Daniel A. Farber
and Philip P. Frickey

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To my parents

DAF

To my father
and the memory of my mother

PPF

CONTENTS

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Some portions of this book appeared in different form in three articles of ours: *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 874 (1987); *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 Tex. L. Rev. 993 (1988); and *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423 (1988). Much smaller fragments of the book have appeared in different form as parts of three articles by Daniel Farber: *Democracy and Disgust: A Comment on Public Choice*, 65 Chi.-Kent L. Rev. 161 (1989); *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281 (1989); and *Review Essay: Environmentalism, Economics and the Public Interest*, 41 Stan. L. Rev. 1021 (1989).

INTRODUCTION

Traditionally, law has been divided into two subfields: private law, which involves private transactions such as contracts, wills, and deeds; and public law, which involves broad issues of public policy. This dichotomy needs to be taken with a grain of salt because the two categories are hardly airtight: contract law, for example, involves public policy issues relating to consumer protection. Still, even today, there is a noticeable difference between the law of wills, which is mostly concerned with helping individuals plan their estates, and discrimination law, which is intended to change rather than facilitate private conduct.

The focus of public law is legislation. Constitutional law studies the limits on legislative power; administrative law studies how statutes are implemented by agencies; fields like discrimination law and environmental law focus on how to apply particular federal statutes. Yet, even though legislation is central to public law, legal scholars have only recently begun to devote serious attention to the legislative process. This book is intended to help fill that gap, by considering how some of the "new learning" from the social sciences can illuminate issues of public law.

If we are to understand how legislation is involved in making public policy, we cannot simply take for granted that the legislature represents the public interest. Realistically, we must also consider the possibility that a statute represents private rather than public interests, because of the undue influence of special interest groups. Alternatively, a statute may fail to represent any identifiable "public" interest because the public itself is too fragmented to generate any coherent public policy. These questions have been the focus of a body of work by economists and political scientists often labeled as public choice.

Public choice theory is a hybrid: the application of the economist's methods to the political scientist's subject. For many people, it was a relatively obscure field until 1986, when James Buchanan was awarded the Nobel prize in economics for his work on public choice. Most people—including many legal scholars—had never heard of public choice before the Buchanan prize. Most of what they then heard seemed dismaying: a cynical portrayal of politics of the kind one would expect from practitioners of the "dismal science" of economics.

Cynicism about politics is not new in American life. It was many years ago that Mark Twain referred to members of Congress as the only truly

native class of American criminals. But Twain did not buttress his remarks with masses of equations, nor did James Buchanan seem to have a Twainian twinkle in his eye. Unlike Twain's, the observations of the public choice theorists seemed deadly serious. Of course, many public choice scholars rightly contend that their purpose, far from being cynical, is merely to describe dispassionately the operation of the political process. Normative judgments are for others.[1] Yet, if their descriptions of politics are correct, certain normative conclusions seem inevitable, and those conclusions are generally not happy ones.

The initial response to public choice by even the intellectually sophisticated was typified by Abner Mikva, one of the nation's leading federal appeals judges. Judge Mikva said he "found it hard to read or profit from the 'public choice' literature." Perhaps, he said, he was "still one of those naive citizens who believe that politics is on the square, that majorities in effect make policy in this country, and that out of the clash of partisan debate and frequent elections 'good' public policy decisions emerge." He added that not even five terms in that notorious den of inequity, the Illinois state legislature, had prepared him for the political villainy depicted in the public choice literature.[2]

Judge Mikva is not alone in finding the public choice literature unpalatable. At least on initial acquaintance with the public choice literature, the reader is likely to come away with a feeling of despair about the political process. Sometimes the legislature is portrayed as the playground of special interests, sometimes as a passive mirror of self-interested voters, sometimes as a slot machine whose outcomes are entirely unpredictable. These images are hardly calculated to evoke respect for democracy.[3]

1. Although this dichotomy between normative and "positive" theory is conventional among social scientists, it is not universal. Buchanan, for example, views the two as closely connected. *See* Buchanan, *Richard Musgrave, Public Finance, and Public Choice*, 61 PUB. CHOICE 289, 290 (1989).

2. Mikva, *Foreword to Symposium on The Theory of Public Choice*, 74 VA. L. REV. 167, 167 (1988).

3. When we say that this image is conveyed by some of the public choice literature, we do not mean that any one writer explicitly endorses all aspects of this view of politics. Any given public choice theorist would undoubtedly introduce qualifications and exceptions to this description of politics. Rather, this view is the common core of much of the writing on public choice as it existed, say, about ten years ago.

The legal scholar who comes closest to adopting this view outright is Judge Frank Easterbrook. He has argued, for example, that because it relies on majority voting, the Supreme Court's opinions will necessarily be incoherent, Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 811–32 (1982); that legislative outcomes are likely to be either incoherent or the result of arbitrary agendas, Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983); and that much legislation purporting to reflect the public interest is in fact the product of special interest groups, Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15–18 (1984).

Judge Mikva's ire was aroused not only by the content of public choice theory but also by its mathematical style. Mathematics, he said, "has always held a strong allure for many social scientists," but "[d]espite its seductiveness . . . the postulates of mathematics usually provide only fools' gold for human problems."[4] In short, he concluded, public choice might aptly describe the behavior of computers but not of the flesh-and-blood politicians who make our laws.[5]

Mikva's irritation is all the more impressive because of its context. He was writing the introduction to a symposium on law and public choice, yet his message seemed to be that the symposium was a waste of paper because its subject matter was intellectually (if not morally) bankrupt.

As the very existence of this book makes clear, we disagree with Judge Mikva's preemptory dismissal of public choice. But his assessment of public choice, while hostile, is not without basis. As he says, much of public choice theory is forbiddingly abstract and mathematical, seemingly far removed from the emotions, ideologies, and personalities that dominate the political news. There is also a basis for Mikva's charge of cynicism: public choice theorists often *have* taken a rather jaundiced view of democracy. In one of the contributions to the same symposium, William Riker (a political scientist) and Barry Weingast (an economist) made several observations about democratic politics. The legislator, they said, is "a placeholder opportunistically building up an ad hoc majority for the next election."[6] Moreover, there is a "fundamental inescapable arbitrariness to majority rule."[7] The decisions of legislatures are "determined mainly by the *agenda*, and related institutions, by which legislative leaders determine the order in which the alternatives arise for a vote."[8] In short, they say, "the notion of a 'will of the people' has no meaning."[9]

Most of our readers probably do not regard this as an accurate portrayal of American government. Why, then, is public choice worth serious attention? There are at least five reasons.

First, the questions raised by public choice are critically important. If Riker and Weingast are accurate in their portrayal of democracy, then the rest of us have been far too sanguine in our attitude toward the political process. If majority rule is a sham behind which self-seeking agenda setters dictate the content of legislation, then we must question whether democracy itself has any inherent worth. It is tempting simply to brush these questions aside,

4. Mikva, *supra* note 2, at 176.

5. *Id.* at 177.

6. Riker & Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislators*, 74 VA. L. REV. 373, 396 (1988).

7. *Id.* at 374.

8. *Id.* at 385 (emphasis in original).

9. *Id.* at 395.

as Judge Mikva does. But public choice scholars can claim support in a mass of empirical studies, as well as in sophisticated mathematical models. Given the seriousness of the issues at stake and the substantial support mustered by public choice scholars, their views of government deserve careful consideration.

Second, even if views like those of Riker and Weingast do not fully capture the realities of government, they may still represent some important tendencies. All legislators may not be self-seeking, all legislative decisions may not be arbitrary—but in designing governmental institutions, we need to take these possibilities into account. Perhaps we can design legal doctrines that will encourage legislators to rise above special interests or rules that can make legislative outcomes more principled. So, for example, public choice may be relevant to current disputes about election financing or to judicial rulings about legislative procedures.

Third, public choice deserves attention because it has already begun to have an important influence on the law. Several influential judges—most notably Justice Scalia on the Supreme Court and Judge Frank Easterbrook on the U.S. Court of Appeals for the Seventh Circuit—have drawn on public choice insights in their own writings. Both judges have strongly criticized current methods of interpreting key federal statutes. They argue that judges should cease looking for the "legislative intent" behind a statute, either because legislation is mindless or because legislative records are deliberately distorted. Under the influence of public choice, other important legal scholars have called for radical changes in constitutional doctrine in order to limit economic regulation. Some of these scholars have sought to undo the New Deal and make deregulation a matter of constitutional law. To ignore public choice is to leave the intellectual battleground in possession of these scholars.

Even if highly pessimistic assumptions about the political process do not lead directly to new legal doctrines, accepting these premises could not help but affect the judicial function. Knowing that legislative actions are generally either self-serving or random might not convey a new intellectual direction to public law, but this knowledge would be bound to have a dispiriting effect. How can a judge take seriously the job of interpreting legislation while believing that the legislature is morally bankrupt? How willingly would judges leave policy decisions to a Congress they believed to be mindless or indifferent to the public interest? If we come to accept this nihilistic vision of politics, judges might still go through the motions of deference to legislatures, but they will surely find it hard to muster much enthusiasm for the task.

Fourth, in accusing public choice of caricaturing politics, Mikva himself presents a caricature of public choice. Mikva's charges against public choice do have a grain of truth, but he ignores may nuances. Like Riker and

Weingast, many public choice scholars do portray legislation as arbitrary and legislators as self-seeking. But this is only one segment of public choice scholarship. Other scholars have given more complex and balanced portraits of the political process. The most dramatic, stark versions of public choice have received the most publicity, but they are not necessarily the most useful or even the most representative of current work in the field.

Finally, even one-sided and simplistic theories have their uses. No theory can capture the richness and diversity of political institutions, but without a theory, we may be overwhelmed by fascinating facts and unable to orient ourselves. Just as even a crude, inaccurate map can provide a general orientation, even a badly flawed theory can provide some badly needed coherence. Public choice can at least provide us with some overall concept of the dynamics of democratic government. So long as we remember that the theory is incomplete, it can provide a useful framework for analysis. The danger lies only in confusing the map with the territory.

For all these reasons, public choice deserves to be taken seriously. In this book, we have attempted to offer a balanced appraisal of public choice and some of its implications for the American legal system. Although we are sharply critical of some portions of the public choice literature, the book is not intended as an exercise in debunking. Rather, we have attempted to assemble the most accurate possible picture of the dynamics of government decisionmaking. Only by getting a clear picture of how government works can we begin to think sensibly about how it should work.

We will begin in chapters 1 and 2 by surveying some of the findings of public choice theory. Chapter 1 deals with the role of interest groups, while chapter 2 covers more abstract studies of decisionmaking procedures. As legal scholars, we are most interested in, and therefore give the most attention to, those aspects of public choice theory with possible application to legal issues. The remainder of the book explores some of these applications. In chapter 3, we consider proposals that constitutional law be radically modified in light of public choice theory. Chapter 4 discusses the possible applications of public choice to problems of statutory interpretation. Chapter 5 then discusses other useful contributions of public choice to public law. Finally, in the Epilogue, we move away from the specific findings and premises of public choice to consider how some of its general implications might help judges in deciding difficult cases. At this point, we will no longer be dealing with a true "application" of public choice. Instead, we will use public choice, with its emphasis on the importance of institutional structures, as a source of inspiration for resolving some hard cases.

Our approach to public choice reflects our general views about the role of theory in law. For the past decade, legal scholarship has been dominated by the search for grand theory. In their search for the magic key that will unlock all the secrets of the legal system, scholars have turned to sources like public

choice theory, French literary theory, feminism, and microeconomics. This quest for abstract theory has taken many scholars increasingly far from the careful attention to particular cases which used to be the hallmark of legal scholarship. In our view, the pendulum has now gone too far toward abstract theory.

This book itself is proof that we take theory seriously and view it as important to law. But we also value the traditional attachment of legal scholars to "the particular." We have tried to balance our investigation of political theory with a pragmatic assessment of the implications of theory for particular cases. As pragmatists, we find theory usually helpful and sometimes enormously illuminating, but the limits of theory and the demands of the empirical must always be kept in mind. Jurisprudentially, then, we align ourselves with those who believe in "practical reason" or "legal pragmatism" as opposed to grand theory.

Even apart from our jurisprudential reservations, we believe that caution is required in applying public choice to actual legal problems. Public choice theory is far from mature. The application of economic methods to political questions already has proved fruitful, and we can expect further insights from this approach, but current formulations of public choice are still far from definitive. It is premature to draw firm conclusions about how public law should respond to public choice theory. But it is not too early, in our view, to begin the task of integrating public choice and public law.

One of the difficulties in seeking to link public law and public choice is that both are really labels for complex entities with rather unclear boundaries. Public law clearly encompasses constitutional law and general theories of statutory interpretation, but lawyers might disagree about whether income tax or antitrust law should be considered part of "public" law. Similarly, the term "public choice" may also suggest a greater degree of unity than actually exists. Under the rubric of public choice we will be discussing a variety of different approaches such as heuristic theories of legislative behavior, mathematical models of collective decision processes, and empirical studies of roll call votes, with little concern about defining the exact line between public choice and allied fields of economics and political science. Some of what we will have to say about public choice may apply more to the "Rochester School" than to the "Virginia School," or vice versa. Because this book is aimed at the general reader, we will not make fine distinctions between these various schools of thought.

Because public choice is a new field—and also because it straddles several disciplines—the definition of the field itself is hotly disputed. Some political scientists are understandably uncomfortable with a definition of public choice in terms of economic methodology. They might prefer to define it as the study of how governments supply "public goods" such as national defense or environmental protection. Consequently, they may also

be inclined to distinguish *public* choice form theories of *social* choice (the study of collective decisionmaking processes) and theories of *rational* choice (any analysis postulating that individuals act rationally to maximize their preferences). For other purposes, these are important distinctions. For purposes of this book, however, we have not found such line-drawing useful. We rely upon Dennis Mueller's definition of public choice "as the economic study of nonmarket decision making, or simply the application of economics to political science,"[10] a definition widely accepted in the legal literature.[11]

When we speak of the relationship between public law and public choice, then, we are really talking about several fields of law in which the role of legislatures is crucial, on the one hand, and several fields of scholarship that make use of economic methodology, on the other. At this relatively early stage of the interaction between public choice and public law, making these terms more precise would complicate the discussion to very little purpose. Our goal is not a detailed topographical map, but simply a guide—designed with the agenda of public law in mind—to some newly discovered, and as yet poorly explored, intellectual territory.

We will begin our examination of public choice by investigating the role of self-interest in politics. Some public choice models portray the political process as an arena of pure greed, in which self-interested voters, avaricious politicians, and self-seeking interest groups meet to do business. Much of the early public choice literature embraced this viewpoint. As we will see in chapter 1, however, recent scholarship gives us good grounds for rejecting this model of politics as informing the content of public law. To view politics as wholly deliberative would be quixotic, but there is (perhaps surprisingly) solid evidence that voters and politicians are actually motivated in part by factors other than greed. Careful statistical studies have shown that ideology—beliefs about the public interest—does indeed influence congressional votes.

If interest group theory suggests the possibility that legislation is likely to be malign, another branch of public choice theory suggests the equally unpleasant possibility that legislation is random and arbitrary. Building on Kenneth Arrow's pioneering work, theorists have shown that under plausible circumstances a majority can be led to adopt absolutely any possible decision. (Notably, these results do not depend on whether legislators are self-interested or motivated by ideology.) It was this body of work that Riker and Weingast relied on when they decried the arbitrariness of majority rule.

In chapter 2, however, we offer another perspective on this body of liter-

10. D. MUELLER, PUBLIC CHOICE II 1 (1989).

11. *See, e.g.*, Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 124 (1989); Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83, 85 n.4 (1989).

ature. It is true that majority rule, in and of itself, is not a sufficient basis for coherent decisionmaking. In our view, however, this finding does not debunk democracy, but instead shows that democracy rests on a much richer institutional basis than pure majoritarianism. Democracy simply cannot be reduced to the precept that whatever is preferred by "50 percent plus one" should be the law. No actual democracy works on this basis. All democracies use complex institutions such as political parties, committees, and procedural rules in order to implement some variety of majority rule. The real lesson of public choice theory is that these are not just accidental features of democratic government, but instead are basic to the whole enterprise. Our normative vision of democracy must reflect these institutional realities if our aspirations are to be anything more than quixotic fantasies.

At about the same time that public choice emerged as a major influence on legal theory, another political theory known as republicanism also became influential. Summarizing republicanism is no easy task, though we attempt a brief description in chapter 2. Superficially, the portrayal of government by republicanism is the antithesis of public choice. Republicanism praises legislatures as forums for public deliberation and civic virtue.[12] Public choice theory can be read to suggest that republicanism is false as a portrayal of the actual legislative process, and that as a normative vision it demands more of legislatures than they can possibly be expected to attain. Despite the apparent conflict between these two forms of political theory, we believe that there is a deeper connection between them. Properly understood, public choice theory can support the republican vision of deliberative democracy.

While chapters 1 and 2 reject the deep pessimism of some portions of the public choice literature, that literature does dramatically portray problems which are all too prevalent. The institutions necessary for legislative deliberation can easily break down, and special interest groups are eager to exploit their weaknesses. In the remainder of the book, we explore possible ways in which the legal system can combat the pathologies of the democratic process.

Some legal scholars have interpreted the implications of public choice as a basis for renewed judicial activism. If legislatures are at best erratic and at worst corrupt, let the judges make public policy. This has been the argument for resurrecting the judicial doctrines of the pre–New Deal Supreme Court, when the Court sought to protect property rights from government regulation. We are skeptical of this invitation to conservative activism. In chapter 3, we critique the arguments for reviving pre–New Deal judicial doctrines.

12. For a brief introduction to republicanism, see Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1989).

Our key criticism is that the difference between "bad" special interest legislation and "good" public interest laws is too subjective and political to form a sound basis for constitutional doctrine. Although these scholars are right to be concerned about special interest legislation, dramatically revamping constitutional law is not the answer.

We are also skeptical of proposals for a radical revision of methods of statutory interpretation. Justice Scalia and others have argued that courts should not concern themselves with legislative intent, in part because of public choice theory. We argue in chapter 4 that the idea of legislative intent remains tenable despite public choice theory, and that Scalia is too cynical in his views about the legislative process. In a constructive vein, we suggest a model of statutory interpretation which combines legal pragmatism with public choice methodology.

Legal pragmatism is also the key to the final chapter, in which we offer some new suggestions for modifying American public law in light of public choice and its allied disciplines. We do not advocate sweeping changes in public law. Rather, we think public choice will be most useful as a basis for incremental adjustments in the legal system. One area for reform is campaign finance, which we consider briefly. We also illustrate at some length how judges might use the insights of public choice in deciding specific cases.

In particular, we think courts need to be more sensitive to considerations of legislative structure and process. On the whole, courts generally have tended to consider the constitutionality of laws with little regard to when they were passed, by whom, or how. If there is one clear practical lesson from public choice, it is the importance of structure and process. Yet courts often ignore the setting of legislation. The same constitutional tests are applied to decrepit city ordinances as to modern congressional statutes. Using the Court's controversial sexual privacy decisions as an example, in an epilogue we show that greater sensitivity to structure and process could have led the Court to a much more satisfactory resolution of the cases, furthering democratic deliberation without imposing a judicial value judgment on the public. We certainly don't argue that public choice and its allied disciplines can "solve" the issues of abortion or gay rights. What the social sciences may be able to do, however, is to show courts how they can help the public come to grips with the issues better.

This book offers a guided tour of many aspects of public choice and some of their possible applications. It does not purport to give a grand theory, and such a theory would be inconsistent with our general philosophical views. On the other hand, there is a unifying perspective. For lack of a better description, we would like to call it a neo-Madisonian view of the political system.

Some aspects of Madison's thought closely tracked modern public choice theory.[13] Where modern theorists speak of interest groups, Madison spoke of factions. He was keenly aware of the threat that factions can pose in a democracy. In *The Federalist No. 10*, he said that the "latent causes of faction are thus sown in the nature of man," but "the most common and durable source of factions has been the various and unequal distribution of property." Like today's public choice theorists, Madison was also skeptical in *The Federalist No. 10* that the virtue of politicians would be a sufficient cure: "It is in vain to say that enlightened statement will be able to adjust these clashing interests, and render them all subservient to the public good." Instead, Madison sought institutional methods of controlling the influence of factions. As he explained in *The Federalist No. 51*, the system of checks and balances is intended to provide the institutional protections against factions and compensate for the possible inadequacies of civic virtue. "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." It is necessary, therefore, to "divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights."

Although he obviously had never heard of Arrow's Theorem, Madison anticipated the other major branch of public choice theory in his thoughts about legislative instability.[14] In *The Federalist No. 62*, he spoke of the "propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions" and the consequent need to control the "mutability in the public councils." Again, he sought a solution to instability through institutional arrangements, thereby anticipating the work of recent public choice theorists.

These elements of Madison's thought are echoed in modern public choice theory. But there is also a strongly republican tinge to his thought. Cass Sunstein has written at length about the role of legislative deliberation in Madison's political theory.[15] Madison's skepticism about human virtue is familiar fare. One of his best known statements (found in *The Federalist No. 51*) is that "[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." But he did not rely wholly on institutional protections. Unlike many of today's public choice theorists, he also understood the importance of civic virtue. As he said in *The Federalist No. 55:*

> As there is a degree of depravity in mankind which requires a certain degree of circumstances and distrust, so there are other

13. Some of the parallelisms between Madison and public choice theory are explored in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM (B. Grofman & D. Wittman eds. 1989).

14. *See* Mayton, *The Possibilities of Collective Choice*, 1986 DUKE L.J. 948, 953–54.

15. *See* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

> qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposed the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

Like Madison, we believe that no theory of government can ignore the powerful forces of individual self-interest and the critical role of institutional design. It is equally one-sided, however, to lose sight of the role of civic virtue. As Judge Mikva admitted, "Certainly, crooks have held public office." But the "biggest crook" Mikva had known in public life had a passion for protecting the interests of the elderly, though he had nothing to gain by doing so.[16]

In this book, we try to steer a middle course between cynicism and romanticism. Public choice theory can help us understand the all-too-real pathologies of government, and it is well to consider how best to avoid them. Just as in medicine, however, the most effective ways to treat the disease may rely on the patient's own strengths. Indeed, some important parts of our government structure can best be understood as part of the political "immune system," designed specifically to combat problems such as special interest influence and legislative incoherence. One of the most pressing problems now facing our legal system is how to strengthen this immune system, so that democratic government can realize its potentials rather than succumb to its pathologies.

16. Mikva, *supra* note 2, at 169.

ONE

Interest Groups and the Political Process

"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. In 1964, less than a third adopted the "interest group" theory of politics. By 1982, over sixty percent did.[1]

Not surprisingly, some legal scholars have also begun to adopt an increasingly negative view of the government.[2] These scholars have been influenced not only by the public mood, but also by social science research. The literature on interest groups is indeed rich and suggestive, but a simplistic reading of that literature threatens to distort public law.

We will begin this chapter by showing how this literature is already affecting public law. Then we will turn to a detailed survey of the literature itself, to see what it really shows about the influence of interest groups in American government. Finally, we will ask whether interest group politics is inevitably harmful to society.

As we noted in the Introduction, how to define "public choice" is itself sharply disputed. Under our definition, interest group theory is part of public choice because it involves the use of economic premises and methodology to

1. *See* Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMM. 97, 114 (1986).

2. For analyses largely reflecting the view of interest group dominance, see Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15–18, 51 (1984) ("[o]ne of the implications of modern economic thought is that many laws are designed to serve private rather than public interests"); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 713–15 (1984) ("interest-group theory of legislation provides powerful evidence of the persistence and extent of legislative abuse"); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224, 229–36, 245 (1986) ("special interest groups tend to dominate"); Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723–26, 769–73 (1986). Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83 (1989), is an excellent case study of rent-seeking legislation using a public choice perspective. Roin, *United They Stand, Divided They Fall: Public Choice Theory and the Tax Code*, 74 CORNELL L. REV. 62 (1988), applies public choice theory in the context of tax legislation. For more general discussions of public choice and public law, see Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U.L. REV. 646 (1988); Rose-Ackerman, *Progressive Law and Economics—and the New Administrative Law*, 98 YALE L.J. 341 (1988).

study political institutions. Under some other definitions, however, the subject of interest groups is not part of public choice, nor are studies about how economic interests affect legislative or popular voting. We do not think much turns on whether a subject is labeled as "public choice" or as something else. Determining the effect of interest groups in American government is crucial. Deciding whether to label the inquiry as part of public choice may be important to some social science scholars in defining their particular disciplines, but for our purposes is only a matter of semantics.

I. The Impact of Interest Group Theory

Some readers may wonder why the social science literature about interest groups is relevant to law. If you think of judges as simply applying existing legal rules, the judges' political worldview doesn't seem very relevant. But legal rules are often unclear and conflicting, thus requiring judges to take a more creative role. A basic issue in "hard cases" is how much judges should defer to other branches of government rather than trying to solve problems themselves. Their willingness to defer to the legislature or the executive may depend on how they perceive those branches.

Public law is currently premised on the assumption that legislators are competent to make public policy. For example, in the constitutional law, deference to the legislature has been the norm, unless some specific constitutional right is threatened. Courts do not second-guess legislatures on issues like tax policy, welfare reform, or safety regulation. But what if the tax code is just designed to enrich particular industries, welfare reform to enrich social workers, and safety regulations to benefit unions? Why *shouldn't* courts decide for themselves whether these statutes make sense?[3]

Our very constitutional structure can be traced to a Madisonian concern about the influence of interest groups in the political process.[4] In the modern world, as well, contrasting visions of the representative process animate quite different versions of public law.[5]

One view of the political process is often called "pluralism." According to pluralists, legislative outcomes simply reflect private political power. Although it may be mechanical and rather disheartening, it is no new view that "[t]he balance of . . . group pressure *is* the existing state of society."[6] Public law theorists who accept the empirical accuracy of this conception have two options. They may celebrate pluralism. Or, if they find pluralism em-

3. *See, e.g.*, B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980); Epstein, *supra* note 2.

4. *See* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

5. *See, e.g.*, Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1468–76 (1989).

6. A. BENTLEY, THE PROCESS OF GOVERNMENT 258–59 (1908).

pirically accurate but morally repulsive, they may favor judicial activism to protect those who lose in the political power struggle. Either way, trying to promote legislative deliberation is useless, since the mechanistic process of legislation leaves no room for a thoughtful legislative response.

Those who believe that legislators have some autonomy face a different menu of theoretical possibilities. Some may find the idea of the "public interest" itself either incoherent or a tyrannical imposition upon dissenters. They may want judges to promote pluralism by undercutting legislator independence. Believers in "republicanism" may embrace the public interest as a goal. They might want judges to rewrite election laws to insulate legislators from powerful private interests. To republicans, legislative deliberation may properly result in the rejection or reformation of "bad" private preferences.

So far, the Supreme Court has not fully embraced either pluralism or republicanism. Its various constitutional strategies—sometimes creating rights immune from legislative interference, at other times protecting politically powerless minorities from disadvantageous statutes, occasionally attempting to promote more careful deliberation about public policy, and frequently deferring to the legislature's judgment—reflect some appreciation of the richness and complexity of public policy formation.[7] The Court's decisions reflect a respectful yet practical understanding of the legislative process— for example, that a representative cannot be expected to understand every bill voted upon, that the remarks of a sponsor are often useful in construing the legislation despite the sponsor's obvious lack of objectivity, and that legislation is often the product of compromise. But there are also decisions invalidating statutes because of demonstrable legislative irrationality or prejudice, as well as decisions refusing to adhere to a legislator's interpretation that deviates substantially from the statutory language.[8] The Supreme Court's mediating path between the drastic alternatives of rigid pluralism and legislative independence indicates at least some appreciation for the problem of faction, while maintaining a degree of respect toward Congress and the state legislatures.

Some work on public choice, however, suggests that the Court might have done better to have adopted a rigid pluralism. 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

7. For some illustrative cases, see Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241–42 (1984); Rogers v. Lodge, 458 U.S. 613, 627 (1982); Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976); Lyng v. International Union, 485 U.S. 360, 370–74 (1988).

8. The Court's understanding of the legislative process is illustrated by Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 373–74 (1986); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985); Regan v. Wald, 468 U.S. 222, 236–37 (1984).

further their own interests,"[9] efforts that have been labeled "rent-seeking."[10] 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."[11] Although this assumption is obviously simplistic, its very simplicity creates the possibility of constructing powerful formal models. The similarity between pluralism and these economic models is obvious.

Several leading legal scholars have been influenced by this vision of the role of special interests. 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 legislation.[12]

Judge Posner himself has shown considerable restraint in his attitude toward public choice theory.[13] But other scholars have enthusiastically argued for changes in public law in light of the public choice literature.[14]

9. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371 (1983). *See generally* Macey, *The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43 (1988).

10. "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." Macey, *supra* note 2, at 224 n.6.

11. Becker, *supra* note 9, at 373–74.

12. 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: "In this setting, an independent judiciary can increase the value of the legislation sold today by making it somewhat immune from short-run political pressures that might try to thwart or overturn the intent of the 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' [citation omitted]. By such fruit has the dismal science earned its reputation." D. MUELLER, PUBLIC CHOICE II 244 (1989).

13. *See* Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974), which evaluated the relative merits of "the traditional public interest theory of regulation and the newer economic theory" and concluded that not only had neither approach any demonstrated empirical support, neither had "been refined to the point where it can generate hypotheses sufficiently precise to be verified empirically." *Id.* at 357. *See also* R. POSNER, THE FEDERAL COURTS 262–67, 271, 286–93 (1985).

14. *See* Aranson, Gellhorn, & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL

Although public choice has not yet radically altered contemporary public law, we are hardly ready to dismiss that possibility. One obvious analogue would be Chicago School economics. Two decades ago, the Chicago School would not have seemed likely to change antitrust law profoundly. Today, antitrust law hews closely to the Chicago "party line." The same could happen with public choice.

Even legal scholars who do not embrace the "new pluralism" may fall under its sway. For example, Cass Sunstein, a leading "republican" scholar, proposed an enhanced judicial role in promoting legislative deliberation insulated from powerful factions. One obvious question, as Sunstein recognized, is whether such legislative deliberation is even possible. He correctly noted that "[t]he state of political and economic theory on [legislative behavior] remains surprisingly crude." Yet, he said, "[f]ew would contend that nationally selected representatives have been able to exercise the [deliberative] role." Instead, there is "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."[15]

What is the "mounting evidence" that led to Sunstein's pessimism about the feasibility of legislative deliberation about the public interest? He cited some political science studies of legislative motivations and alluded to "the economic literature" attempting "to explain legislative behavior solely by reference to constituent pressures."[16] That literature has pessimistic implications not only regarding the deliberative qualities of legislatures, but also regarding the likelihood that voters will be influenced by anything but raw self-interest. As we will see, Sunstein's forebodings are consistent with some of the best-known work in each area. We believe, however, that the

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L. REV. 1, 21–67 (1982); Bruff, *Legislative Formality, Administrative Rationality*, 63 TEXAS L. REV. 207, 214–18 (1984); Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1086–95; Krier & Gillette, *The Un-Easy Case for Technological Optimism*, 84 MICH. L. REV. 405, 421–23 (1985); Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 374–80, 392, 396–405; Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the F.C.C. and the Courts*, 88 YALE L.J. 717 (1979); Wiley, *supra* note 2. *See also* Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 728 (1985) (majorities "pay the bill for tariffs, agricultural subsidies and the like," while congressmen "deliver the goods to their well-organized local constituents"); Cass, *The Meaning of Liberty: Notes on Problems Within the Fraternity*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 777, 790 (1985).

15. Sunstein, *supra* note 4, at 48.

16. *Id.* at 48 nn.78–80. Sunstein remarked that "[s]uch interpretations have been attacked as too reductionist," Sunstein, *id.*, at 48, thus anticipating some of what follows in this chapter. *See also* Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988); Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1548–49 (1983).

prospects for democracy are not so dim as some theorists would have us believe. Legislators are indeed influenced by special interests, but they need not be mere pawns.

II. Interest Groups and Political Science

Interest groups are obviously important in the political process, so one would expect to find sustained study of their influence by political scientists. In fact, however, attention to special interests has fluctuated rather dramatically in the political science literature.

In 1935 a classic case study of E. E. Schattschneider concluded that special interest groups profoundly shaped the Smoot-Hawley Tariff of 1930.[17] By the early 1950s,[18] a pluralistic interpretation of politics had emerged, in which legislative outcomes were said simply to mirror the equilibrium of competing group pressures:

> [t]he 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.[19]

This model received important support from Robert Dahl's famous study of New Haven politics in which he found a pluralistic dispersion of power among groups, which promoted stability and orderly change in response to the political preferences of the community.[20]

Other writers soon challenged the pluralist notion of the political centrality of interest groups. A survey of Washington lobbyists carried out in the late 1950s concluded that interest groups did not dominate the federal political process.[21] Bauer, Pool, and Dexter's detailed examination of tariff

17. E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF (1935).

18. *See* D. TRUMAN, THE GOVERNMENTAL PROCESS (1951); E. LATHAM, THE GROUP BASIS OF POLITICS (1952).

19. E. LATHAM, *supra*, at 35. Schattschneider, whose Smoot-Hawley Tariff study reached pluralist conclusions, stopped far short of this mechanical conception of politics. "It is hard to imagine a more effective way of saying that Congress had no mind or force of its own or that Congress is unable to invoke new forces that might alter the equation." E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE 37 (1960).

20. R. DAHL, WHO GOVERNS? (1961).

21. L. MILBRATH, THE WASHINGTON LOBBYISTS (1963).

legislation between 1953 and 1962 echoed this finding. They described lobbying groups as usually underfinanced, poorly organized, overworked, and often cancelling each other out.[22] Indeed, they concluded that lobbyists were more like "service bureaus" for legislators than "agents of direct persuasion."[23]

These conclusions about the relative unimportance of interest groups became "something approaching a new conventional wisdom" in political science.[24] With few exceptions, political scientists then paid little attention to interest groups until recently. Some theoretical advances were made by Theodore Lowi, James Q. Wilson, and Michael Hayes, suggesting that interest group activity should differ depending upon the distribution of the costs and benefits of proposed legislation.[25] 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."[26] Notwithstanding these insights, one scholar complained in 1983 that interest group studies were "badly in need of empirical research and conceptual development."[27]

The rather discouragingly weak political science literature received a major boost in 1986, when Kay Lehman Schlozman and John T. Tierney published the first systematic study of interest group politics in twenty years.[28] A short summary cannot do justice to the rich information and anal-

22. R. BAUER, I. POOL, & L. DEXTER, AMERICAN BUSINESS AND PUBLIC POLICY (1963).

23. *Id.* at 350–53. In short order, Theodore Lowi explained that these conclusions about the impotence of interest groups in influencing 1950s tariff legislation could not fairly be compared to Schattschneider's finding that groups dominated the passage of the 1930 tariff (see *supra* note 17), 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 W. POL. 677 (1964). For a brief overview, see M. HAYES, LOBBYISTS & LEGISLATORS: A THEORY OF POLITICAL MARKETS 8–10 (1981).

24. M. HAYES, *supra* note 23, at 2. *See id.* at 10–17.

25. *See* Lowi, *supra* note 23; J. WILSON, POLITICAL ORGANIZATIONS (1973); M. HAYES, *supra* note 23.

26. M. HAYES, *supra* note 23, at 3. Although Hayes's 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.

27. Sinclair, *Purposive Behavior in the U.S. Congress: A Review Essay*, 8 LEGIS. STUD. Q. 117, 126 (1983). The publication of Sinclair's complaint coincided with the appearance of two important books on interest groups. *See* INTEREST GROUP POLITICS (A. CIGLER & B. LOOMIS eds. 1983); A. MCFARLAND, COMMON CAUSE: LOBBYING IN THE PUBLIC INTEREST (1984).

28. K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986). 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 Elections Commission. *Id.* at xii–xiii. Public law theorists tempted to accept simple generalizations about interest group politics should consider closely why Schlozman and Tierney attempted such a broad-gauged study: "By undertaking a systematic inquiry across the entire pressure scene we are able to pose questions that would be, quite sim-

ysis they provide. We will only note those principal findings most pertinent to public law theory.

Schlozman and Tierney concluded that, despite the recent growth in broad-based groups such as Common Cause, interest group politics is skewed dramatically toward narrow economic interests. There are few lobbyists for consumers but many for producers. Moreover, Schlozman and Tierney found little support for the "conventional wisdom" of scholars like Bauer, Pool, and Dexter about the supposed organizational and political weaknesses of interest groups. Today, many groups have substantial resources and engage in sophisticated political strategies, including active involvement in electoral politics. Contrary to another finding of Bauer, Pool, and Dexter, groups are not always active on both sides of an issue. Earlier studies focused too much on whether groups were able to kill legislation or push bills through Congress, ignoring whether the group was able to influence the details of legislation—for example, to soften a disfavored bill.

Nevertheless, Schlozman and Tierney reject the simple-minded view that groups control Congress. Group influence is likely to be strongest when the group is attempting to block rather than obtain legislation; when the group's goals are narrow and have low visibility; 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); and when the group is able to move the issue to a favorable forum such as a sympathetic congressional committee. "Depending 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 effect of organized pressure on Congress can range from insignificant to determinative."[29]

Schlozman and Tierney confirm the frequently central role of interest groups. But their work also demonstrates that this process is too complex for simple predictive modeling. To be sure, "[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 disproportion-

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ply, 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.

29. *Id.* at 317. In addition to demonstrating the empirical invalidity of any reductionist theory of interest group influence in Congress, Schlozman and Tierney debunked any generalized theory that administrative agencies are inevitably captured by the interests they regulate. *See id.* at 276–78, 339–46.

ally but not uniformly affluent ones."[30] Yet the less advantaged, Schlozman and Tierney concluded, "are nonetheless heeded in the making of policy" because they are somewhat active in group politics, because they sometimes benefit from the activities of narrower groups, "electoral and social movements are more hospitable to their interests," and because "those in government sometimes take up the cudgel on their behalf."[31] 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.[32]

Why do public officials sometimes oppose powerful groups? Another body of literature has contemplated legislative behavior. In "one of the most influential essays in recent years,"[33] David Mayhew assumed that federal representatives "are interested in getting reelected—indeed, in their role here as abstractions, interested in nothing else."[34] Mayhew acknowledged that "[a]ny such assumption necessarily does violence to the facts,"[35] and that "a complete explanation (if one were possible) of a [representative's] or any one else's behavior would require attention to more than just one goal."[36] Yet Mayhew forcefully argued that the actions of federal legislators could profitably be understood by use of the "simple abstract assumption" that representatives are "single-minded seekers of reelection."[37]

As Mayhew noted, this assumption about legislators' motives is not necessarily inconsistent with democratic norms. Responsiveness to broad constituencies is not only an important aspect of representation, it also helps ameliorate the influence of special interests, as Schlozman and Tierney indicated. Yet fixation on reelection has its drawbacks. It may lead legislators to spend their time on pork barrel legislation for their districts and on personal contact with voters and casework for constituents, rather than on addressing hard policy issues.[38]

30. *Id.* at 403.
31. *Id.*
32. *Id.* at 402.
33. Matthews, *Legislative Recruitment and Legislative Careers*, in HANDBOOK OF LEGISLATIVE RESEARCH 17, 32 (1985).
34. D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13 (1974).
35. *Id.*
36. *Id.* at 15.
37. *Id.* at 5.
38. *See id.* at 49–61, 81–158; M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989).

Because Mayhew's model is based on economic methodology, much of the discussion in the next section is applicable to his study. In particular, the demonstrated importance of legislators' ideology cuts against Mayhew's model. Moreover, empirical studies suggest, not surprisingly, that Mayhew's behavioral assumption is too simplistic.[39]

Surely closer to reality—although not as intellectually elegant—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. 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."[40] These goals are interconnected: a legislator's primary goal may be obtaining policy-making influence, not reelection for its own sake—but of course the former requires the latter.[41] This analysis fits well one federal representative's comment, in response to Fenno's remark 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."[42] Sorting out these conflicting motives may be difficult because many actions serve both interests at once.

In the final analysis, contemporary political science research concerning interest 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 largely by narrow economic interests and reelection posturing by representatives. These concerns are reinforced by another body of research about interest groups conducted largely by economists.

III. 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 as-

39. *See* Kozak, *Decision-Making on Roll Call Votes in the House of Representatives*, 9 CONGRESS & THE PRESIDENCY 51 (1982) (voting is not a function of a single determinant); Smith & Deering, *Changing Motives for Committee Preferences of New Members of the U.S. House*, 8 LEGIS. STUD. Q. 271 (1983) (new members of 97th Congress reported preferences for committee assignments that represented mixed goals of reelection, policy impact, and prestige); Thomas, *Electoral Proximity and Senatorial Role Call Voting*, 29 AM. J. POL. SCI. 96 (1985) (as election approaches, federal senators seeking reelection tend to change voting patterns in direction of views of probable opponents, but even those senators attempt simultaneously to satisfy goals of reelection and of achieving preferred policy outcomes).

40. R. FENNO, CONGRESSMEN IN COMMITTEES 1 (1973). Fenno focused on members of the House of Representatives. He also acknowledged a fourth goal, setting up a career beyond the House, and a potential fifth, aggrandizing personal gain.

41. *See* Dodd, *Congress and the Quest for Power*, in CONGRESS RECONSIDERED (L. Dodd & B. Oppenheimer 1st ed. 1977). *See also* A. MAASS, CONGRESS AND THE COMMON GOOD 70–71 (1983) (reelection seen as a constraint to achievement of other goals).

42. R. FENNO, HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 199 (1978).

sumed that politicians were solely interested in furthering the public interest. Like some "pluralist" political scientists, economists then embraced the belief that legislation is generally a product of special interest groups.[43] This economic theory, which is most closely associated with George Stigler[44] and other members of the Chicago School, has increasingly influenced legal scholars. In this section, we will sketch the major arguments underlying the economic approach to legislation, 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 jaundiced view of legislative motivation. In place of their prior assumption that legislators voted to promote their view of the public interest, economists now postulate that legislators are motivated solely by self-interest.[45] In particular, legislators must maximize their likelihood of reelection.[46] A legislator who is not reelected loses all the other possible benefits flowing from office.

The question, then, is what do legislators have to do to get reelected? In other words, what determines the outcomes of elections? Economic models can be classified into two groups, depending on how they answer this question.

Models in the first group assume that legislators attempt to maximize their appeal to their constituents. These constituents, in turn, vote according to their own economic self-interest.[47] Thus, those models suggest that legisla-

43. For excellent, balanced reviews of the literature, see Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 141–50 (1989); Posner, *supra* note 13. Michael Hayes states: "For all their promise, these theories ultimately represent a reversion to the naive pressure model so effectively refuted by Bauer, Pool, and Dexter. Ironically these economists, not having read [Bauer, Pool, and Dexter], never fell prey to the new conventional wisdom it helped to create; unfortunately they also failed to benefit from its insights." M. HAYES, *supra* note 23, at 18.

44. *See* G. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION (1975); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

45. *See* Shepsle, *Prospects for Formal Models of Legislatures*, 10 LEGIS. STUD. Q. 5, 12–13 (1985). As Landes and Posner state, *supra* note 12, at 877: "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. . . . Payment takes the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes." Thus, as they note later, when interpreting statutes, "The courts do not enforce the moral law or ideals of neutrality, justice, or fairness; they enforce the 'deals' made by effective interest groups with earlier legislatures." *Id.* at 894.

46. *See, e.g.*, Sinclair, *supra* note 27. Stigler suggests that legislators would vote according to the public interest if they could, but that the need to be reelected makes this impossible. Stigler, *supra* note 44, at 11.

47. Some empirical evidence suggests that legislators are also influenced by the ideology of their constituents. *See* Kau, Kennan, & Rubin, *A General Equilibrium Model of Congressional Voting*, 97 Q.J. ECON. 271 (1982).

tive votes can be easily predicted from the economic interests of constituents.[48]

Models in the second group give a greater role to special interest groups. Because voters don't know much about a legislator's conduct, elections may turn on financial backing, publicity, and endorsements. These forms of support, as well as other possible benefits including outright bribes, are likely to be 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 collection action.[49] Olson pointed out that political action generally benefits large groups. For example, everyone presumably benefits from improved national security. But any single person's efforts to protect national security normally can have only an infinitesimal effect. Hence, a rational person will try to "free ride" on the efforts of others, contributing nothing to the national defense while benefiting from other people's actions.

This "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.[50] The easiest groups to organize would presumably consist of a few individuals or firms seeking government benefits for themselves, which will be financed by the general public. Thus, if Olson is correct, politics should be dominated by "rent-seeking" special interest groups.

The various economic theories of legislation have in common their rejection of ideology as a significant factor in the political process.[51] They assume that ideology, defined simply as individual beliefs about the public interest, influences neither voters nor legislators. The heart of the economic

48. *See* Weingast, Shepsle, & Johnsen, *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642 (1981) (explanation of pork barrel politics based on constituent interest); Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181 (1984).

49. *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. Other possible explanations are discussed in Finkel, Muller, & Opp, *Personal Influence, Collective Rationality, and Mass Political Action*, 83 AM. POL. SCI. REV. 885 (1989).

50. *See, e.g.*, Macey, *supra* note 2, at 231–32. As Becker points out, most groups involved in politics may suffer from free rider problems. What is important is the relative rather than absolute degree of free riding, since this determines the relative power of the group. *See* Becker, *supra* note 9, at 380.

51. Olson conceded that "[t]here is to be sure always *some* ideologically oriented behavior in any society, and even among the most stable and well-adjusted groups." M. OLSON, *supra* note 49, at 162. He went on to suggest, however, that in the United States this behavior is relatively minor. *Id.*

approach is the assumption that self-interest is the exclusive causal agent in politics. (This may seem a cynical perspective, but in some ways it may actually be unduly optimistic, because it ignores the dark side of ideology as exemplified by the Nazis and other hate groups. There are worse forces in the human psyche than greed.)

Clearly, these economists have identified some important political realities. Legislators with more affluent constituencies often vote differently from those with blue collar or unemployed constituents. Those from agricultural districts often have different views from those from manufacturing centers. This is consistent with the assumption that legislators represent their constituents' economic interests. Moreover, as the political science literature indicates, special interest groups do appear to play a major role in the legislative process.[52] Thus, the economic model appears to have a certain amount of explanatory power—which is not surprising, because it parallels some common sense observations about politics.

On the other hand, public choice ignores some other common sense observations about politics. Some crucial features of the political world do not fit the economic model. It does not account for ideological politicians like Reagan and Thatcher. Most notably, it does 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 nil.[53] Since voting is costly in terms of time and inconvenience, no economically rational person would vote. Indeed, the likelihood of casting a decisive vote is about the same as that of being run over by a car in the process of going to or from the polls.[54] Yet, millions of people do in fact

52. As Olson would predict, these groups generally represent relatively concentrated economic interests. In contrast, consumers—the most widely dispersed economic interest—remain unrepresented. *See* K. SCHLOZMAN & J. TIERNEY, *supra* note 28, at 74–87, 111, 128, 387–89. On the other hand, even if members of large diffused groups are individually less likely to attend to, and base their votes on, recent legislation, the greater size of the group is a countervailing factor. *See* Wittman, *Why Democracies Produce Efficient Results,* 97 J. POL. ECON. 1395, 1407–8 (1989). *See also* Blais, Couiseneau, & McRoberts, *The Determinants of Minimum Wage Rates,* 62 PUB. CHOICE 15, 19 (1989) (finding that diffuse groups have more influence than labor unions).

53. The chance that a single vote will decide an election goes down rapidly with the number of voters. The exact formula depends on the particular statistical assumptions. Roughly speaking, if a district contains 500,000 voters, the likelihood of such a close election is somewhere between 1 in 700 and 1 in 500,000. *See* Foster, *The Performance of Rational Voter Models in Recent Presidential Elections,* 78 AM. POL. SCI. REV. 678 (1984). Using the larger probability, we would expect in any given district to have one such House election every 1,400 years (once every million years if we use the other figure). And even then, only the identity of one House member has been changed, which can be expected to have only a tenuous impact on public policy.

54. D. MUELLER, *supra* note 12, at 350.

vote.[55] A theory that cannot even account for people going to the polls,[56] let alone explain how they vote once they get there,[57] can hardly claim to provide a complete theory of politics.

Public choice's inability to account for voting is important for two reasons. First, if public choice cannot explain such a fundamental aspect of political behavior as voting, can we trust its explanations of other political behavior? Second, because much of what politicians do is either constrained or motivated by electoral results, a theory that cannot explain the behavior of voters may also be unilluminating when it comes to some aspects of politicians' behavior. Successful politicians must have their own models about how voters behave, and these models cannot be based on public choice. So even a model of legislators' behavior must incorporate a non–public choice model of voting in order to predict legislative events.

In a recent article, Professors DeBow and Lee have tried to plug this hole in public choice theory.[58] They admit that ideology and self-interest are not coterminous, and that people are not single-minded seekers of either. But they suggest that popular voting behavior is nonetheless largely compatible with public choice. As we understand their argument, voting provides the pleasure of expressing an opinion on a matter of public importance at a relatively low cost. The very impotence of the vote allows people to express their ideological viewpoints at minimal personal sacrifice. For example, someone who thinks that taxes should be raised can express that view by voting for a candidate who advocates a tax increase. This vote is "cheap"

55. As Margolis points out, not only do most people vote, but "generally the propensity to vote increases with education." Thus, "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).

56. 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 turnout should be strongly related to the closeness of the election, since in close elections the voter's "taste" for voting is reinforced by the increased likelihood of affecting the result. The data reveal only a rather weak relationship between turnout and closeness. 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. *See* Foster, *supra* note 53, at 688. For a recent survey of the literature, see D. MUELLER, *supra* note 12, at 348–69.

57. 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). The empirical evidence suggests that voters are influenced by both their own economic interest and their view of the national economy, but that the latter has more effect on election results. *See* Markus, *The Impact of Personal and National Economic Conditions on the Presidential Vote: A Pooled Cross-Sectional Analysis*, 32 AM. J. POL. SCI. 137 (1988). There is some evidence that ideological voting is on the increase. *See* M. FIORINA, *supra* note 38, at 90.

58. DeBow & Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993 (1988).

since the voter can rest free of any concern that her vote might actually make a difference and result in the candidate's election, which might ultimately result in a tax increase costly to the voter. The same vote would become more costly (and hence less likely) in a very close election where a single vote might make a difference to the outcome.

This seems a bit farfetched. Voting is time-consuming and bothersome; an individual could find many more efficient ways to express her ideology at less overall expense, such as scribbling a postcard and mailing it to a legislator, or shouting out the window. Moreover, if DeBow and Lee are correct, it should not matter whether the total votes cast determine who holds public office. People should be just as happy to vote so long as the votes are tallied and reported in the newspaper—indeed, they should be happier, because then votes inconsistent with their economic self-interest would be even less likely to cost them anything![59]

Why is it so difficult to admit that people vote out of political commitment, not personal satisfaction? Popular voting is rational largely in a Kantian, not an economic sense.[60] DeBow and Lee do readily acknowledge the "Virginia School criticism of the claim that voters vote their economic self-interest, *narrowly defined,*" citing an article by Brennan and Buchanan.[61] DeBow and Lee continue to argue, however, that a public choice theorist would expect "the average person to pursue objectives in his political behavior that are different from those pursued in his market behavior *simply* because the costs of such pursuits differ between the political process and the market process."[62] They have seemingly missed the thrust of Brennan and Buchanan's remarks: "Public choice theory, in simply assuming that voters behave rationally and in a manner analogous to that in which market agents can be presumed to operate, is . . . at risk entirely on logical grounds."[63]

59. Actually, the ideal method of expression would be to lock yourself in a room, make sure that no one else was in the house, and then shout your political views at the empty house, free from any concern that anyone might hear and implement your views. This would insure that your self-expression could not possibly result in the implementation of any of the potentially costly policies that you might favor.

60. That is, voting is rational because society is better off if everyone does it, even if no one individual's decision to vote has any impact. Thus, people would agree to the recognition of a moral duty to vote when determining social rules behind the Rawlsian "veil of ignorance." *See generally* J. RAWLS, A THEORY OF JUSTICE 333–42 (1971) (arguing in favor of some similar "natural duties"). Such conduct is socially rational but not rational in the sense economists use the term, since any given individual could increase his welfare by allowing others to incur the costs of political participation.

61. *See* DeBow & Lee, *supra* note 58, at 998 n.23 (citing Brennan & Buchanan, *Voter Choice*, 28 AM. BEHAV. SCIENTIST 185 (1984) (emphasis added)).

62. DeBow & Lee, *supra* note 58, at 997 (emphasis added).

63. Brennan & Buchanan, *supra* note 61, at 200.

We doubt that DeBow and Lee have made the case for the premise that voting is economically rational because it is impotent. We also doubt that this premise rescues the public choice theory of voting from tautology, in the sense that you can explain anything if you postulate a "taste" for that behavior. DeBow and Lee seek to avoid the tautology by postulating a single taste which can then be gratified with methods of varying cost. Nevertheless, their account cannot be empirically falsified and hence must be considered tautological. Suppose, for example, that in some population a more costly method of political activity (carefully monitoring legislators or organizing political action groups) was actually preferred to voting. This would disprove the DeBow-Lee hypothesis only if we knew that these individuals valued the self-expression involved in voting and the other activities equally. But we have no independent measure of the amount of "self-expression" purchased through these activities. So, if individuals choose a course of conduct despite a higher price, we can infer that not only do they have a "taste" for political self-expression, but they put a higher value on that "flavor" of self-expression than on the self-expression involved in voting. Without some independent measure, not only of the cost of each activity, but of its "self-expression value," we can account for *any* pattern of activities within the public choice framework.

In short, we agree with another theorist that "[i]deology plays a role in political choice that has no real parallel in ordinary private choice on how to spend on consumer goods."[64] Besides failing to explain the behavior of voters, the economic model also fails to explain how voters and interest groups control legislators. In the model, voters and interest groups seek to use legislators as their agents, while legislators (like all economic actors) seek to further their own goals. Economists have a well-developed theory of agency. This theory suggests strongly that the behavior of agents is unlikely to correspond perfectly with the preferences of their principals.[65] On the basis of general economic theory, then, it seems likely that legislators will sometimes "shirk," acting in accord with their own preferences, rather than those of voters or interest groups.

The economic model clearly overlooks important aspects of the political process. Nevertheless, a theory may make unrealistic assumptions but prove highly useful in making predictions. Even a physicist, when seeking to describe a complex physical system, will often make simplifying assumptions that are known to be at best approximations. The basic assumptions of microeconomic theory are notoriously unrealistic, but most economists feel that the predictions are sufficiently accurate to justify the continued use of

64. H. MARGOLIS, *supra* note 55, at 95.

65. For details concerning this argument and citations to the economics literature on agency, *see* Kalt & Zupan, *supra* note 57, at 282–84.

the assumptions. The ultimate test of an economic model is its predictive ability. How well does the economic theory of legislation perform empirically? Despite the common assumption to the contrary in the legal literature,[66] the supporting evidence is quite thin.[67]

Two types of evidence are commonly cited in support of the theory. The first consists of studies showing that some particular law in fact benefits a discrete economic group.[68] For example, environmental regulation may favor firms owning large plants over those owning small plants;[69] this finding has been cited as showing that even legislation apparently in the public interest is really the product of special interests. Such evidence is not entitled to much weight. To begin with, the finding of differential impact is often dubious.[70] Economists disagree, for example, over whether federal trucking regulation benefited the owners, the drivers, or both.[71] If economists cannot always determine the economic impact of legislation after the fact, interest groups must also sometimes find it difficult to determine whether to support proposed legislation.[72] Moreover, showing that a law benefits a certain group hardly establishes that this support caused the passage of the law. Differential economic impact only suggests that the passage of a law *could* possibly have an economic explanation. But ideological forces may be an alternative explanation.

The other type of empirical study attempts to meet this criticism by using

66. *See* Easterbrook, *supra* note 2, at 16 n.16, 45 n.101; Macey, *supra* note 2, at 224 n.224.

67. Our conclusion in this regard is in agreement with Judge Posner's earlier survey of the literature. *See* Posner, *supra* note 13, at 352–55.

68. *See* Macey, *supra* note 2, at 232 n.46; Easterbrook, *supra* note 2, at 45 n.101.

69. *See* Pashigan, *The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares*, 27 J.L. & ECON. 1 (1984). (For a debate on the validity of Pashingan's methodology, *see* Evans, *The Differential Effect of Regulation Across Plant Size: Comment on Pashigan*, 29 J.L. & ECON. 187 (1986), and Pashigan, *Reply to Evans*, *id.* at 201.) A similar study of OSHA can be found in Bartel & Thomas, *Direct and Indirect Effects of Regulation: A New Look at OSHA's Impact*, 28 J.L. & ECON. 1 (1985). *But see* Kelman, *supra* note 16, at 251–63 (critiquing Bartel & Thomas); Leone & Jackson, *The Political Economy of Federal Regulatory Activity: The Case of Water Pollution Controls*, in STUDIES IN PUBLIC REGULATION 248 (G. Fromm ed. 1981) (finding no relationship between legislators' votes and compliance costs for local industry). Note that if a law would help one group of firms at the expense of a second group, either the passage or defeat of the law can be cited as proof of the economic theory, because the researcher can always attribute the outcome to the influence of one of the contesting groups.

70. Posner points out the difficulty of tracing the economic effects of regulation. *See* Posner, *supra* note 13, at 355.

71. *See* Rose, *The Incidence of Regulatory Rents in the Motor Carrier Industry*, 16 RAND J. ECON. 299, 300–303 (1985); Kim, *The Beneficiaries of Trucking Regulation, Revisited*, 27 J.L. & ECON. 227 (1984).

72. For example, physicians, who lobbied hard against Medicare legislation, received an unanticipated financial windfall from its passage. *See* K. SCHLOZMAN & J. TIERNEY, *supra* note 28, at 18.

the economic model to predict the votes of individual legislators. Typically, the researcher finds several rough measures of a law's economic effects on constituents or campaign contributors. The researcher then studies whether the votes of individual legislators are statistically related to these economic impacts. In general, as predicted by the model, these studies do find positive relationships between legislative behavior and economic variables.[73] They fail to show, however, that noneconomic factors are not even more important.[74]

Other studies have focused on noneconomic factors. They also find positive relationships. In fact, ideology (usually measured by the annual ratings given by the Americans for Democratic Action) seems to be an even better predictor than economics. Even on purely economic matters, ideology is a strong predictor of legislators' votes.[75] For example, in consider-

73. *See* Netter, *An Empirical Investigation of the Determinants of Congressional Voting on Federal Financing of Abortions and the ERA*, 14 J. LEGAL STUD. 245 (1985); Primeaux, Filer, Herren, & Hollas, *Determinants of Regulatory Policies Toward Competition in the Electric Utility Industry*, 43 PUB. CHOICE 173 (1984); Frendreis & Waterman, *PAC Contributions and Legislative Behavior: Senate Voting on Trucking Deregulation*, 66 SOCIAL SCIENCE Q. 401 (1985); Kau & Rubin, *Voting on Minimum Wages: A Time-Series Analysis*, 86 J. POL. ECON. 337 (1978); Danielsen & Rubin, *An Empirical Investigation of Voting on Energy Issues*, 31 PUB. CHOICE 121 (1977); Silberman & Durden, *Determining Legislative Preferences on the Minimum Wage: An Economic Approach*, 84 J. POL. ECON. 317 (1976). Other studies are discussed in M. HAYES, *supra* note 23, at 44–46. In failing to detect any economic influence on passage of the Sherman Act, Stigler, *The Origin of the Sherman Act*, 14 J. LEG. STUD. 1 (1985), concluded that the reason must be that the Sherman Act was only a "moderate change" in public policy, *id.* at 7.

74. Many of the studies are done with statistical techniques (logit or probit analysis) that do not provide any convenient measure of how much of the variation in the dependent variable (here, legislative voting) is explained by the independent economic variables. (For an introduction to these variants of regression analysis, *see* R. PINDYCK & D. RUBINFELD, ECONOMETRIC MODELS AND ECONOMIC FORECASTS 273–318 (2d ed. 1981).) Other studies use traditional regression analysis for which R^2 provides a measure of how much legislative behavior is left statistically unexplained. (Regression analysis is explained in H. KELEJIAN & H. OATES, INTRODUCTION TO ECONOMETRICS 19–76 (2d ed. 1981).) These studies have come up with relatively low R^2s, indicating that either the data are poor or much of the legislative voting is left unexplained.

75. *See* Bernstein & Anthony, *The ABM Issue in the Senate, 1968–1970: The Importance of Ideology*, 68 AM. POL. SCI. REV. 1198 (1974) (ideology much more important factor than amount of defense spending in district generated by ABM); Bernstein & Horn, *Explaining House Voting on Energy Policy: Ideology and the Conditional Effects of Party and District Economic Interests*, 34 W. POL. Q. 235 (1981) (ideology much more important explanatory factor than constituent interest); Goldstein, *The Political Economy of Trade: Institutions of Protection*, 80 AM. POL. SCI. REV. 161, 173, 179–80 (1986) (free trade views more important in determining trade policy than interest groups); Kenski & Kenski, *Partisanship, Ideology, and Constituency Differences on Environmental Issues in the U.S. House of Representatives: 1973–1978*, 9 POL'Y STUD. J. 325 (1980) (similar finding with respect to environmental legislation); Mitchell, *The Basis of Congressional Energy Policy*, 57 TEX. L. REV. 591 (1979) (reporting

ing votes on natural gas deregulation, Professor Mitchell found that over ninety percent of the votes could be predicted simply by whether the congressman's ADA score was greater than forty-five percent. This simple rule predicted 361 out of 399 votes correctly.[76]

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 substantial factors in predicting legislators' votes. Models that include both ideological and economic factors outperform purely economic models, even when legislation involves strictly economic issues.[77]

Some economists criticize these studies because ADA scores are themselves correlated with the legislators' constituencies. Hence, the ADA score may be indirectly measuring the makeup of a legislator's district rather than the legislator's own political views.[78] This is not an implausible criticism, but it appears to be ill-founded.[79] Several researchers have developed techniques of "cleansing" ADA scores of their association with constituent makeup.[80] (Essentially, the portion of the ADA score that can be correlated with constituent interests is eliminated, and the residue is treated as a measure of the legislator's ideology.) The cleansed scores were still found to be significantly related to legislative votes.[81]

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that ideology is an *extremely* strong predictor of votes on energy legislation); Welch, *Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports*, 35 W. POL. SCI. Q. 478 (1982) (ideology more important factor than campaign contributions). Another article suggests that political science case studies overestimate the influence of interest groups because such groups may influence decisions at one point in the legislative process which are cancelled out by later decisions. *See* Meier & Copeland, *Interest Groups and Public Policy*, 64 SOC. SCI. Q. 641 (1983).

76. Mitchell, *supra* note 75, at 598. *See also* Poole & Daniels, *Ideology, Party, and Voting in the U.S. Congress, 1959–1980*, 79 AM. POL. SCI. REV. 373 (1985) (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, *A Spatial Model for Legislative Roll Call Analysis*, 29 AM. J. POL. SCI. 357 (1985). Their methodology is critiqued in Koford, *Dimensions in Congressional Voting*, 83 AM. POL. SCI. REV. 949 (1989).

77. Peltzman now concedes that inclusion of noneconomic factors increases a model's explanatory power. *See* Peltzman, *An Economic Interpretation of the History of Congressional Voting in the Twentieth Century*, 75 AM. ECON. REV. 656, 663, 666 (1985).

78. *See* Peltzman, *Constituent Interest and Congressional Voting*, *supra* note 48.

79. *See* Poole & Rosenthal, *The Political Economy of Roll-Call Voting in the "Multi-Party" Congress of the United States*, 1 EUR. J. POL. ECON. 45 (1985).

80. *See* Kalt & Zupan, *supra* note 57, at 288, 290–97. A somewhat more rigorous development can be found in Carson & Oppenheimer, *A Method of Estimating the Personal Ideology of Political Representatives*, 78 AM. POL. SCI. REV. 163 (1984); Poole & Rosenthal, *supra* note 79.

81. *See* Carson & Oppenheimer, *supra* note 80, at 173, 177; Kalt & Zupan, *supra* note 57, at

There are strong reasons to believe that the cleansed scores actually measure legislators' personal views on public policy, rather than indicating the influence of undetected economic factors. First, the cleansed scores correlate better with voting in off years than in election years. Politicians presumably feel freer to vote their own views when they aren't up for reelection. Second, any undetected economic factor would have to be entirely unrelated to the economic factors already taken into account.[82] (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 not easy to imagine.) Third, the cleansed scores correlate with a broad range of votes, including both economic and social issues. Again, it is hard to imagine economic groups with such diverse constellations of interests.[83] Thus, these results strongly suggest that one factor in determining how a legislator votes is simply that legislator's view of the public interest.[84]

Indeed, these results may underestimate the importance of ideology. Their statistical method essentially assumes that whenever a legislator's ide-

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286–98; Kau & Rubin, *Self Interest, Ideology, and Logrolling in Congressional Voting*, 22 J.L. & ECON. 365, 379–81 (1979); Poole & Rosenthal, *supra* note 79. Another study found significant effects of constituent ideology after controlling for constituent economic traits. *See* Kau, Kennan, & Rubin, *supra* note 47, at 287. This and 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). Another sophisticated technique, with similar results, was used in J. KALT, THE ECONOMICS AND POLITICS OF OIL PRICE REGULATION: FEDERAL POLICY IN THE POST-EMBARGO ERA 253–78 (1981) (using a technique that pools prior information and sample information). Another study, using a simultaneous equation model, found that much of the apparent effect of campaign contributions on legislative votes was actually due to the propensity of interest groups to contribute to legislators whose initial positions were sympathetic. *See* Chappell, *Campaign Contributions and Voting on the Cargo Preference Bill: A Comparison of Simultaneous Models*, 36 PUB. CHOICE 301 (1981).

82. For instance, Kau and Rubin took into account per capita income, unionization, racial composition, education, oil production, average age, defense spending, percentage of farmers, and welfare payments. Kau & Rubin, *supra* note 81, at 370. This is far from a complete list of major economic interests, but most other economic factors seem to have some correlation with at least one of these variables. For example, it is not easy to come up with economic interests that are equally powerful in rural and urban areas.

83. 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. *See* Kalt & Zupan, *supra* note 57, at 291. We are unable to imagine any group with an economic interest in all these issues.

84. 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, & Rosenthal, *Constituency, Party and Representation in Congress*, 48 PUB. OPINION Q. 741, 752 (1984).

ology correlates with the interests of his constituency, all of the causal power is to be attributed to constituency economic interest. A plausible argument can be made, however, that part of the effect of the economic makeup of the constituency is on constituency ideology, which in turn relates to the choice of legislator.[85] If so, constituency economic interest may have little direct effect on legislators' votes. If, as seems likely, the truth is somewhere in between the economic model and this ideological model, ideology may play a role of at least the same order of magnitude as economics in the political process.

The studies using "cleansed" ADA ratings are the best of the current crop of econometric tests of the economic model of legislation. That does not, of course, mean that they are foolproof. The results of these studies are reinforced, however, by two other important kinds of evidence. First, as we saw earlier, the political science literature on legislative behavior supports the conclusion that legislators are partly influenced by a desire to promote the public interest. While economists sometimes seem to trust only the results of econometric studies, we see no reason to be so parochial in our methodological assessments. Indeed, the fact that traditional political scientists have reached the same conclusions as the best econometric research is a particularly valuable confirmation precisely because the research methodologies are so different.

Second, detailed investigations of the adoption of particular statutes tend not to support explanations based solely on special interest influence. For example, it has been suggested that environmental statutes favor large firms over small ones.[86] In reality, the major influence on the legislation seems to have been a desire to appeal to environmentalist voters.[87] Similarly, the Glass-Steagall Act has been described by a prominent public choice analyst as the result of lobbying by New York investment bankers.[88] A recent study,

85. For empirical evidence on the significance of constituent ideology in explaining legislative votes, see Kau & Rubin, *Economic and Ideological Factors in Congressional Voting: The 1980 Election*, 44 PUB. CHOICE 385 (1984); Page, Shapiro, Gronke, & Rosenberg, *supra* note 84. *See also* Glazer & Robbins, *How Elections Matter: A Study of U.S. Senators*, 46 PUB. CHOICE 163 (1985) (senators change their positions to track the ideology of recently elected senators from their states). *See generally* Wattier, *Ideological Voting in 1980 Republican Primaries*, 45 J. POL. 1016 (1983) (ideology guides voters); sources cited in note 39 *supra*. A recent article suggests that it may be futile to attempt to separate a legislator's personal beliefs from those of the constituents, because an entrepreneurial politician can often find enough support groups in diverse districts to be elected when voter turnout is low. See Poole, *Recent Developments in Analytical Models of Voting in the U.S. Congress*, 13 LEGIS. STUD. Q. 117 (1988).

86. Easterbrook, *supra* note 2, at 16 n.16; Pashigan, *supra* note 69.

87. Elliott, Ackerman, & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985). Notably, the authors of this study concluded that these voters were not represented by organized interest groups at the time. *Id.* at 317.

88. Macey, *Special Interest Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall*, 33 EMORY L.J. 1, 20 (1984).

however, demonstrates that the statute is precisely what it appeared to be all along: the product of misguided populist impulses.[89]

Thus, we have three bodies of evidence that seem to point to the same conclusion: the most careful econometric work, the findings of traditional social scientists, and historical investigations of the public choice accounts of particular legislation. There is no such thing as conclusive evidence in the social sciences, but we can feel some degree of confidence in rejecting the economic model of legislation (at least, without significant modifications). No one would deny the importance of self-interest in the political process, but we can also be reasonably sure that self-interest is not the whole story.

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 thereby 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, rather than claiming to explain all of politics. Based on the empirical evidence, this less ambitious, weaker version of the theory seems far more supportable than the strong version.

Our best picture of the political process, then, is a mixed model in which constituent interest, special interest groups, and ideology all help determine legislative conduct.[90] Even in purely economic matters, ideology plays some role, while economics may have some impact even 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 some suggestions about how the relative influence of interest groups may vary, the empirical evidence so far is spotty at best. The studies of tariff legislation discussed earlier in this chapter show that, even with a single type of legislation, the relative influence of special interest groups and ideology has varied over time. For now, the strongest (if somewhat vague) conclusion is simply that these relative weights seem somewhat correlated with the nature of the issue.

IV. Normative Implications

Much of the literature on interest groups conveys a strong flavor of disapproval. Suppose organized interest groups do have disproportionate political influence. What is so wrong with that?

89. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Banking Regulation*, 85 MICH. L. REV. 672 (1987).

90. 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 who suspect us of creating a straw man out of the economic theory of legislation should see *A Bias Toward Bad Government?*, N.Y. Times, Jan. 19, 1986, § 3, p. 1, col. 2, at p. 27, attributing to Gordon Tullock, a leading public choice theorist, the view "that people act from

When economists describe special interest legislation as "rent-seeking," they mean that the legislation is not justified on a cost-benefit basis: it costs the public more than it benefits the special interest, so society as a whole is worse off.[91] We agree that, all other things being equal, this is undesirable. But all other things are not always equal. Some wealth transfers may be morally desirable, even though the process involves some inevitable degree of waste, if only the cost of printing the checks. (There is also a more subtle social cost, in that potential beneficiaries of such transfers will expend resources in lobbying for favorable legislation.) Only if we are willing to make cost-benefit analysis our sole norm can we categorically reject such wealth transfers.

Cost-benefit analysis cannot be the only standard for evaluating government decisions. For technical reasons, cost-benefit analysis—or more specifically, the underlying standard of economic efficiency—cannot be applied until a prior decision is made about how to distribute social entitlements. Without such a prior decision, the standard of economic efficiency can give inconsistent results.[92] It is also possible to have more than one economically efficient outcome, so that efficiency gives no basis for judging between them.

Some of the limits of the efficiency standard can be seen by considering a hypothetical world with only two individuals, Bush and Dukakis, neither of whom cares about the other. In state *A*, Bush holds all the wealth. In state *B*, Dukakis holds all the wealth. Both states are economically efficient: it is impossible to improve the welfare of either individual without harming the other at least as much. Since redistribution does not create new wealth, cost-benefit analysis cannot distinguish between these two states of the world. Hence, cost-benefit analysis cannot tell us whether state *A* or state *B* is more desirable.

The same kind of problem can also arise when intangible entitlements rather than ordinary "wealth" are at stake. Consider the decision to destroy a stand of redwoods. If lumber companies have the legal right to harvest the trees, environmentalists might not be willing (or able) to pay the companies

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selfish motivations about 95 percent of the time. And they are no more high-minded as voters than as customers, selecting the candidate they think represents the best bargain for them just the way they select cars or detergent."

91. The standard underlying cost-benefit analysis is called Kaldor-Hicks efficiency.

92. This point is developed at greater length in Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L.F. 337, 352–54. For a related argument against "wealth maximization" as a principle for social choice, see Keenan, *Value Maximization and Welfare Theory*, 10 J. LEG. STUD. 409 (1981). Note that these results do not contradict the Coase Theorem, which holds that in the absence of transaction costs, the parties will bargain to an efficient result. Given each initial allocation, the resulting bargain is efficient, but the two allocations produce *different* efficient bargains.

enough to get them to stop. A cost-benefit analyst would say that company profits were greater than the harm to the environmentalists, so logging would be economically efficient. Thus, the loggers can claim that their actions meet the "market" test of cost-benefit analysis: in a world of perfect markets, the logging would proceed because its benefits to them outweigh the costs to the environmentalists. Hence, the environmentalist attempt to ban the logging is rent-seeking.

The loggers' argument covertly assumes, however, that they have the right to control logging. If the environmentalists had the legal right to prevent logging, they might demand a much higher price to sell that right to the lumber companies. One reason for the disparity is that environmentalists are in a sense "wealthier" (they have a legal entitlement they didn't own before). Changes in wealth shift the demand curve. Now, the cost-benefit analysis may well show that logging is inefficient; the environmentalists wouldn't be willing to sell the logging rights at a price the firms would be willing to pay. If so, lobbying by the loggers would be rent-seeking. We can't decide whether the logging is economically efficient until we know who has the entitlement. Thus, cost-benefit analysis is indeterminate in this situation. We have to look elsewhere to decide whether we should allow the trees to be cut, or which side we want to accuse of being a rent-seeking special interest.

None of this is news to economists.[93] Even fervent believers in economic efficiency concede that "there is more to justice than economics."[94]

Because the efficiency standard is limited, rent-seeking can be justified when it advances other social values. From one perspective, legislation requiring handicapped access may be rent-seeking. It may well cost society more to give the access than the handicapped would be willing to pay to obtain it. (In fact, this is probably true; otherwise the market would already offer access to the handicapped.) But many people think that deeper issues of social justice are involved, and they are willing to sacrifice some of society's economic wealth to attain these goals. Calling a law "rent-seeking" means at most that it decreases society's total wealth, but this price may be worth paying.

Thus, the fact that interest groups obtain rent-seeking legislation does not *necessarily* mean that interest group politics is undesirable. Realistically, however, we must concede that at least some of the resulting legislation may be hard to justify based on *anybody's* view of social justice. As a society, we are made poorer by such legislation with no countervailing moral benefit.

The current federal budgetary woes suggest another reason to be con-

93. For example, the reversibility problem is discussed in Cooter, *Liberty, Efficiency, and Law*, 50 L. & CONTEMP. PROBS 141, 152–58 (1987).

94. R. POSNER, ECONOMIC ANALYSIS OF LAW 25–26 (3d ed. 1986).

cerned about interest group politics. We may be facing a version of the prisoners' dilemma game, in which choices that are individually rational become collectively disastrous.[95] (Prisoners' dilemma is a game theory situation in which two prisoners find it rational to "rat" on each other, though they would both be better off if they could trust each other to remain silent.) Suppose that the budgetary deficit will have serious economic consequences, and that everybody recognizes this fact. It is even possible that in the long run these economic consequences will outweigh whatever benefits interest groups now receive. Even if everyone knows this, however, it may be impossible to do anything about it. The struggle of the various interest groups in the end can make them all worse off.

For example, although farmers benefit from price supports, they might be willing to give up those supports if the budget could be balanced. The reason is that they are hurt even more by budget deficits, which unhinge exchange rates and destroy their foreign markets. If other interest groups were willing to agree to a cut in federal spending, the farmers would go along. But other groups haven't made such a commitment. If the farmers were to voluntarily give up price supports and other groups failed to go along, the farmers would then be faced with the worst of all worlds: no price supports and a budget deficit that is essentially unreduced. Thus, without a commitment from all the other interest groups, it would be crazy for the farmers to give up their price supports. The other interest groups all reason the same way, so no one is willing to give up their own "piece of the federal action." The result is that the deficit continues to mount, even though everyone agrees that serious action is called for.

Analytically, this problem is much like that of air pollution. Suppose catalytic converters cost $100, but that each catalytic converter would prevent $200 worth of air pollution damage. A law requiring converters is in everyone's interest. But without such a law, individuals may not find it in their rational self-interest to install converters. If any one person installs a converter, she has to pay the full cost of $100, but the $200 worth of cleaner air is enjoyed by everybody; the effect of one converter on her own air supply is negligible. If she does a personal cost-benefit analysis, she finds that she is paying $100 to obtain insignificant personal benefits. If she is economically rational—luckily, not everybody is—she won't install the converter, and, for the same reason, neither will everyone else. Special interest legislation, then, can be like air pollution: collectively irrational but individually rational.

Another concern about special interest legislation relates to equity. Not everyone is equally represented by organized interest groups. Indeed, all

95. Another explanation of the deficit may be that current generations are externalizing the costs onto their descendants.

other things being equal, one would expect that the wealthy would be willing to pay more for political influence, just as they are usually willing to pay more for other goods. Even apart from any connection with wealth as such, the process may exclude some politically disfavored groups, who are neither powerful enough to belong to the establishment, nor treated so badly that they are spurred to organize. Moreover, there is another form of inequity in that, because of the "free rider" problem, broadly diffused groups like consumers are likely to be underrepresented compared with producers.

The most fundamental concern about interest group politics, however, is that it corrodes the political system. As we saw earlier, for example, voting is not economically rational. People apparently vote because of some view of political obligation: it is part of their conception of themselves as citizens in a democracy. Interest group politics erodes such norms. If politics is just a fight for spoils, why bother to vote? And if politics is just a fight for spoils, why hold politicians to any higher standards than used car sellers? As we saw at the beginning of this chapter, this view of politics has become increasingly prevalent among the public. In the long run, it is not clear that a democratic society can function effectively once this perspective becomes thoroughly established.

Public choice theory can help us analyze the problem of interest group influence and seek ways to prevent excesses. It can also, unfortunately, contribute to the problem by reinforcing existing public cynicism about the political process.[96] In later chapters, we will return to the question of how public law should respond to the problem of special interests. First, however, we must consider another body of public choice theory that presents a serious challenge to conventional views of democracy.

96. *Compare* Kelman, *"Public Choice" and Public Spirit*, 87 PUB. INTEREST 80 (1987), *with* Brennan & Buchanan, *Is Public Choice Immoral? The case of the "Nobel" Lie*, 74 VA. L. REV. 179 (1988). For a more extended discussion by Kelman, see S. KELMAN, MAKING PUBLIC POLICY (1987).