 27, col. 4 (attributing to Gordon Tullock, a leading public choice theorist, the view that "people act from selfish motivations about 95 percent of the time. And they are no more high-minded as voters than as consumers, selecting the candidate they think represents the best bargain for them just the way they select cars or detergent.

166. See, e.g., supra notes 149-50 and accompanying text (describing studies of strip mining and natural gas regulation).
167. See Netter, supra note 147 (correlating votes on women's rights issues with the economic interests of constituents).
168. See supra note 72 (discussing M. Hayes, supra note 66 and J. Wilson, supra note 70).
169. See Goldstein, supra note 149 (reviewing the literature).
can be exploited by special interest groups. More fundamentally, however, it suggests that legislatures are incapable of formulating policy of any kind.

The heart of the matter is “Arrow's Paradox.” In some circumstances, majority rule may be unable to resolve the choice among three or more mutually exclusive alternatives. For a simple example, assume that three children—Alice, Bobby, and Cindy—have been pestering their parents for a pet. The parents agree that the children may vote to have a dog, a parrot, or a cat. Suppose each child’s order of pet preferences is as follows: Alice—dog, parrot, cat; Bobby—parrot, cat, dog; Cindy—cat, dog, parrot. In this situation, if pairwise voting is required, then majority voting cannot pick a pet, as the reader can verify.

Kenneth Arrow proved that, in general, no method of voting, or any other method of making social decisions, can avoid the possibility of such paradoxical results. In some situations, however, the assumptions underlying his theorem are inapplicable. In the example above, a majority decision is possible if the children agree that a pet’s size is the only relevant factor and merely differ in their conception of the ideal size. Such a case is an example of a population with “uni-peaked preferences”; this situation avoids Arrow’s result and allows consistent, noncyclical majority rule. Similarly, in a legislature, voting paradoxes can be avoided if each legislator ranks her choices on a liberal-to-conservative scale, and differs only in her preferred location on the scale. Furthermore, Ar-


172. A majority (Alice and Cindy) will vote for a dog rather than a parrot; a majority (Alice and Bobby) will vote for a parrot rather than a cat; and a majority (Bobby and Cindy) will vote for a cat rather than a dog.

173. This finding should be especially troubling to pluralist theorists because it indicates that legislation ordinarily cannot be the simple result of the aggregation of preferences. For several examples of the occurrence of the paradox in the legislative setting, see Riker, Arrow's Theorem and Some Examples of the Paradox of Voting, in 1 MATHEMATICAL APPLICATIONS IN POLITICAL SCIENCE (J. Claunch ed. 1965); Riker, The Paradox of Voting and Congressional Rules for Voting on Amendments, 52 AM. POL. SCI. REV. 349, 352-62 (1958).

174. See K. ARROW, COLLECTED PAPERS OF KENNETH J. ARROW: SOCIAL CHOICE AND JUSTICE 78-87 (1983); A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 166-72 (1970). The likelihood of having sufficiently “well-behaved” preferences to avoid Arrow's theorem is presumably much greater in a small group such as a legislative committee. Nevertheless, according to a recent paper, roll call data reveal that, from 1919 to 1984, the preferences of members of the United States Congress have fallen largely on a unidimensional, liberal-conservative spectrum. K. POOLE & H. ROSENTHAL, THE UNIDIMENSIONAL CONGRESS, 1919-1984 (1986) (unpublished paper). Poole and Rosenthal suggest that this strong unidimensionality in roll call voting is attributable in part to earlier bargaining at the committee level and to optimizing behavior by political actions in models of incomplete information. Unidimensionality “solves” the following problems: (1) it allows horse-trading to occur among spatially adjacent actors in defining the midpoint on a given issue. Conditional on the
row's paradox need not occur if the result involves more than a head count. For instance, strength of preferences may be somehow considered or the legislators may agree to debate until one side persuades the other. These escapes from Arrow's paradox may play a significant role in legislatures, particularly in smaller groups such as committees.

Another method of preventing cycling is to limit majority rule, for example by using a set agenda. Legislative rules, such as rules that allow a committee chair to structure a decisional agenda or rules that require the status quo to be included in the last pairwise vote, may result in the selection of one alternative among the many that could have commanded majority support. Thus, one important focus of public choice theory concerns agenda setting, decisional structure, and arbitrary outcomes.

From one perspective, agendas and other structural rules may be considered arbitrary ways of breaking majority cycles. But these rules themselves may have normative value. A germaneness rule, for example, may avoid the paradox by limiting the set of pairwise votes. The germaneness requirement is far from arbitrary, however, if majority rule is believed to be desirable only when the issues considered have some logical connection. For example, if the agenda includes both sex education and truck deregulation, the question of which package (for example, "deregulate trucks and allow sex education") has the greatest majority

midpoint, liberals and conservatives will look like they are voting in a consistent, non-strategic fashion that maintains their voting histories . . . , thereby preserving their reputations . . . with their electorates; (2) from the viewpoint of voters and campaign contributors, a single index greatly simplifies decision problems in an information poor environment; similarly, the dimension greatly facilitates cue-taking by members of Congress, who, massive staffs notwithstanding, are clearly information overloaded when faced with hundreds of roll calls a year.

Id. at 28.

175. For a discussion of the assumptions underlying Arrow's result, and some of the ways of avoiding the paradox, see Farber, From Plastic Trees to Arrow's Theorem, 1986 U. ILL. L. REV. 337.

176. For example, in a legislature, those with weak preferences might vote with a minority that had very strong feelings on a subject.

177. For instance, if the parents in our earlier example define the decisional agenda as (1) dog versus parrot [dog wins]; then (2) dog versus cat [cat wins], the children will have a cat. If the parents, however, structure the decisional agenda differently and still allow only one set of pairwise votes, a parrot can win ((1) cat versus dog [cat wins]; (2) cat versus parrot [parrot wins]) or a dog can win ((1) parrot versus cat [parrot wins]; (2) parrot versus dog [dog wins]).

178. For an overview of the literature, see Panning, supra note 41, at 676-78, 681-82. Obviously, agenda control and legislative decisional structure can influence outcomes even when cycling majorities are not present, for example, by keeping popular alternatives entirely off the voting agenda. See generally Levine & Plott, Agenda Influence and Its Implications, 63 VA. L. REV. 561, 564 (1977) ("[A]genda or groupings in which alternatives are considered for adoption or elimination can be a major parameter in determining what a group will ultimately choose.").

179. This seems to be the dominant view in the public choice literature. See, e.g., W. Riker, Liberalism Against Populism 169-95, 189 (1982) (equilibria stemming from agenda control are "subject to attack because they enforce an equilibrium that [majority] tastes would not allow").
approval is probably irrelevant. Vote trading can occur even when separate votes are taken on each issue, but separating the two votes makes the logrolling deal much riskier.\textsuperscript{180}

Arrow's Paradox is both fascinating and illuminating, but it may have little direct relevance to legislative practice. Legislatures use a variety of structures, rules, and norms to ameliorate the problem of cycling majorities.\textsuperscript{181} Legislatures possess "structure-induced equilibrium," to use the phrase coined by social scientists researching the impact of Arrow's Paradox in concrete legislative settings.\textsuperscript{182} We have already noted several important examples. If enforced, a germaneness rule tends to limit logrolling, strategic voting, and other instances in which the paradox is likely to occur.\textsuperscript{183} Similarly, other rules governing the setting of the legislative agenda prevent endless cycling. For example, a simple, yet critical aspect of legislative decision making requires a final yes or no vote on any change in public policy. This final pairwise vote pits the proposed policy change against the status quo. Regardless of whether potential cycling majorities exist, the status quo is altered only if a majority of legislators prefer the proposed change; this outcome is surely consistent with democratic norms.\textsuperscript{184} These structural constraints suggest that what is true of majority voting in the abstract is untrue of legislative voting in specific settings.\textsuperscript{185}

\textsuperscript{180} In the simple "pet picking" example above we assumed that each child would vote sincerely in each pairwise contest. But one child with perfect information can prevent the cycle—and substantially satisfy her desires—by strategic voting. For example, assume that Alice, who likes parrots almost as much as dogs but cannot stand cats, has discovered the preferences of her siblings. If the first pairwise contest is dog versus parrot, sincere voting on her part will eventually lead to the selection of a cat. If instead she casts a strategic vote for a parrot rather than a dog, a parrot will win. Numerous studies about voting in legislatures have focused on strategic behavior, such as vote trading and logrolling, that can substantially affect legislative outcomes. For an overview of the studies, see Panning, \textit{supra} note 41, at 678-80.

\textsuperscript{181} These devices and norms have other consequences as well, such as their tendency to increase legislative bias in favor of the status quo.


\textsuperscript{183} A germaneness requirement thus may have significant public-law implications. \textit{See infra} text accompanying notes 271-77. From some perspectives, of course, logrolling is not objectionable. For example, logrolling sometimes can reach a more economically efficient result than can the separate consideration of proposed bills. \textit{See generally} W. RIKER, \textit{supra} note 179, at 160 ("[U]nder ordinary procedures, vote-trading can sometimes improve outcomes for a majority.").


\textsuperscript{185} As Shepsle and Weingast explain:

\begin{quote}
Agenda manipulation by strategic players within well-defined contexts is, in our opinion,
\end{quote}
The belief that "anything can happen" in legislatures also ignores the human aspects of those institutions. Sophisticated rather than sincere voting no doubt sometimes occurs, but this strategy is severely limited by the imperfect information legislators have about the preferences of their colleagues. In addition, legislators who cast strategic votes may offend their constituency and other groups who share their goals but do not perceive that the votes in question were strategic rather than sincere.\textsuperscript{186} As one commentator has noted, "Voting contrary to the preferences of supporters thus has costs quite distinct from the effect of doing so on the voting outcome."\textsuperscript{187}

One scholar recently observed that "the theoretical results achieved by the formal [that is, abstract and deductive] analysis of legislative choice are markedly inconsistent with our empirical knowledge of legislatures such as the U.S. Congress."\textsuperscript{188} There is a lesson in this observation for law as well as social science; in both there is a danger of "[f]ormal theory 'descending to us' without critical examination."\textsuperscript{189} Although reductionism is sometimes a useful strategy for the theorist seeking to construct an illuminating model, it is a dangerous foundation for public policy. The appropriate judicial role must avoid facile premises about both politics and the abilities of judges to unscramble political complexities.

the central characteristic of legislatures. Its study requires, however, that general theories not abstract away relevant institutional details concerning agenda access and admissibility, a theoretical route that provides only the illusion of generality. We hope we have shown that our approach improves upon the currently well-established (but free of policy content) social choice predictions that "anything can happen."


186. \textit{See generally Denzau, Riker & Shepsle, Farquharson and Fenno: Sophisticated Voting and Home Style}, 79 AM. POL. SCI. REV. 1117, 1118 (1985) (observing that voting strategically can appear to conflict with the constituencies' needs and can be difficult for the legislator to explain); Panning, \textit{Rational Choice and Congressional Norms}, 35 W. POL. Q. 193, 193 (1982) (stating that vote-trading is best explained as "a social adaptation to ignorance and uncertainty"); \textit{see also Bernhardt & Ingberman, Candidate Reputations and the "Incumbency Effect,"} 27 J. PUB. ECON. 47, 47-49, 59 (1985) (incumbents have incentive to maintain consistent records so that voters can efficiently predict their actions if reelected); K. Poole & H. Rosenthal, \textit{The Dynamics of Interest Group Evaluations of Congress 2} (1986) (unpublished manuscript) (suggesting that congressional roll call votes do not reveal substantial sophisticated voting and that interest-group rankings of legislators provide "an important, non-strategic source of data").

187. Panning, \textit{supra} note 41, at 685.

188. \textit{Id.} at 689.

189. Shepsle, \textit{supra} note 114, at 8. Professor John Aldrich of the University of Minnesota Department of Political Science has informed us that he and others, including Shepsle and Weingast, \textit{see supra} note 182, are involved in a variety of projects designed to integrate abstract majority-voting theories with legislative structure and empirical evidence. For initial work along these lines, see K. Shepsle, \textit{The Positive Theory of Legislative Institutions: An Enrichment of Social Choice and Spatial Models} (1985) (unpublished manuscript). Public law theory might well profit from these developments.
Formal theory, of course, can be helpful in formulating public law theory. Legislatures are not characterized by chaos, but the threat of disorder posed by Arrow's Theorem may determine much of their structure. Understanding the threat can illuminate the importance of legislative procedures. As we will suggest in subpart IV(B), courts may be able to reinforce some of these legislative procedures, and thus increase the legislature's ability to articulate intelligible public policies.

IV. Public Law Implications

Interest groups play a significant role in the legislative process and thus in shaping our society. Some rather general conclusions may be drawn from our survey of the relevant literature. The social science literature indicates that interest groups participate in a broad range of legislative decisions, and often exercise more power when they block legislation than when they support it.\(^{190}\) Thus, although their influence on particular legislation is often difficult to isolate,\(^ {191}\) their overall systemic influence is indisputable. Although the extent of this influence occasionally is overstated, it nevertheless is quite real.

The influence of special interest groups is unfortunate in at least three respects. First, interest group politics redistributes wealth and political power away from segments of the population that do not belong to any organized interest group.\(^ {192}\) In general, this results in a movement of wealth from the poor to the affluent.

Second, apart from the distributional effect of interest group politics, there is also the "Pogo effect."\(^ {193}\) No group can afford to drop out of the contest for government handouts; members of a group that did would pay the same taxes but receive fewer benefits, thus redistributing income to the remaining contestants. As in the "prisoner's dilemma" game,\(^ {194}\) however, the result of this individually rational behavior is that everyone is worse off. This creates a kind of "race to the bottom," in which pork-barrel politics displaces pursuit of the public interest—a situation individuals may deplore even as they find themselves compelled to participate. Even if everybody belonged to a special interest group, so

190. See supra text accompanying note 81.
191. See R. POSNER, supra note 44, at 267-68.
192. See M. OLSON, supra note 121, at 163; K. SCHLOZMAN & J. TIERNEY, supra note 61, at 60-63.
193. "We have met the enemy and he is us." Use of the Pogo quote in this context is due to Aaron Wildavsky. See Foster, supra note 113, at 365 (citing Wildavsky's Pogo theory of overspending as one cause of the budget deficit; special interest groups make it impossible to negotiate a joint reduction in spending that would benefit everyone).
194. For an introduction, see D. MUELLER, supra note 33, at 14-18.
that special interest politics did not affect the distribution of wealth, interest groups still would direct resources to socially unproductive programs. The Pogo effect is part of the current problem in controlling the federal budget.\textsuperscript{195} More generally, as Olson has recently suggested, the Pogo effect potentially can inflict substantial long-term economic damage.\textsuperscript{196}

Third, and perhaps most important, the activities of special interest groups undermine the democratic ethos. The successful functioning of a democracy requires voters, and sometimes government officials, to act in economically irrational ways.\textsuperscript{197} Because these behaviors are not reinforced by economic incentives, they depend on a somewhat fragile public adherence to a social code. Special interest groups create the impression that government is simply an arena of self-interest and thus foster an atmosphere of cynicism that is incompatible with a healthy democracy.\textsuperscript{198}

We saw earlier that democracy rests on the willingness of individuals to engage in the economically irrational act of voting. They are willing to do so only because of an ideological belief in the importance of the democratic process.\textsuperscript{199} The real risk is not so much that special interest groups will destroy social efficiency directly through their rent-seeking activity, but that they will destroy the credibility of the democratic ethos to the ordinary citizen. The notorious increases in public cynicism over government, combined with concurrent declines in voter turnout, suggest that this process may be underway already. Because democratic participation is actually inconsistent with the notion of economic rationality that underlies much of our economy, the democratic ethos may suffer from inherent instability. The frightening possibility is that the "economic theory of legislation,"\textsuperscript{200} although currently only a caricature of the political process, may yet become the reality simply because many citizens eventually believe in it.

Although interest groups may play an inordinately powerful role in our legislative process, a review of the social science literature demonstrates that knowledge about the legislative process is far more limited than many legal scholars realize. The easy generalizations and reductionist models found in the early literature have not fared well empiri-

\textsuperscript{195} See Elliott, supra note 52, at 1095 (stating that the current budget deficit is the outward symptom of narrow interest groups seeking preferential government treatment).

\textsuperscript{196} See M. Olson, \textit{The Rise and Decline of Nations} 41-47 (1982).

\textsuperscript{197} See supra notes 127-32 and accompanying text.

\textsuperscript{198} See supra notes 1-3, 129 & 182.

\textsuperscript{199} See supra note 129 and accompanying text.

\textsuperscript{200} See supra subpart III(B).
cally. We hope to have persuaded the reader of the need for caution in relying on this literature when propounding grand theories of public law. We do know that ideology, economic interest, and legislative structure all are factors in the legislative process, although their relative importance is unclear and variable. In this Part we explore some of the implications of this eclectic view for American public law. We offer tentative suggestions about how courts can shift the balance toward ideology and structure, and thus toward legislative ability to formulate public policy, and away from legislative capture by special interests. We will consider four different approaches to the problem. Two we find especially promising: reform of the political process and judicial enforcement of legislative procedural rules. We are more skeptical about the other two: judicial attempts to mandate legislative deliberation and enhanced substantive judicial review.

A. Substantive Judicial Review

To limit undue influence by special interest groups and foster legislative deliberation, several recent commentators have advocated more stringent judicial review of statutes. The purpose of such review would be to ensure that legislation reflects public values, rather than simply producing benefits for special interest groups. The scope of the review would be more expansive than the traditional judicial attempt to eliminate only a few illegitimate legislative goals, such as invidious racial discrimination. Under the proposed approach, judges would not simply place "off limits" a few legislative goals. Rather, legislation would be restricted to a specific set of judicially identified goals chosen because they embrace civic virtue.

We share many of these commentators' concerns about the power of special interests. Nonetheless, we have grave doubts about solving the problem through heightened judicial review. First, lobbying that effectively blocks the passage of legislation is beyond judicial review. Hence, at best, expanded substantive review could deal with only half of the problem. Second, proponents of heightened judicial review assume that the judiciary can identify the influence of special interest groups in the passage of particular legislation. As discussed earlier, however, ideology plays a role in the adoption of a broad range of legislation, including

201. Political party is obviously another relevant factor that deserves further attention in public law theory.
202. See Epstein, supra note 4; Mashaw, Constitutional Deregulation: Notes Toward a Public, Public Law, 54 Tul. L. Rev. 849 (1980); Sunstein, supra note 8.
statutes involving purely economic subjects.\textsuperscript{204} Lobbying is also a pervasive part of the legislative process,\textsuperscript{205} and lobbyists are often found on both sides of an issue. Thus, investigating the influences behind a specific statute offers little prospect for isolating a distinct class of nonpublic interest legislation.\textsuperscript{206}

A more fundamental problem is that the very distinction on which these commentators rely—special interest versus public interest legislation—is highly value-laden and political. The difficulty in making a principled distinction along these lines can be seen in \textit{Fullilove v. Klutznick}.\textsuperscript{207} The set-aside program for minority owned contractors at issue in that case had the earmarks of interest group legislation. It was passed as a floor amendment, with little legislative deliberation.\textsuperscript{208} If the minority firms were not efficient enough to obtain contracts otherwise, the legislation benefited a relatively small and discrete set of firms at the expense of a much broader group, and perhaps of the public.\textsuperscript{209} Nevertheless, the Supreme Court obviously believed this legislation embodied public values of the highest order.\textsuperscript{210}

Another prime example is the nuclear regulatory program. Some commentators have cited the regulation of nuclear power as a classic case

\begin{itemize}
\item \textsuperscript{204} See supra note 149 and accompanying text. Even Stigler concedes that much of the regulatory legislation opposed by economists has broad public support. See G. STIGLER, supra note 109, at 167-68.
\item \textsuperscript{205} See supra text accompanying notes 76-80.
\item \textsuperscript{206} Much of what we have to say about this also suggests that such a distinction ordinarily will be unhelpful in construing statutes. For this reason, we are skeptical of an approach to statutory construction, see Easterbrook, supra note 4, that treats private-interest legislation as a judicially enforceable contract. For critical discussions of this theory of statutory construction, see Eskridge, supra note 49; Macey, supra note 4.
\item \textsuperscript{207} 448 U.S. 448 (1980).
\item \textsuperscript{208} See id. at 458, 461; see also id. at 549-50 (Stevens, J., dissenting) (stating that Congress gave "perfunctory consideration . . . [to an] unprecedented policy decision of profound constitutional importance"). Justice Stevens observed in dissent:
\begin{quote}
The legislative history of the Act discloses that there is a group of legislators in Congress identified as the "Black Caucus" and that members of that group argued that if the Federal Government was going to provide $4 billion of new public contract business, their constituents were entitled to "a piece of the action."
\end{quote}
\item \textsuperscript{209} Thus, in the Hayes-Wilson typology, discussed supra note 72, this legislation would be especially suspect, falling at least partially into the "concentrated benefits/distributed cost" category.
\item \textsuperscript{210} According to Chief Justice Burger, Congress reasonably determined that the statute was necessary to ensure that minority businesses had an equal opportunity to receive public contracts, "which is one aspect of the equal protection of the laws." \textit{Fullilove}, 448 U.S. at 478. A concurring opinion, joined by three Justices, stated:
\begin{quote}
Today, by upholding this race-conscious remedy, the Court accords Congress the authority necessary to undertake the task of moving our society toward a state of meaningful equality of opportunity, not an abstract version of equality in which the effects of past discrimination would be forever frozen into our social fabric. I applaud this result.
\end{quote}
\end{itemize}
of special interest legislation designed to benefit a particular industry.\textsuperscript{211} This characterization seems as much based on the commentators' ideologies as on the facts. Surely any monopoly profit to the nuclear power industry is difficult to identify;\textsuperscript{212} in fact, some observers credit the regulatory program with driving the industry to its knees.\textsuperscript{213} In addition, the idea of deregulating nuclear energy probably would face almost universal public opposition; substantial public support exists, after all, for an absolute ban on new plants.\textsuperscript{214} Indeed, it is far from clear that complete reliance on tort liability, which these commentators apparently regard as superior to government regulation, would actually provide a better balance between safety and energy needs.\textsuperscript{215} The chances are all too great that "public values" would simply correspond with the judge's favored political program.\textsuperscript{216} The question of what constitutes a valid public value is itself a fundamental political issue.\textsuperscript{217} For example, from one perspective, farm subsidies are a classic raid on the Treasury by a special interest group.\textsuperscript{218} Indeed, one scholar

\begin{itemize}
  \item[\textsuperscript{211}] See Easterbrook, \textit{supra} note 4, at 45; Macey, \textit{supra} note 4, at 252-54.
  \item[\textsuperscript{212}] From 1972 to early 1984, 147 power plant cancellations cost the nation more than $14 billion in completely unproductive construction. At least a dozen additional unfinished plants, representing more than $12 billion in sunk costs, were on the brink of termination. With termination of work on the Marble Hill plant in Indiana in January 1984, all 33 nuclear reactors ordered by the utility companies in 1974, along with all 15 reactors ordered in later years, have now been cancelled. See R. Findley & D. Farber, \textit{Environmental Law: Cases & Materials} 569 (2d ed. 1985).
  \item[\textsuperscript{215}] See Huber, \textit{Safety and the Second Best: The Hazards of Public Risk Management in the Courts}, 85 Colum. L. Rev. 277, 278 (1985) ([T]he judicial system is . . . incapable of engaging in the aggregative calculus of risk created and risk averted that progressive public-risk management requires.").
  \item[\textsuperscript{216}] For example, Sunstein seemingly classifies as "ideological" and thus unacceptable any legislation based on traditional views about the role of women in society. See Sunstein, \textit{supra} note 8, at 57-58. Feminism, however, apparently would be an acceptable government motivation. See \textit{id.} at 57 n.118 (citing feminist authors with apparent approval).
  \item[\textsuperscript{217}] The lines drawn by the commentators seem to track their own political preferences. See Epstein, \textit{supra} note 4 (arguing that most twentieth century economic legislation is unconstitutional); Landes & Posner, \textit{supra} note 42, at 876 (characterizing the New Deal as interest group legislation); Sunstein, \textit{supra} note 8, at 73 (arguing for liberal results such as judicial protection of the poor, the mentally retarded, and homosexuals).
  \item[\textsuperscript{218}] From 1948 to 1973, taxpayers spent an average of $3.7 billion per year to support farm prices and income. Moreover, during much of that period, taxpayers paid an indirect subsidy through higher prices. Without government price supports, consumer food prices between 1948 and 1965 would have been 10% to 40% lower, according to econometric estimates; after 1965, the price
\end{itemize}
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recently called dairy price supports "a fairly stark payoff to a favored group."219 From another perspective, even if farm subsidies are not economically efficient,220 they arguably support an important public value: the family farm.221 Whether to accept this as a legitimate public value is essentially a legislative decision.222

Judicial review inevitably requires courts to place some limits on the legislative process, and to hold some legislative goals illegitimate. Despite all its familiar difficulties, judicial review is an essential part of our system of government. Nevertheless, although the courts have identified some "anti-public" values, they have left most value judgments to the political process. We realize that courts make value judgments; what we reject is the idea of courts making all of society's important value judgments. If courts assume the task of exhaustively defining public values, the democratic process could be reduced to quibbling over means, with the ends chosen by judicial fiat.223

B. Reforming the Political Process

Our analysis suggests that, although courts are appropriately concerned about the role of special interests in the political process, judges ordinarily will be unable to identify, in any principled fashion, individual increases were smaller. See W. COCHRANE & M. RYAN, AMERICAN FARM POLICY, 1948-1973, at 381, 391 (1981).

219. Bruff, supra note 52, at 218.

220. Obviously, we do not intend with these offhand comments to take a considered position on the complex economic issues of agricultural policy. For example, risk-averse consumers might view higher prices and tax payments as justifiable insurance premiums against drastic fluctuations in food supply. See W. COCHRANE & M. RYAN, supra note 218, at 381-82.


222. See G. STIGLER, supra note 109, at 8-9. Macey correctly criticizes proposals for increased judicial review of supposed special interest legislation as an intrusion by the courts into the legislative function. See Macey, supra note 4, at 226-27.

223. Thus, we are skeptical of the ability of courts to systematically review legislation on the basis of a special interest/public value dichotomy. On the other hand, in a few pathological cases, the special interest nature of a statute may be almost beyond dispute. See, e.g., Independent Electricians & Elec. Contractors Ass'n v. New Jersey Bd. of Examiners, 48 N.J. 413, 420-21, 427, 226 A.2d 169, 173, 179 (1967) (evaluating a licensing statute that insulated electrical contractors from competition). Such outcomes often may be associated with defects in process of the kind discussed in the next subpart. We do not preclude the possibility of judicial invalidation in such cases. Care must be taken, however, that rules devised for pathological cases do not metastasize into new global theories of judicial review.
instances in which that process has malfunctioned because of undue influence by special interests. Judges are better able to examine the structures and procedures through which public policy is adopted. In our view, judicial sensitivity to the overall factors that systematically may skew political outcomes is a more effective means of promoting legislative deliberation than is stricter scrutiny of the substance of particular statutes.\textsuperscript{224} At this point, we can only sketch briefly the tentative outlines of such an approach.

One way of reducing the power of special interest groups is to limit their role in the political process. For example, campaign expenditures by business and labor political action committees (PACs) should be restricted. Eliminating such "economic" PACs would reduce the tendency of legislators to favor these special interests because of past or possible future contributions, and would help combat unhealthy public cynicism about government.\textsuperscript{225}

Ironically, on those rare occasions when legislatures have attempted to curb special interests, the Supreme Court has intervened on behalf of the special interest groups.\textsuperscript{226} In particular, the Supreme Court has invalidated on first amendment grounds limitations on PAC campaign expenditures.\textsuperscript{227} Our proposal, however, is much narrower than those the Court has invalidated.\textsuperscript{228} The intrusion on free speech would be minimal, because individuals could divert their PAC contributions to

\textsuperscript{224} Although we have expressed skepticism about Sunstein's suggestions that courts review whether particular legislation is premised on public values, we endorse his suggestion that courts play a role in structuring the overall processes of representation to insulate representatives from pressures so that they can better deliberate in the public interest. See Sunstein, supra note 8, at 31-35. Sunstein correctly emphasized that Madisonian notions of the importance of representational structure support this inquiry. See id. at 40-45; see also Macey, supra note 4, at 247-50 (discussing constitutional structures designed to impede rent seeking); Sunstein, supra note 8, at 52-53 (noting Supreme Court decisions affecting the structure of representation).

\textsuperscript{225} Sorauf persuasively makes the argument for the restriction. See F. Sorauf, What Price PACs? (1984); Sorauf, supra note 3. For a much more benign view of PACs, see A. Matasar, Corporate PACs and Federal Campaign Financing Laws (1986).


\textsuperscript{227} The most recent case in this line is FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985) [hereinafter NCPAC], invalidating a federal statute limiting the amount of money a PAC can spend on a candidate who is also receiving federal campaign financing.

\textsuperscript{228} We believe that NCPAC is distinguishable from our proposal in several regards. First, the Court suggested that the outcome might have been different if the statute had not been so broad as to include even "small neighborhood groups." Id. at 448. Second, combined with the limits on direct contributions to candidates and parties upheld in Buckley, the effect of the PAC restriction considered in NCPAC was to limit the total amount of campaign speech. Our proposal, however, would leave noneconomic PACs unrestrained as to expenditures, and thus would rechannel rather than limit speech.
noneconomic PACs.  

A full discussion of the first amendment issues is beyond this Article's scope, but a carefully tailored ban on economic PACs could be defended as a means of channeling, rather than limiting, speech, not because of the speech's content, but because of its secondary effects on the legislative process and the democratic ethos. As such, the Court could uphold our proposal under its recently formulated Renton test of "content neutral" speech regulations.

Renton upheld a severe zoning restriction on adult theatres, a context admittedly far removed from campaign financing. For our purposes, the importance of Renton is that it refined the test for content neutrality. According to the Court, a statute is content neutral if it is "justified without reference to the content of the regulated speech." This test is satisfied if the government's justification relates to the secondary effect of the speech on its surroundings, rather than to any objection to the viewpoint.

229. As a result, the legislation we propose would be less likely to prevent challengers from raising enough money to successfully challenge incumbents.

230. For an introduction to the voluminous literature, see BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 CALIF. L. REV. 1045 (1985); Polsby, Buckley v. Valeo: The Special Nature of Political Speech, 1976 SUP. CT. REV. 1; Sorauf, supra note 3; The Supreme Court—1984 Term—Leading Cases, 99 HARV. L. REV. 120, 222-33 (1985). Much of the argument has focused on whether Congress properly may use restrictions on campaign financing as a means of equalizing political influence. See, e.g., Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 COLUM. L. REV. 609, 643-44 (1982) (arguing that restrictions on contributions are necessary to prevent concentrated wealth from distorting the political process). In Buckley, the Court held this to be an unconstitutional purpose. 424 U.S. at 48-49. The most recent information indicates that PAC contributors are more representative of the general population than campaign contributors in general, so that equality may not be as great a concern as some commentators feared. See K. SCHOLZMAN & J. TIERNEY, supra note 61, at 247.

Also of concern, however, is the "Pogo effect," see supra notes 193-96 and accompanying text, which can cause long-term injury to a democratic society. PACs are strongly skewed in terms of the types of interests they reflect. For example, of the nearly 3000 PACs, only 17 are concerned with environmental preservation and energy, and only one represents consumers. See K. SCHLOZMAN & J. TIERNEY, supra note 61, at 247-52. Of course, the extent to which PAC contributions influence legislators is itself controversial. See Sorauf, supra note 3, at 109-12, for a review of the literature. In addition, as Sorauf argues, economic PACs undermine the fragile set of values necessary for a healthy democracy. Id. at 112-19. Our own view is that economic PACs raise serious concerns about the health of the political process.

The Framers themselves seem to have been concerned about the "Pogo effect," under the broad rubric of what they called corruption. Their concept of corruption obviously was far broader than even the "appearance of corruption" discussed in Supreme Court opinions, for the Court seems to have in mind bribery rather than the pursuit of private interests at the expense of the public. See Sunstein, supra note 8, at 35-45. Thus, present-day concern about PACs can lay claim to a tradition embodied in the Constitution itself.

231. Presumably, many of the same individuals currently contributing to economic PACs would still contribute to noneconomic PACs.

232. See supra notes 197-98 and accompanying text.


234. Id. at 929 (emphasis in original).
expressed. Regulations of this kind may be upheld if they serve a substantial government purpose and do not restrict unreasonably the available channels of communication. In short, Renton appears to adopt the view that the government generally may take into account the content of speech when channeling speech, but may only rarely consider content when the purpose is censorship. We believe that in doing so, Renton merely states explicitly what was implicit in a long line of prior cases. In restricting expenditures by economic PACs, the legislature is not objecting to the viewpoint expressed by the PAC's speech, which is simply that a certain candidate should be elected, but to the effects of the speech on the legislative process.

Admittedly, making economic PACs illegal would not alone radically diminish the power of special interest groups, although it would be a significant step toward reaching that goal. Certainly, a reduction in the number of PACs to which people may contribute is a far less radical response to the problem of special interests than judicially imposing new substantive limitations on legislation. In any event, despite the potential first amendment problems, campaign financing reforms and greater control of lobbying can be useful means of controlling special interest groups.

C. Mandating Legislative Deliberation

Apart from encouraging legislative reform of electoral finance,
courts may be able to reduce the power of special interests and foster legislative deliberation by more aggressively overseeing the legislative process. Several writers, under the labels "structural due process" or "due process of lawmaking," have urged a greater judicial role in this area. They have urged attention to "the structures through which policies are both formed and applied" and to "the primacy" of legislative processes rather than particular legislative outcomes. The basic thesis, as Hans Linde has explained, is that courts are more capable of constructing "a blueprint for the due process of deliberative, democratically accountable government" than of assessing whether particular statutes promote public values.

In a variety of contexts, the Supreme Court has begun to give greater consideration to matters of lawmaking structure and process. Some of the most notable cases, like Hampton v. Mow Sun Wong, in-
volve the exercise of power by subordinate governmental entities and hold that some decisions are permissible only if made by more responsible governmental bodies such as Congress. Because our major con-

Congress or the President to adopt the rule, but neither allowed the Civil Service Commission to adopt the rule nor explicitly sanctioned it. See id. at 103-06, 116. The third justification was related to the business of the Civil Service Commission, but the regulation was an unacceptable means of promoting that goal because (1) the Commission had never made "any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value to the service of enlarging the pool of eligible employees on the other," id. at 115; (2) there was no showing that a narrower exclusionary rule would be onerous to establish or administer, id.; and (3) under "[a]ny fair balancing" the individual interests of the aliens and the public interest "in avoiding the wholesale deprivation of employment opportunities" outweighed the government's interest in administrative convenience, id. at 115-16. Thus, even "assuming without deciding" that Congress or the President constitutionally could have adopted the rule, the Court found it violative of due process. See id. at 116-17. President Ford subsequently issued an executive order reinstating the rule, and the lower courts upheld it. See Mow Sun Wong v. Hampton, 626 F.2d 739 (9th Cir. 1980), cert. denied, 450 U.S. 959 (1981).

Hampton in many ways fits the "remand to the legislature" theory espoused in one form or another by a distinguished group of commentators. See supra note 17. To implement the legislative remand approach, the Court in Hampton, as Justice Rehnquist in dissent noted, "meld[ed] together the concepts of equal protection and procedural and substantive due process," 426 U.S. at 119 (Rehnquist, J., dissenting), and used "a novel conception . . . of procedural due process . . . to evolve a doctrine of delegation of legislative authority." Id. at 117 (Rehnquist, J., dissenting). The utility of the remand in Hampton is discussed infra note 280.


246. American Indian law cases are another prime example. Long-standing precedent establishes a trust relationship between the federal government and the tribes. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-52 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 589-92 (1823). The federal government has vast legislative power over Native Americans, but the states have minimal legislative power absent an express delegation of authority from Congress, and the tribal governments retain a right of self-determination consistent with federal law. See generally Felix S. Cohen's Handbook on American Indian Law 207-572 (1982). The means and ends of federal legislation relating to Indians are subjected to extraordinarily minimal scrutiny. See Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84-85 (1977). The Supreme Court, however, has endorsed a variety of canons of interpretation that, absent express congressional intent to the contrary, promote statutory and treaty interpretation favorable to the tribes. See, e.g., United States v. Dion, 106 S. Ct. 2216, 2219-20 (1986) (requiring "clear and plain" evidence of congressional intention to abrogate Indian treaty rights to hunt bald eagles). See generally Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?, 63 CALIF. L. REV. 601, 617-20 (1975) (arguing that the Court has treated the construction of Indian treaties like the construction of adhesion contracts in that they are liberally construed in favor of the weaker party). Thus, in general, tribal sovereignty may be invaded only by Congress, not by the states, and even then only when Congress has clearly evidenced intent to do so.

The Court's affirmative action decisions also sometimes focus on the legitimacy of the governmental entity that formulated the policy in question. See Fullilove v. Klutznick, 448 U.S. 448, 472-73, 480, 483-84 (1980) (plurality opinion of Burger, C.J.) (deferring to an affirmative action program adopted by Congress); id. at 497-502, 508-10, 515 n.14, 516 (Powell, J., concurring) (suggesting that Congress has more authority to adopt affirmative action measures than other decisionmakers, including the state legislatures); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307-10 (1978) (opinion of Powell, J.) (concluding that a medical school faculty was an inappropriate body to adopt a plan for affirmative action in admission to the school). See generally McCormack, Race and Politics in the Supreme Court: Bakke to Basics, 1979 UTAH L. REV. 491, 519 (suggesting that the amount of deference the Court gives to the governmental entity depends on the entity's "breath of constituency" and its "position within the hierarchy of the overall governmental structure"); Tribe, Perspectives on Bakke, supra note 239, at 873-77 (discussing how the Bakke decision indicates a
cern in this Article is with the control of legislative decision making, these cases are not directly apposite. They are significant, however, as reflections of the growing judicial awareness of the existence of alternatives to traditional substantive review. Another line of opinions relates to the quality of legislative consideration surrounding the passage of legislation. These opinions suggest that, at least in some areas, legislative decisions will be upheld only if they reflect true deliberation.247

These forms of structural review are innovative. Neither their limits nor their ultimate judicial acceptance is certain.248 For example, it is not yet clear whether a showing of deliberation should be a general constitutional requirement, or instead should apply only to decisions that are in some sense constitutionally suspect. The cases suggest the narrower of these views.249 Moreover, the critical question remains whether either of

heightened judicial focus on the constitutionality of the process and structure through which policies are formed and applied; Note, Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans, 53 U. CHI. L. REV. 581, 598-602 (1986) (discussing Justice Powell's requirement of "competence" on the part of the institution that has adopted an affirmative action plan). But compare Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986), in which those Justices voting to strike down the plan requiring affirmative action in layoffs gave little overt consideration to the legitimacy of the governmental entity that formulated the plan. See generally Note, supra, at 589, 591-92 (discussing Wygant from the perspective of institutional competence).

247. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 72-83 (1981) (upholding the exclusion of women from military registration because, inter alia, Congress deliberated on the issue); Fullilove, 448 U.S. at 456-67, 477-78, 490 (plurality opinion of Burger, C.J.) (embracing a similar rationale in upholding federal affirmative action legislation); id. at 548-54 (Stevens, J., dissenting) (questioning whether Congress carefully considered the legislation in question); Califano v. Webster, 430 U.S. 313, 317-21 (1977) (per curiam) (upholding a gender classification that advantaged women and that was adopted by Congress deliberately as compensation for past discrimination against women); Delaware Tribal Business Comm., 430 U.S. at 92-98 (Stevens, J., dissenting) (concluding that a federal statute providing compensation to certain, but not all, Delaware Indians was the result of Congressional mistake, not deliberation); Schlesinger v. Ballard, 419 U.S. 498, 508-10 & n.12 (1975) (upholding a gender classification benefiting female officers in the Navy that was adopted by Congress in recognition of the fact that women have less opportunity for promotion than male officers). Occasionally, a Justice dissenting from a decision invalidating a public policy will justify the policy in part by asserting that it was the product of appropriate deliberation. See, e.g., Wygant., 106 S. Ct. at 1869-70 & n.10 (Stevens, J., dissenting); Shapiro v. Thompson, 394 U.S. 618, 674 (1969) (Harlan, J., dissenting). On Justice Stevens' special concern about legislative deliberation, see Comment, The Emerging Constitutional Jurisprudence of Justice Stevens, 46 U. CHI. L. REV. 155, 217-32 (1978).

This approach is somewhat similar to the "articulated purpose" requirement for equal protection proposed by Gunther. See Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 20-48 (1972); see also Sunstein, supra note 8, at 69-72 (suggesting a strengthened rationality requirement in judicial review that would inquire into whether legislators based disparate treatment on some conception of the public interest rather than on a response to purely factional pressure). Trenchant criticisms of this suggestion include R. Posner, Economic Analysis of Law 586-87 (3d ed. 1986); Linde, supra note 240, at 222-35 (suggesting that the legislative process falls far short of the deliberative search for ends and the informal assessment of ends postulated by the deliberative model).

248. See generally Tushnet, supra note 241, at 821-28 (offering a sweeping attack of structural review as a constitutional theory).

249. Of the cases discussed supra note 247, Rostker, Webster, and Ballard dealt with gender discrimination, Fullilove with affirmative action, and Weeks with discrimination among American Indians.
these approaches can be traced fairly to constitutional constraints on legislative and executive lawmaking. A discussion of these broader issues would take us far afield. Suffice it to say, however, that in our view due process of lawmaking is sufficiently tied to constitutional structure, to the Madisonian constitutional ideal of deliberative legislative policymaking, and perhaps even to the federal common law to justify its continued use in constitutional adjudication.

Although these forms of procedural review are promising, they may not be very effective in dealing with the problem of special interest influence on legislation. The "appropriate decision maker" model can help shunt decisions to the legislature, but can do little to affect their disposition by the legislature itself. The deliberation approach sometimes may be useful in screening out "backroom deals," but it can be evaded by sophisticated legislators who are savvy enough to construct an appropriate legislative history.

More generally, the legislative deliberation model may reflect an excessively tidy view of legislation. Consider Fullilove again. The minority business quota adopted in that case can be seen as resulting from an abuse of the legislative process, an effort by a legislative bloc to obtain spoils by inserting a last minute floor amendment in a pork-barrel bill that was already "greased to go." Another plausible story, however, explains the set-aside provision as an attempt to insure the fair distribution of the benefits of a Keynesian spending measure. If adopted, a model

250. See C. Black, supra note 241.
251. See Sunstein, supra note 8, at 68-85 (arguing for a Madisonian Republicanism in part through a strengthened rationality requirement, closer scrutiny of the relationship between statutory outcomes and private power, and heightened review of agency decisions to ensure that they reflect adequate deliberation).
252. See Monaghan, supra note 241, at 2-3 (arguing that much of constitutional interpretation is best understood as a "substructure of substantive, procedural, and remedial rules drawing their inspiration from, but not required by, various constitutional provisions").
253. It should not be overlooked, however, that merely shifting the burden of inertia in the policymaking process itself can be significant. For example, if Native Americans are able to obtain judicial relief against proposed executive branch action that would disadvantage them on the ground that federal deprivation of Indian interests requires express congressional approval, see supra note 246, then proponents of the executive-branch proposal must bear the burden of lobbying Congress to adopt legislation expressly allowing that action. Because it is easier for an interest group to block legislation than to obtain its passage, see supra text accompanying note 81, and because Native Americans have organized and lobbied Congress rather effectively in recent times, see C. Wilkinson, American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy 82-83 (1987), Native Americans may stand a good chance of preventing congressional approval of the action. In this fashion, judicial use of due process of lawmaking techniques, although in theory only resulting in a "suspensive veto" that leaves open the possibility of reinstatement of the invalidated policy, may as a practical matter result in a policy's ultimate demise.
255. See Brief for the Secretary of Commerce at 26-51, Fullilove (No. 78-1007); Brief of the NAACP Legal Defense and Educational Fund, Inc., as Amici Curiae at 15-30, Fullilove (No. 78-1007). The provision at issue in Fullilove was adopted in the 1977 amendments to a 1976 public
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of legislative deliberation would have required, at a minimum, that Congress reopen committee hearings to consider the desirability of a set-aside provision. In addition to delaying legislation for which time was of the essence, this requirement might have enhanced legislative consideration only marginally. As the Chief Justice’s opinion in *Fullilove* reveals, in the 1970s Congress had been presented with substantial information from which it reasonably could have concluded that some sort of set-aside was appropriate.\(^{256}\)

Despite its weaknesses, the legislative deliberation model sometimes may be useful. The prima facie unconstitutionality of some classes of legislation should be rebuttable, if at all, only by clear and persuasive congressional deliberation. At least, if evidence establishes that Congress did not make a deliberate choice, otherwise “suspect” legislation should receive even less judicial deference. Thus, at the constitutional margin, this model may be useful.\(^{257}\) As an overall principle of judicial review,

works legislation. According to the briefs cited above, the 1976 act can be conceptualized not as mere pork-barrel spoils, but as a curative measure attacking the recession of that era, which featured high unemployment in the construction industry. The 1977 amendments initially were proposed to pump additional money into the struggling economy, and from the outset supporters urged quick adoption of the amendments so that the money would be spent while the economy was stagnant, not later when, if the economy heated up, the appropriations would have the unintended effect of refueling inflation. The limited information available at the close of the committee consideration of the 1977 amendments suggested that, although unemployment was far higher for minorities than for whites, contracting under the 1976 program had been distributed in a manner disproportionally disadvantaging minorities. One black Congressman, testifying on the last day of committee hearings, noted this newly documented problem, suggested its linkage to historical discrimination in the construction industry, and announced his intent to review the matter.


256. See *Fullilove*, 448 U.S. at 456-72; *see also* Days, *Fullilove*, 96 YALE L.J. 453, 463-65 (1987) (reviewing the legislative history); Brief for the Secretary of Commerce at 32-43, *Fullilove* (No. 78-1007) (arguing that Congress had fully studied the problems of minority owned enterprises before enacting the legislation and outlining the hearings and studies undertaken in the ten years prior to enactment relating to similar issues); Brief for the Lawyers’ Committee for Civil Rights Under Law as Amicus Curiae at 27-69, *Fullilove* (No. 78-1007) (arguing that Congress and the Executive had studied discrimination against minority owned businesses and the effectiveness of various remedial strategies). The legislative deliberation model might require Congress not only to compile an adequate record by having committee staff aggregate this diverse collection of documents, but also to insert planned colloquies and other boilerplate language in hearings. Neither requirement would advance public policy substantially, and both would have potentially severe costs on legislative practice, including rendering suspect any floor amendments that differed from the compiled legislative record but nonetheless were required for political compromise or suggested by new evidence.

257. In an interesting recent article, Drew Days III, who successfully argued *Fullilove* on behalf of the government, has expressed grave concern about the lack of a record of congressional deliberation concerning the minority set-aside statute upheld in that case. *See Days, supra* note 256, at 456. Professor Days makes clear that he considers *Fullilove* correctly decided, *see id.* at 455, but he asserts that the “six to three vote in favor of the provision does not reflect adequately the closeness of the
however, it is insufficiently sensitive to institutional reality. If due process of lawmaking is to fulfill its promise, another, complementary approach is also necessary.

D. Procedural Regularity

Another model of due process of lawmaking is more promising as a control on special interests. This model focuses on legislative procedural regularity rather than on institutional legitimacy or deliberation.\textsuperscript{258} Under this approach, courts merely would require legislatures to adhere to established procedures. Absent compelling circumstances or express constitutional requirements, respect for a coordinate branch at the federal level has inhibited judicial intrusion into congressional processes. The Court, however, has occasionally invalidated actions taken by Congress without clear compliance with its own procedural rules.\textsuperscript{259} In addition, federal judges sometimes favor the statutory constructions most consistent with relevant legislative procedural rules.\textsuperscript{260}

Although the Constitution is less specific about legislative proce-
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duress than many of its state counterparts, it does place some restrictions on the ways in which legislation can be created. In particular, it requires bicameral action with an opportunity for presidential veto. In two recent cases, the Court has enforced these requirements stringently. *INS v. Chadha* struck down the legislative veto, and *Bowsher v. Synar* prevented Congress from delegating its budget-making authority to the Comptroller General. The effect of both rulings was to require the observance of constitutionally mandated procedures that encourage bifurcated congressional deliberation, the opportunity for a suspensive presidential veto, and ultimate congressional authority. Public choice theory suggests that such strict adherence to a preordained lawmaking format generally reduces both the opportunities for strategic behavior on the part of legislators and the influence of interest groups.

261. See infra text accompanying notes 267-77.  
263. 106 S. Ct. 3181 (1986).  
264. As the Court said in *Chadha*:  

[T]he Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. 462 U.S. at 951.  
265. See supra notes 177-80 and accompanying text.  
266. Harold Bruff has explained that the federal legislative veto subverted primary controls on the fairness of legislation in two ways. The first was to vitiate the effectiveness of the bicameralism and presentment requirements in raising the size of coalitions needed for collective choice. Retention of veto authority systematically favored interest groups having advantages in one or both houses of Congress because of their distribution throughout the nation. Second, the veto device allowed Congress to select its decision rule at the operational stage of policymaking rather than at the constitutional stage. A check on the fairness of selecting decision rules is the difficulty of determining who will profit from their later use in specific cases. Yet at the operational stage it is much easier to predict the winners and losers from a change in the decision rules.  

Bruff, supra note 52, at 221. Other commentary further supports the notion that the federal legislative veto promoted ill-formed and politically unaccountable public policy. See, e.g., B. CRAIG, THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION 123-28, 132-36 (1983) (noting that the legislative veto has resulted in a shift toward more closed decision making, committee and staff power aggrandizement, and agency inefficiency, and that the veto makes judicial review difficult); Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 HARV. L. REV. 1369, 1409-23 (1977) (concluding that uses of the legislative veto have resulted in variances in negotiation, interest group influence, degree of congressional review, political accountability, and the traditional relationship between Congress and other federal agencies); Frickey, The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota, 70 MINN. L. REV. 1237, 1240-46, 1259-67 (1986) (arguing that one common form of state legislative veto is subject to similar criticism).  

Justice Stevens, writing separately in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), most clearly articulated these concerns in the context of the Comptroller General's delegated budget-making authority. See id. at 3202-05 (Stevens, J., concurring in the judgment). Stevens stated: "I have previously noted my concern about the need for a 'due process of lawmaking' even when Congress has
The model of legislative procedural regularity is better established at the state than the federal level. State constitutions routinely place detailed limitations on legislative procedure. In reviewing whether legislation was validly enacted, some state supreme courts will not look beyond the enrolled bill, although others will also examine the legislative journals. State constitutions commonly limit legislative sessions to specified periods, and some state supreme courts will invalidate legislation passed outside the constitutional time limitations, even if that defect is shown only by evidence extrinsic to the enrolled bill and the legislative journals.

One legislative rule that appears inconsequential on its face, but whose significance is shown by public choice theory, is the common state constitutional requirement that legislation may embrace only one subject, which must be expressed in its title. This rule is designed to limit logrolling, to avoid the passage of legislation containing material unnoticed by legislators, and to protect the governor's veto power from the resulting dilution if irrelevant riders are attached to legislation favored by the executive. The problem of the omnibus bill that contains heterogeneous matter was recognized as long ago as Roman times. Beginning in 1818, state constitutions began to impose the requirement of unity of subject. Many state courts construe the single-subject rule flexibly to avoid undue interference with legislative processes. Yet the

acted with bicameralism and presentment. When a legislature's agent is given powers to act without even the formalities of the legislative process, these concerns are especially prominent." Id. at 3204-05 (citations omitted).


268. See generally 1 SUTHERLAND STATUTORY CONSTRUCTION § 15.01-18 (N. Singer 4th ed. 1985) (providing an an overview of the "enrolled bill" and "journal entry" rules).


271. See supra text accompanying notes 177-80.

272. See generally 1A SUTHERLAND STATUTORY CONSTRUCTION, supra note 268, §§ 7.01-06 (summarizing state constitutional provisions on the unity of subject matter and the decisions thereunder).


274. Ruud, supra note 273, at 389.

275. See id. at 389-90.

purposes of the rule are worthy, and the rule should be more vigorously enforced. Enforcement of the rule is particularly appropriate when substantive riders have been attached to appropriations legislation.277

In discussing various models of structural review, we have focused primarily on the specific advantages and disadvantages of each model. One general issue concerning structural review requires discussion here. Some commentators question whether any form of structural review can affect the ultimate legislative decision.278 Pluralists, too, might suggest that the legislative process is too mechanical for "legislative remands" to be effective. The question, then, is whether structural review is futile.

We think these commentators have underestimated the usefulness of structural review. As Part III has demonstrated, Congress is not merely the reflection of private political power. Faith in deliberative congressional resolution of sensitive issues is not entirely misplaced, particularly when courts assist the deliberative process through structural and procedural review. To be sure, judicial invalidation under this approach constitutes only a suspensive veto. Yet even that shifts the burden of inertia to those seeking to reimpose the invalidated decision, highlights the perceived unfairness of the decision, and, because of the passage of time, often presents the issue to a legislature constituted somewhat differently from the one that made the original decision. Considering the ease of killing legislation and the difficulty of passing it,279 these consequences of a suspensive veto are significant.

Although the remand in Hampton did not affect the ultimate outcome,280 a more successful example of a suspensive judicial veto exists.

777, 783-85 (Minn. 1986) (concurring opinion) (urging enforcement of the single-subject rule). Other recent examples of relaxed enforcement include Dague v. Piper Aircraft Corp., 275 Ind. 520, 523, 418 N.E.2d 207, 214 (1981) (validating a products liability act passed as one part of a twenty-eight part revision of the operation and jurisdiction of the state's courts); Wass v. Anderson, 312 Minn. 394, 397-99, 252 N.W.2d 131, 134-35 (1977) (upholding a wide variety of measures, including a constitutional amendment, all passed under the general subject matter heading of transportation). For an argument for flexible interpretation of the single-subject rule even in the context of direct democracy, see Lowenstein, California Initiatives and the Single-Subject Rule, 30 UCLA L. REV. 936 (1983).

277. For a good discussion, see Department of Educ. v. Lewis, 416 So. 2d 455, 459-61 (Fla. 1982) (striking a provision in an appropriations bill as an attempt to change substantive law not directly and rationally related to the subject of the appropriations).

278. See, e.g., Tushnet, supra note 241, at 826-28 (suggesting that structural review cannot serve as a theory of constitutional law because it would require a judicialized legislature in which interests are openly articulated and balanced against each other).

279. See supra text accompanying note 81.

280. See supra note 245. Indeed, in an unpublished manuscript, T. Alexander Aleinikoff has demonstrated that President Ford apparently gave little thoughtful reconsideration before he in effect overruled Hampton by executive order. Professor Aleinikoff's discussion is summarized in W. Eskridge & P. Frickey, supra note 105, at 421-23. We are indebted to Professor Aleinikoff for sharing his information and analysis with us.
In *Kent v. Dulles*,\(^n\) the Supreme Court held that the executive branch lacked the authority to deny passports to "subversives" without express congressional authorization.\(^m\) President Eisenhower immediately urged Congress to supply such authorization. "It is essential," he said, "that the Government today have power to deny passports where their possessions . . . would be inimical to the security of the United States."\(^n\) Each day and week that passes [without such legislation] exposes us to great danger."\(^i\) Despite continued pressure from the White House, however, Congress refused to enact even a limited form of the legislation the President sought.\(^h\) Thus, the Court's suspensive veto ended a widespread and pernicious governmental attempt to control foreign travel.\(^i\)

Although "due process of lawmaking" deserves further judicial development, we have not attempted to sketch even the outlines of a complete theory of legislative due process. First, the topic of legislative process involves concerns far beyond those of special interest groups, on which this Article focuses. For example, the "appropriate decision maker" model is quite promising in other contexts but largely irrelevant to controlling interest group influence on legislation. A complete theory also would have to consider the relationship between legislative process and substantive constitutional guarantees, as well as the problem of discrete and insular minorities.\(^i\) Second, providing a complete general theory would be largely futile. If some aspects of due process of lawmaking become established methods of judicial review, it will surely be through a case-by-case, largely inductive process akin to the traditional common law method. This method of constructing a durable legal theory is ordinarily superior to creating abstract, general theories of public law based on fragile and facile generalizations about public life.

V. Conclusion

This Article has focused on three related questions: whether legislators are simply tools of special interests; whether they are ever motivated by their own views of the public interest; and whether legislatures can formulate intelligible public policies. Given the pivotal role of legislation

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\(^{281}\) 357 U.S. 116 (1958).

\(^{282}\) Id. at 120-30.

\(^{283}\) 104 CONG. REC. 13046 (1958).

\(^{284}\) Id.


\(^{286}\) See id. at 278-82.

\(^{287}\) See generally Ackerman, *supra* note 52 (discussing the relationship between the legislative process and substantive constitutional guarantees).
in modern law, answers to these questions are crucial. Contemporary legal scholarship is haunted by the idea that statutes are nothing more than deals between contending interest groups.

Based on our examination of the social science literature, we believe this fear is exaggerated. Indeed, we were somewhat surprised by the strong empirical evidence indicating that many members of Congress do indeed care about the public interest and act accordingly. Perhaps our surprise is more a tribute to our initial cynicism than to the depth of congressional public spiritedness. Nevertheless, we suspect that our initial suspicions about politicians were widely shared, and that many readers are equally surprised by the empirical evidence.

The empirical evidence, however, clearly does not support a sanguine view of the legislative process. Although the public interest is indeed a factor, so too are the efforts of numerous interest groups. These interest groups threaten to push the political process in the direction of a self-interested search for economic gain. Increasing public awareness of the significance of interest groups may become the basis for constructive political action against them, but also may trigger a widespread cynicism destructive of the democratic process.

Unlike some other scholars, we do not believe that courts can systematically combat the efforts of interest groups by heightened scrutiny of legislation. The difference between a special interest lobbyist and a public interest advocate, like the difference between a private interest and a public value, is itself at the heart of many political disputes. Moreover, judges are simply unable to make principled distinctions in particular cases between the "public interest" and merely private interests. In addition, the social science literature indicates that it is extremely difficult to determine the effect of particular interest groups on legislative outcomes.

Nevertheless, despite the difficulty of drawing the distinction in particular cases, special interest groups undoubtedly wield too much collective influence in the legislative process. Two judicial courses could ameliorate the problem. Besides exercising a more lenient judicial attitude toward legislation regulating campaign financing, courts should promote deliberation and procedural regularity in legislatures.288

288. We have not attempted an exhaustive survey of legal doctrines affecting the influence of special interests. We agree with Professor Macey, for example, that certain approaches to statutory construction discourage special interest legislation. See Macey, supra note 4, at 250-51. No doubt many areas of administrative law can be usefully understood from this perspective. For an insightful discussion, see Sunstein, supra note 53, at 277-87 (discussing recent trends in administrative law that reduce the risks of self-interested representation and of factional control over governmental processes). In these areas and others, useful analysis can be based only on a clear understanding of the political role of special interests.
The problem of special interest groups will not be solved easily. Our proposals do not provide a panacea. Reassuringly, however, these legal remedies discussed above do not function in a vacuum. The law professor's usual fascination with legal remedies should not obscure another, probably more important, avenue of relief. The social science literature suggests that ideology plays an important role in the political process; thus, neither voters nor legislators are wholly captives of self-interest. Ultimately, a political assault on special interest legislation may be the most effective, if also the most arduous, means of attacking the problem. After all, "capture theory" itself contributed to the important deregulation efforts of the past decade.289

Although our primary focus has been on special interests, their influence is only one of the causes of malfunctions in the legislative process. We also have addressed, somewhat tentatively, the larger question of how courts can foster the legislature's ability to create public policy. Although still developing, "due process of lawmaking" has the potential to strengthen the democratic process.

In analyzing these problems, we have not tried to formulate a grand theory of the legislative process or a global theory of judicial review. Rather, we have attempted to build from existing case law, using the social science literature to illuminate the underlying legislative realities.

We have also tried to avoid what Mark Tushnet has aptly called "the 'lawyer as astrophysicist' assumption, namely, that the generalist training of lawyers allows any lawyer to read a text on astrophysics over the weekend and launch a rocket on Monday."290 Use of interdisciplinary materials poses obvious dangers, but it is senseless to analyze the role of interest groups in public law while ignoring the views of the best qualified investigators of the legislative process. The alternative to the "lawyer as astrophysicist" is sometimes the "lawyer as astrologer," clinging to outmoded notions while ignoring contemporary knowledge.

The danger of using learning from other disciplines is greatest when a scholar proposes a grand legal theory, taking the latest fashionable po-

289. See M. OLSON, supra note 196, at 236-37. As Kau, Kennan, and Rubin state, "The importance of ideology indicates that economists can have a significant impact on the political process in their roles as teachers and researchers." Kau, Kennon & Rubin, supra note 118, at 289; see also J. KAU & P. RUBIN, supra note 156, at 28-30 (making a similar point); J. KINGDON, supra note 105, at 57-61 (discussing the significant influence of academics and consultants in the formulation of governmental policy). Peltzman also has noted the potential impact of academic writings on airline deregulation. See Peltzman, Current Developments in the Economics of Regulation, in STUDIES IN PUBLIC REGULATION 372, 382-83 (G. Fromm ed. 1981). Perhaps even mere law professors can have an effect, implausible as that may seem.

sition in another field as revealed truth, which then suffices to resolve every controversial legal issue. We have minimized the danger by using the social science literature cautiously. On the whole, like Dean Calabresi, we believe that the common-law style of building mid-level theories from the results of individual cases has considerable merit. In the course of building these theories, reference to the work of social scientists is useful but provides few definitive answers.

Apart from these methodological points, our primary conclusion is that reports of the death of “the public interest” are greatly exaggerated. Although beleaguered, the public interest remains a significant factor in politics. Thus, public law theory must learn to be realistic without being cynical.


292. Although we have not discussed it here, another body of public law literature has erred in the opposite direction from public choice theory. Some recent commentators seem to take an unrealistically glorified view of politics. See Farber, From Plastic Trees to Arrow’s Theorem, supra note 175, at 342-44.