

1-1999

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Frank B. Cross

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Recommended Citation

Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355 (1999).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol50/iss2/3

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Essay

The Judiciary and Public Choice

by
FRANK B. CROSS*

Public choice theory has assumed nearly preeminent importance in legal analysis and often has been employed to justify an expansive role for the judiciary and litigation in law interpretation. Concern over the excessive influence of interest groups has focused upon shortcomings of the legislative or administrative processes and has often called upon judges to correct these failings. Yet the structural shortcomings of litigation have been largely overlooked. My thesis is that the judicial process is more susceptible to manipulation by narrow interests than are the more democratic branches of government and that expanding judicial review of those branches would increase rather than decrease the influence of narrow special interests on public policy.

I. Public Choice Analysis and the Law¹

A broad theme of many public choice analyses is a preference for the judiciary vis-à-vis other government institutions. This section explores the basis of the pro-judiciary analysis. I also consider the

* Visiting Professor, Duke University School of Law; Herbert D. Kelleher Professor of Business Law, University of Texas at Austin.

1. Public choice, for purposes of this article, involves interest group theory rather than Arrowian randomness. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991) (discussing and distinguishing these two aspects of public choice theory). Kenneth Arrow, among others, has demonstrated that majority voting produces unstable results in the presence of more than two options. As different sets of options are compared, results will cycle between options. *See generally* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951). While theoretically troublesome, such cycling doesn't appear to occur much in practice. *See* William F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 *GEO. MASON L. REV.* 953, 956 (1998) (observing that "majority rule outcomes seem to be remarkably stable in practice" and offering explanation).

nature of the legal and political proposals that follow from this preference. The proposals generally favor expanding the role of the judiciary in checking the other institutions of government but apply little scrutiny to the nature of the judicial process itself.

A. Institutions and Their Incentives

By public choice, I mean a concatenation of economic principles. First, the theory assumes that all actors are motivated by self-interest. Legislators, for example, are presumed interested in maximizing their reelection prospects. Private entities are motivated by their financial interests and will try to extract rents from the government whenever possible.² Second, public choice analysis commonly invokes Mancur Olson's theory of collective choice.³ This widely accepted theory suggests that smaller groups will be better able to organize collectively and combine their resources, with less of a free rider problem. For larger groups, each potential individual member has less incentive to participate in the group, because the individual can still benefit from the group's actions ("free ride") without participating. For this reason, producers will be able to organize better than consumers. Consequently, narrow groups such as producers will commonly prevail before the legislature at the expense of the broad but diffuse public interest.

Public choice thus suggests that the legislature will typically be in thrall to narrow private interests, sometimes called factions. These interests will attempt to purchase rents from the legislature. Legislators will sell such rents in exchange for their own rents, in the form of perquisites (*e.g.* golfing junkets), campaign contributions, and other reelection advantages.⁴ Broader public interests will be unable to counteract this influence because they will find it difficult to organize effectively.⁵ Elections, the theory goes, will not counteract

2. A rent in this context refers to an economic benefit acquired by an entity through its ability to escape the competitive pressure of markets, such as by establishing a monopoly position, or by obtaining a direct transfer of wealth, rather than by creating wealth. Rent-seeking research typically addresses the means by which special interest groups attempt to manipulate the law in order to reduce competition or receive subsidies from the government.

3. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (2d ed. 1971)

4. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 877 (1975) (reporting that "legislation is 'sold' by the legislature and 'bought' by the beneficiaries of the legislation"); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 344 (1990) (referring to the "deal between rent-seeking groups and reelection-minded legislators").

5. See FARBER & FRICKEY, *supra* note 1, at 19 (observing that "[t]here are few lobbyists for consumers but many for producers").

this influence.⁶ Interest group politics is biased in favor of narrow economic interests. As a consequence, legislation will typically or even always favor narrow interests at the expense of the general public.⁷

Public choice theory is similarly gloomy about the administrative process. The executive-supervising president has the same incentives as the legislatures. Individual bureaucrats need not worry about reelection, but they have their own self-interests. One such interest is lucrative future employment.⁸ As a consequence, narrow collective interests will also influence the administrative agencies. This is sometimes referred to as "regulatory capture."

Federal judges are not so obviously influenced by narrow collectivities. These judges are given life tenure and hence need not worry about reelection.⁹ Nor do such judges typically leave the bench for more lucrative employment. The maximand of federal judges remains quite uncertain.¹⁰ While the nature of judges' self-interests is not fully understood, judges do seem to be less susceptible than legislators and bureaucrats to collective interests seeking rents at the expense of the general welfare.¹¹ This intuition has led to a relative

6. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 n.38 (1997) (observing that according to public choice theorists, "legislators generally respond not to the will of a majority of their constituents but rather to well-organized special interest groups which offer campaign contributions in exchange for favorable votes on legislation"); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 490 (1988) (contending that "[p]olitical parties, recognizing the phenomenon of voter apathy due to rational ignorance, compete for the right to divert resources from the general population to those interest groups most adept at overcoming the free rider problem").

7. See, e.g., Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) (suggesting that "many laws are designed to serve private rather than public interests").

8. See generally George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). This seminal article suggests that administrators look to the possibility of post-government employment as well as maximizing their budgets and their powers. These objectives may work at cross-purposes, however. Actions taken to maximize agency budgets and power will often be pro-regulatory and contrary to the interests of the regulated entities (at least in the case of social regulation).

9. See, e.g., Landes & Posner, *supra* note 4, at 886-887 (observing that life tenure largely divorces judicial rewards from the outcome of judicial decisions).

10. See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 294-303 (1997) (generally reviewing inconclusivity of research); Shugart & Tollison, *supra* note 1, at 959-60 (discussing theories of judicial motivation).

11. See William C. Mitchell & Randy T. Simmons, *Public Choice and the Judiciary: Introductory Notes*, 1990 BYU L. REV. 729, 741 (1990) (reporting that "the judiciary is commonly thought to be so organized that public choice principles are not applicable").

preference for judicial decision-making.¹²

B. Preference for the Judiciary and Litigation

Law and economics has had a longstanding preference for litigation over legislation. Some have argued that the common law was efficient, in contrast to the relatively inefficient public law created by legislatures.¹³ The implicit prescription was for more law to be made by judges and less by legislatures. Others have argued that the judiciary should aggressively review legislation, striking it down or modifying its prescriptions toward the end of the common good.¹⁴ The public choice theorists generally call for more active judicial involvement in lawmaking, at the expense of the legislative and executive branches of government.¹⁵ Edward Rubin has observed

12. See Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 2 (1991) (observing that public choice theory of legislation is often accepted, though "few legal scholars will countenance this approach where judges are concerned").

13. See, e.g., DONALD WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE* 116 (1995) (noting that the "main thrust of the literature in economic analysis of the law is that judge-made law is efficient, while legislative regulation is woefully inept and subject to rent-seeking").

14. See FARBER & FRICKEY, *supra* note 1, at 63 (observing that the "most dramatic proposals to apply public choice" have been to use constitutional law to limit economic legislation and regulation); Erwin Chemerinsky, *Foreward: The Vanishing Constitution* 103 HARV. L. REV. 43 (1989) (calling for less deferential constitutional review of political decisions); Richard A. Epstein, *Toward a Revitalization of the Commerce Clause*, 51 U. CHI. L. REV. 703 (1984) (advocating enhanced judicial review of rent-seeking legislation); WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 92 (1988) (observing that interest group theorists would probably adopt an "interventionist judicial strategy" of the constitution); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980) (arguing generally for aggressive judicial review of economic legislation); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980) (suggesting that the Supreme Court invalidate special interest legislation); Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT'L REV. L. & ECON. 191 (1992) (calling for expanded judicial review of the appropriation process).

15. See generally David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 661-62 (1997) (describing tendency of public choice scholars to prefer judicial action); Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 TEX. L. REV. 1541, 1543 (1993) (noting that public choice provides "a rationale for remedying alleged deficiencies of electoral and legislative politics through judicial intervention"); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 33 (1991) (listing numerous prominent legal scholars contending that public choice theory "justifies changing judicial review to make it less deferential to political outcomes"); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 908 (1987) (noting that public choice commentators "have advocated more stringent judicial review"); Jonathan Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50 (1987)

that public choice scholars, like legal scholars in general, conclude that whatever the issue, "the best people to resolve it are judges."¹⁶ While not every public choice devotee is utterly enamored with judicial review, this is the clear tendency of the writings.

Administrative law lies at the intersection of the three branches and has been the primary recent focus of public choice theorists. Their central argument has been for greater judicial activism in review of administrative action. Prominent scholars, such as Cass Sunstein have called for more intrusive judicial review of agency rulemaking, to combat public choice problems such as agency capture.¹⁷ Yet it is in administrative law that I believe the public choice case *against* judicial review is strongest. I will focus upon this area of the law throughout the article.

The public choice preference for the judiciary and litigation is not universally embraced. Some, including Landes and Posner, have questioned the effectiveness of judges in combating inappropriate legislative action.¹⁸ Others, such as Farber and Frickey, have

(contending generally that an independent federal judiciary is an obstacle to rent-seeking behavior of interest groups); Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 850-51 (contending that judicial independence enables courts to strike down interest group deals); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (arguing that the structure of courts makes them better suited to resolve policy issues fairly); Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 952 (addressing view that "[c]ourts, where the intellectual class dominates, constrain the rent-seeking of government classes"); Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219 (1997) (suggesting that in some circumstances courts neutralize the dynamics of interest group influence); Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 119 (1995) (reporting that legal scholars "call on the judiciary to realign the perceived unrepresentative, undemocratic, or even corrupt interest-group influence and political dealmaking").

16. Edward L. Rubin, *Public Choice in Practice and Theory*, 81 CAL. L. REV. 1657, 1670 (1993). See also Skeel, *supra* note 15, at 662 (observing that "the proposals tend to assume that judges are somehow above the fray and can be wholly objective in interpreting the statutes that come before them").

17. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61-63 (1985) (suggesting that hard look judicial review can flush out impermissible rent-seeking bases for regulation). See also Marc Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 502 (1997) (arguing that limiting judicial review would "benefit groups with narrow interests"); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387 (1987) (arguing that judicial review protects public interest against agency capture); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992) (contending that judicial review prevents agencies from favoring special interests).

18. See Landes & Posner, *supra* note 4 (indicating that incentive of independent

suggested that judges may be unable to distinguish between illegitimate government action and public-regarding legislation.¹⁹ Yet others have invoked normative or formalist critiques, arguing that our Constitution precludes a more active judicial role.²⁰

Scholars have not generally considered the possibility that litigation could be more susceptible to inappropriate rent-seeking influences than are the legislature and executive.²¹ I contend that more active judicial review of administrative action, for example, will exacerbate the problems of government favoring narrow special interests. This derives not from the preferences or incentives of judges but from the essential structure of the litigation process itself. I explain in the following section.

II. Public Choice and Litigation

The focus on decisionmaker incentives makes courts look appealing from a public choice perspective but ignores the structural effects of institutional arrangements. Courts are simply another venue in which influence may be brought to bear upon government policy. The lobbying of courts can take a variety of forms, including test cases and forum shopping, amicus curiae participation, provision of expert witnesses, selective settlement, and other techniques. This section reviews three distinct reasons why special interests find a favorable audience in the judiciary.

A. Resources

The theory of public choice and the legislature describes the "purchase" of legal benefits by special interests best able to pay for such benefits, such as by campaign contributions to elected officials. This same principle obviously calls for consideration of resource costs

judiciary is to enforce special interest bargains of past legislatures).

19. See FARBER & FRICKEY, *supra* note 1, at 64; see also Farber & Frickey, *supra* note 15, at 908-09 (questioning whether the judiciary can accurately identify and cure interest group influence).

20. See Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695; James M. Buchanan, *Good Economics - Bad Law*, 60 VA. L. REV. 483 (1974).

21. The influence of group lobbying in courts was recognized long ago. See generally DAVID TRUMAN, *THE GOVERNMENTAL PROCESS* (1951). There are some more recent criticisms of the judiciary that should be recognized. For example, the problem of precedent-purchasing (discussed below in section IIC) has been noted in Peter H. Aranson, *Models of Judicial Choice as Allocation and Distribution in Constitutional Law*, 1990 BYU L. REV. 745 (1990). The same issue is also addressed in Elhauge, *supra* note 15, at 68-71. The latter article offers a rare example of comparative institutional analysis from the public choice perspective. Such pieces are relatively few, however, and are typically ignored by the pro-judiciary theorists.

of litigation. While judicial filing fees are relatively low, litigation calls for many additional costs. Lawyer time is expensive and the best lawyers are the most expensive. These costs can best be borne by special interest groups. The typical plaintiff in an administrative law challenge, for example, is an organization; the incentives of an individual to bear litigation costs are small due to the free rider problem.²² Organizations sponsor litigation "because individuals lack the necessary time, money, and skill."²³ Litigation therefore suffers the same Olsonian²⁴ special interest problems as political action, and special interests may use litigation to enhance their market power or frustrate public-interested regulation.

Once in court, those organizations with greater resources are more successful. Experience and litigation expertise contributes to success in court.²⁵ Marc Galanter has explained how the "basic architecture" of the litigation process enables wealthier participants to prevail frequently.²⁶ In the contested area of administrative law, "the power is held by interest groups and others who can afford the lawyers to play the process and go to the courts."²⁷ McCubbins, Noll, and Weingast observe that "industries, with greater economic stakes in regulatory issues, are more likely to devote the resources necessary to be effectively represented in expensive proceedings."²⁸ The existing public interest groups, as Mancur Olson predicts, tend to be poorer than special interest groups. In consequence, they become "exhausted [by] the litigation process" and unable to "mobilize the resources to capitalize on the fruits of legal victories."²⁹ Litigation over government policies, such as regulation, typically requires great expense and considerable expertise.³⁰ While it was once thought that

22. See Karen Orren, *Standing to Sue: Interest Group Conflict in the Federal Courts*, 70 AM. POL. SCI. REV. 723, 735 (1976).

23. Clement E. Vose, *Litigation as a Form of Pressure Group Activity*, 319 ANNALS 20, 22 (1958).

24. See *supra* note 3 and accompanying text.

25. Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995).

26. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 95 (1974).

27. Phillip K. Howard, *Administrative Procedure and the Decline of Responsibility*, 48 ADMIN. L. REV. 312, 318 (1996).

28. Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 469 (1989).

29. Joel B. Grossman & Austin Sarat, *Access to Justice and the Limits of Law*, in GOVERNING THROUGH COURTS 88 (Richard A.L. Gambitta, Marlynn L. May & James C. Foster eds., 1981).

30. See Susan M. Olson, *Interest Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory*, 52 J. POL. 854, 859 (1990).

disadvantaged groups could successfully turn to the courts to protect their interests, this was an artifact of early case studies on the civil rights movements. More recent analyses have shown that politically advantaged groups are better able to take advantage of the litigation process.³¹ Many such groups can synergistically use their influence in the political branches in combination with a judicial strategy in order to maximize their prospects.³²

Data demonstrate that richer interest groups are more successful in court.³³ A review of United States Circuit Court of Appeals decisions found that “upperdogs” or “haves” are far more successful than individuals or small businesses.³⁴ Throughout the court system, big business wins an overwhelming proportion of its cases, whether as plaintiff or defendant.³⁵ A recent close study of the development of doctrine in the federal law of public nuisance found that significant factors in predicting decisions included the party’s resources, the attorney’s experience, and the presence of amicus support.³⁶ In addition to financial resources, special interest groups may succeed in court in part because of their general political clout.³⁷ Such groups have not been shy about using the courts to advance their agenda.³⁸

Thomas Merrill recognizes the resource benefits enjoyed by

31. *Id.* at 854-856. See generally, Paul J. Wahlbeck, *The Life of the Law: Judicial Politics and Legal Change*, 59 J. POL. 778, 783 (1997) (reporting that litigants with financial resources “are much more successful in appellate courts than less resourceful litigants” and thereby “gain legal rules that will give them substantial leverage in subsequent encounters”).

32. See Olson, *supra* note 30, at 859-81.

33. See Kevin T. McGuire, *Capital Investments in the U.S. Supreme Court: Winning with Washington Representation*, in CONTEMPLATING COURTS 72, 81 (Lee Epstein ed. 1995) (reporting empirical advantages for organizational litigants before the Court); HERBERT JACOB, *LAW AND POLITICS IN THE UNITED STATES* 154-55 (2nd ed. 1995) (observing that interest groups have more success getting the U.S. Supreme Court to take certiorari in a case and in winning those cases that are taken).

34. Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235 (1992).

35. Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 L. & SOC. INQUIRY 497 (1996).

36. Paul J. Wahlbeck, *The Development of a Legal Rule*, 23 L. & SOC’Y. REV. 613, 632 (1998).

37. See Barbara M. Yarnold, *Do Courts Respond to the Political Clout of Groups or to Their Superior Litigation Resources? Repeat Player Status*, 18 JUST. SYS. J. 29 (1995) (studying district court opinions on abortion and finding significant association between success in court and political involvement).

38. See generally Karen O’Connor & Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman’s “Folklore,”* 16 L. & SOC’Y REV. 311, 314 (1981-82) (reviewing social science studies and reporting that “[v]irtually all recent research, therefore, has found evidence of a significant systematic organizational role in Supreme Court litigation”).

special interest litigants but nevertheless favors the judicial role.³⁹ This more nuanced justification of courts suggests that the minimally necessary costs of litigation are less than the costs of lobbying and that the marginal benefit of additional litigation expenditures is rather small.⁴⁰ As a consequence, he believes that the judiciary opens up the government to more interest groups and may enable groups with fewer resources to prevail.⁴¹

Merrill's attention to the legislative branch focuses exclusively upon the costs of a lobbying campaign. The costs of lobbying Congress may be well beyond the capacity of the average individual or small group, and effective lobbying may exceed the resources of broad-based public interest groups. The average individual citizen does have an inexpensive way to influence legislators, though, by voting. Evidence discussed in section III.A below indicates that voting may be an effective tool for influencing representatives. Even nonelectoral expressions of public opinion may influence representatives, including the president, who attend to polling results. However, the average citizen has no comparable tool for influencing the decisions of federal judges. On this score, the representative branches are structurally more responsive to the general welfare.

Merrill's theory suffers other shortcomings as well. When evaluating the benefit of litigation resources, he considers only their value for winning the instant case. He does not consider the ability of richer groups to bring more cases more strategically, thereby overextending public interest groups.⁴² More seriously, he does not consider the ability of richer groups to use their resources to settle cases selectively in order to direct the path of the law.⁴³ His focus is on constitutional litigation, and he does not compare the relative resource demands of the judiciary and the agencies, which is crucial to the administrative law analysis on which I focus.

B. Standing

Under the Constitution, any citizen may petition the government

39. See Merrill, *supra* note 15, at 222.

40. Merrill suggests that the minimally necessary costs of litigation are around \$250,000, *id.* at 222, and that the minimally necessary costs of lobbying are around \$2 million. *Id.* at 224. He then contends that the direct benefits of litigation expenditure become inelastic at a sum around \$1.5 million. *Id.* at 227. While none of these numbers are empirically supported, they seem plausible.

41. See *id.* at 226 (contending that "[j]udicial activism therefore adds spice to the political system").

42. See JACOB, *supra* note 33, at 149 (noting that interest groups "develop a stream of litigation over many years" as part of a "broader strategy of action" and "carefully select their clients to provide the best chance of obtaining a favorable ruling").

43. See *infra* Section II.C on precedent-purchasing.

for redress of grievances. The circumstances permitting petition of the courts, however, are more restrictive. A plaintiff must have standing in order to invoke judicial action. The doctrine of standing and the closely related case or controversy requirement for adjudication serve directly to promote narrow special interests over the general public interest. Due to standing doctrine, individual industries may be represented in court, but "the societal interest in an innovative and competitive economy is often not effectively represented."⁴⁴

Supreme Court standing doctrine explicitly favors special interests seeking rents at the expense of the broad general public. The Court has consistently granted standing to groups seeking to invoke the law in order to prevent competition. Travel agencies have standing to sue to keep banks from operating competing travel agency services.⁴⁵ An investment company trade association has standing to challenge competition from banks.⁴⁶ Securities dealers have standing to fight bank competition.⁴⁷ Banks have standing to limit competition from credit unions.⁴⁸ In all these cases, a narrow special interest invoked the judicial process to insulate itself from full free market competition. The general interest of consumers, by contrast, typically does not generate standing to sue. According to longstanding doctrine, standing requires a particular injury, "as distinguished from the public's interest in the administration of the law."⁴⁹

The adverse consequences of standing doctrine are well illustrated by *Block v. Community Nutrition Institute*.⁵⁰ In that action, a group representing consumers nationwide sought to challenge an agricultural marketing order that limited dairy production and thereby increased price. The Court held that the public interest representatives lacked standing, though there is little doubt that the regulated targets of the order would have had standing. The Court has frankly declared that there is no standing to represent interests "pervasively shared" by members of the public.⁵¹ Standing, almost by definition, offers a forum for narrow special interests and closes the

44. Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 681 (1985).

45. See *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970).

46. See *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971).

47. See *Clarke v. Securities Indus. Ass'n.*, 479 U.S. 388 (1987).

48. See *National Credit Union Admin. v. First Nat'l Bank and Trust Co.*, ___ U.S. ___, 118 S. Ct. 927 (1999).

49. *Perkins v. Lukens Steel Co.*, 310 U.S. 125, 125 (1940).

50. 467 U.S. 340 (1984).

51. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474 (1982).

door to appeals by the diffuse public interest.⁵²

Standing doctrine has been liberalized somewhat, but it remains biased against the diffuse public interest. The liberalization has itself created new opportunities for special interest manipulation of the law. The Supreme Court created a “zone of interests” test that enables certain parties to challenge statutory interpretation, apparently broadening the group of those who have standing.⁵³ In determining who falls within this zone of interests of the statute, providing standing, courts typically reference the legislative history of the statute. This provides special interests with an inexpensive opportunity to use the legislative process (even individual legislators) in order to slip within the zone of interests, thereby opening up the courts to those who can more effectively play the legislative game.⁵⁴ Countervailing interests may be excluded from the zone. A study of district court litigation found that interest groups used their political and legal resources complementarily in order to gain influence.⁵⁵ Rather than combating special interest influence in the legislative process, judicial review may thus enhance such influence.

Maxwell Stearns has argued that standing doctrine helps save judicial decisions from the cycling problems associated with social choice theory.⁵⁶ Yet this rescue condemns judicial decision-making to suffer the influence of narrow interest groups and deny a forum to broad public interests. At best, judges could “do no harm” by voting against such narrow interests that possess standing. Yet as the preceding section shows, judges more often rule in favor of the interests.

In contrast to judicial standing doctrine, anyone may petition the elected branches of government. Groups of taxpayers, for example, who could not get in the door of the federal courts, have had at least occasional success in petitioning Congress for tax relief.⁵⁷

52. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (declaring that targets of regulation presumptively have standing but that “much more” is needed to establish standing for “someone else”).

53. The seminal cases establishing the zone of interests test are *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970).

54. See Karen Orren, *Standing to Sue: Interest Group Conflict in the Federal Courts*, 70 AM. POL. SCI. REV. 723, 732-33 (1976) (suggesting that the new test opens options to interest groups that “seem to be limited only by the imaginative and financial resources of the groups themselves”).

55. See Shughart & Tollison, *supra* note 1, at 877.

56. See Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability: and Social Choice*, 83 CAL. L. REV. 1309 (1995).

57. Taxpayers generally lack standing to sue over federal expenditures. See *United States v. Richardson*, 418 U.S. 155 (1974); *Valley Forge Christian College v. Americans*

Legislatures can set their own agendas and can choose to do nothing. In contrast, courts' agendas are set by parties, and decisions generally must be rendered.⁵⁸ Standing doctrine grants special access to special interests and access "means increasing the power of those given access."⁵⁹

C. Precedent-Purchasing

Law and economics scholars have increasingly come to recognize the power of litigants over the path of the law. Courts cannot affirmatively issue advisory opinions regarding the state of the law. Judges must instead take those cases that come before them. Litigants control which cases reach the courts, a control that can be used to manipulate the path of the law. Should a defendant fear a court's decision, that defendant can evade such a decision by settling the case, often for a sum of money. The special interests, of course, possess both the resources and the incentive to settle cases selectively in this fashion.

The recently settled case of *Piscataway Township Board v. Taxman* illustrates the ability to manipulate courts through settlement.⁶⁰ When civil rights groups feared that the case might set a broad precedent against affirmative action, they arranged a settlement with the white teacher plaintiff. Thus, a non-party interested group intervened to remove the case from the Court and avoid a feared precedent.⁶¹ Expert repeat players with resources can most effectively exercise this law manipulation.⁶²

A party can strategically avoid an undesirable judicial ruling

United for Separation of Church and State, 454 U.S. 464 (1982); *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447 (1923). There may be a narrow exception when the challenge is under the Establishment Clause. See *Flast v. Cohen*, 392 U.S. 83 (1968).

58. See JACOB, *supra* note 33, at 150 (reporting that "interest groups that bring such cases find themselves in a uniquely influential position because they can bend the agenda of the court to their own purposes in a way they could rarely affect the agendas of legislatures or administrative agencies").

59. R. SHEP MELNICK, *REGULATION AND THE COURTS* 15 (1983).

60. See *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547 (3rd Cir. 1996), *cert. granted sub. nom.*, *Piscataway Township Bd. v. Taxman*, 521 U.S. 1116 (1997).

61. See Kathleen M. Sullivan, *Supreme Court Avoidance*, WASH. POST, Dec. 7, 1997, at C1 (discussing the strategic settlement of *Taxman*).

62. The settlement funds in *Taxman* actually came from large corporations, raising the suggestion that the settlement preserving affirmative action may have been intended to preserve a competitive edge for large companies over small competitors, who have higher relative costs of compliance with affirmative action commands. See James K. Glassman, *Buying Off Justice*, WASH. POST, Nov. 25, 1997, at A19 (noting that big companies can better absorb the costs of affirmative action than smaller firms).

through settlement.⁶³ A favorable ruling may be created simply by screening out the unfavorable fact patterns. Acting as a plaintiff, a party may shop for the most favorable forum and favorable judge or panel of judges before proceeding with its claim. As a defendant, a party may settle all challenges save for the case that presents the most favorable fact pattern and weakest adversaries. Driving the relatively promising case to litigation may functionally enable the defendant to select a forum to create a favorable precedent. Or a party may simply keep relitigating the matter until clear favorable precedents were obtained.⁶⁴ Parties have also used *vacatur* or “depublishing” of opinions to protect themselves from those precedents that proved unexpectedly adverse.⁶⁵

Selective litigation has been invoked as a basis for the law’s efficiency, as the party with the greatest stake in the matter will be best able to settle selectively and purchase precedent. This theory rests on a highly unrealistic assumption of equal stakes and resources, however. To effectively purchase precedent, a party must have the resources to selectively settle and the ability to capture the benefits of a favorable precedent. These features are characteristic of narrow special interests, rather than the general interest.⁶⁶

A recent doctoral dissertation analytically and empirically reveals how telecommunications companies use administrative law litigation for “protecting profitable markets, raising rivals’ costs, and affecting market entry patterns.”⁶⁷ It demonstrates how litigation information and expertise, acquired at some cost, is invaluable in selecting and prosecuting successful cases. The empirical analysis of challenges to the Federal Communications Commission demonstrates a pronounced effect of both resources and litigation experience on success in court.⁶⁸

Purchasing judicial precedent analogizes to the theory of purchasing legislation. While litigants may be unable to purchase the judge’s favors directly, they can achieve the same end indirectly, by

63. See Elhauge, *supra* note 15, at 78 (observing that parties will “settle strategically in cases where the type of judge or set of facts seems likely to lead to unfavorable precedent”). Elhauge notes that this process favors special interests because large, diffuse groups that share a common interest may be unable to “collect the funds necessary to pay off litigants bringing worrisome cases.” *Id.* at 79. Large diffuse groups may be at an even greater disadvantage in monitoring outstanding litigation that threatens the group interest.

64. See Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205, 212 (1982).

65. Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 665 (1994).

66. This point is effectively made in Elhauge, *supra* note 15.

67. John de Figueiredo, *The Politics of the Court and the Strategy of the Firm* (1997) unpublished Ph.D dissertation, University of California, Berkeley, on file with author.

68. See *id.* at 115-17.

dictating the cases that go to a judicial decision. Precedent purchasing may be considered more adverse to the public interest than legislation purchasing. There is no countervailing power of public opinion or public vote in the courts. There may be no countervailing power of ideology – factions must take Congress and the President as they find them but may strategically choose to litigate in front of a favorably ideological panel of the appellate courts, at least for those cases that do not reach the Supreme Court. The media monitors litigation less thoroughly than it does the legislature and presidency, thus protecting deals from public whistleblowing. Buying off a plaintiff is generally cheaper than buying off the essential members of a legislature. Perhaps most critically, a settlement agreement buying off a plaintiff can be essentially unambiguous and legally enforceable, while a clear contract with a legislator would be an illegal and unenforceable bribe.⁶⁹

III. Comparative Institutional Analysis

In the above section, I have sought to provide persuasive theoretical reasons why the judiciary is susceptible to the influence of narrow special interests. Any policy prescriptions, however, should be based upon a comparative institutional analysis of legislatures and the judiciary, and should consider empirical evidence.⁷⁰ Conducting a rigorous empirical comparative institutional analysis is problematic, however, due to the imprecision of the analogies between the participants in the legislative and judicial institutions. Bearing this difficulty in mind, I discuss in this section some additional comparative theoretical considerations as well as some anecdotal evidence indicating that the judiciary is inferior to the democratic branches from a public choice perspective.

A. Limits of the Public Choice Model and Comparative Institutions

In the extreme version of public choice modeling, *all* government action is inefficient and unwise. Under this vision, judicial review could hardly make the problem worse. Yet this vision is too narrow – public choice can be an effective explanation of legislative and administrative action but is surely not a complete explanation of such action. Ample evidence demonstrates that narrow self-interest does

69. See, e.g., Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 72 (1990) (noting that special interest deals with legislators do not approach status as binding contract).

70. See Elhauge, *supra* note 15, at 67 (suggesting comparative analysis is required, though “[t]hose advocating more intrusive judicial review rarely address this comparative question”).

not utterly rule the legislative and administrative processes.

While public choice theory certainly explains some legislative and executive actions, the theory is incomplete and ignores countervailing interests, such as the more diffuse but nevertheless extant organizations of public interest, the ideological objectives of politicians (especially those with job security), accountability to the general public in elections, and the influence of the media.⁷¹ These factors may counteract illegitimate pressures from special interests.⁷²

If the legislator's goal is re-election as presumed, she should be responsive to the vast bulk of voters. Campaign contributions surely help win re-election, but so do popular policies. The vote can counteract interest group pressures, and the factions realize this effect. It has been observed that "[o]rganized groups often do little to oppose legislation that is potentially adverse to their interests, especially when public opinion strongly favors the legislation."⁷³ Daniel Shaviro has shown how and why special interests could not derail tax reform legislation.⁷⁴ Political scientists have found a significant association between general public opinion and government policy in a variety of areas.⁷⁵

Legislation is also influenced by the legislators' concept of good policy. It should not be too shocking to suggest that elected officials are interested in power as well as money. Ample evidence indicates that ideology is a good predictor of congressional voting.⁷⁶ For example, a recent study of educational finance reform found decisions explained more by ideology and media influence than by special

71. See Shaviro, *supra* note 69 (describing limits of public choice theory as applied to tax reform legislation).

72. See JACOB, *supra* note 33, at 145 (noting that "[g]roups may be effective in gaining access and yet fail to convince lawmakers to adopt their suggestions, for legislators must face the electorate, which may defeat them if they case unpopular votes").

73. Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 197 (1988). Lee uses the example of environmental legislation. He then suggests that interest groups may accept the legislation due to their confidence in their ability to subvert the implementation of the law at the administrative level. See *id.* Yet the frequency of interest group judicial challenges to environmental regulation demonstrates that this ability to subvert implementation is not so strong as he implies.

74. See Shaviro, *supra* note 69.

75. See, e.g., Robert S. Erikson, et al., *Political Parties, Public Opinion, and State Policy in the United States*, 83 AM. POL. SCI. REV. 729 (1989); Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, AM. J. POL. SCI. 175 (1983); Gerald Kramer, *Short-Term Fluctuations in U.S. Voting Behavior, 1896-1964*, 65 AM. POL. SCI. REV. 131 (1981); Amihai Glazer & Marc Robbins, *Congressional Responsiveness to Constituency Change*, 29 AM. J. POL. SCI. 260 (1985).

76. For a recent review article on the impact of ideology on congressional voting, see Bruce Bender & John R. Lott, Jr., *Legislator Voting and Shirking: A Critical Review of the Literature*, 87 PUB. CHOICE 67 (1996).

interest lobbying.⁷⁷ Empirical data also suggests that bureaucratic action is heavily influenced by ideology.⁷⁸ Judge Posner observes that today's regulation is characterized by "diffuse benefits and concentrated costs . . . and so cannot easily be assimilated to a model of regulation that is based on cartel and interest-group theory."⁷⁹

The theoretical simplicity of public choice models does not translate directly into reality. Empirical evidence demonstrates that ideology and voter power overcomes special interest pressure.⁸⁰ In a vote on fast track trade negotiation power extension, for example, there was considerable interest group pressure, but voting patterns were explained well by ideology, party loyalty, and constituent interest.⁸¹ Other research indicates that interest groups have only a slight marginal influence on congressional voting.⁸²

Moreover, even legislative special interest favors may sometimes go hand in hand with the public interest. The legislature may create public interest programs in order to obtain a hook to facilitate special interest bargains. The interstate highway program, surely in the general interest, enables legislators to finance individual projects that may benefit narrow interests. Likewise, a water pollution control act may enable similar local special interest programs while simultaneously advancing the public interest in clean water. Even though the particular special interest benefits may be unworthy, the overall program providing public goods may well be net beneficial.⁸³

The need for Congress to legislate generally on behalf of narrow interests is further obviated by the availability of "milkers" – threats

77. See Dorothy A. Brown, *The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions*, 74 WASH. U. L.Q. 179, 189-202 (1996).

78. See, e.g., William Gormley, *A Test of the Revolving Door Hypothesis at the FCC*, 23 AM. J. POL. SCI. 665 (1979) (finding that Commissioners' political party affiliation was best predictor of voting).

79. Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 957-58 (1997).

80. In addition to the sources cited above, see those cited in Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 88-89 (1990). See also Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 214 (1988); Rubin, *supra* note 12, at 22.

81. See Leo H. Kahane, *Senate Voting Patterns on the 1991 Extension of the Fast-Track Trade Procedure: Prelude to NAFTA*, 87 PUB. CHOICE 35 (1996). See also Dennis Coates & Michael Munger, *Legislative Voting and the Economic Theory of Politics*, 61 SOC. ECON. J. 861 (1995) (reporting empirical demonstration of limits to special interest influence in strip mining legislation).

82. See John Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 75 AM. POL. SCI. REV. 400 (1985); WITTMAN, *supra* note 13, at 80-5 (summarizing research).

83. See Tyler Cowen, et al., *Rent Seeking Can Promote the Provision of Public Goods*, 6 ECON. & POL. 131 (1994).

to take action against such interests.⁸⁴ By making such threats, the legislature can raise considerable resources from interest groups in exchange for *not* taking action. Congresspersons can obtain their rents simply by doing nothing on some subset of potential legislation. Given the monopoly position of the legislature, its members should be able to raise substantial revenues from the interest groups and still be able to both take action on behalf of constituents and their visions of the general public interest.

Nor is executive action so frequently the product of interest group pressures. The once popular theory of agency capture is no longer persuasive.⁸⁵ Agencies commonly frustrate special interest factions, as demonstrated by the direct costs of regulation and the many court challenges such factions file against agency action. Increased presidential oversight also reduces the powers of interest groups in the executive branch.⁸⁶ Presidential oversight may be able to counter legislative special interest favors far more effectively than can the courts. If one supposes that the original legislative enactment was a special interest bargain, "federal judges are far more likely to enforce original legislative deals than agencies controlled by the President are."⁸⁷ Judicial review would, therefore, protect narrow special interests from public-regarding executive action.

The evidence is mounting that government, despite its imperfections and bows to special interests, works reasonable well in the public interest. Hovenkamp notes that "[t]here is no obvious reason for thinking that political markets work more poorly than economic markets; in fact, there are many reasons for thinking that

84. See Fred S. McChesney, *Purchasing Political Inaction: How Regulators Use the Threat of Legal "Reform" to Extort Payoffs*, 21 HARV. J.L. & PUB. POL'Y 211 (1997); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987); Shaviro, *supra* note 69, at 71.

85. See Macey, *supra* note 6, at 513 (reporting that "interest group capture of administrative agencies . . . is unusual"); Ian Ayres & John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 L. & SOC. INQUIRY 435, 436 (1991) (observing that "capture has not seemed to be theoretically or empirically fertile to many sociologists and political scientists working in the regulation literature"); K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 344 (1986) (reporting that "[c]apture is not by any means the norm, and where capture occurs, it does not always last").

86. See Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J. L. ECON. & ORG. 213, 237 (1990) (indicating that the President is primarily interested in "effective governance" and will focus upon "social problems and interests and resist specialized appeals"); James C. Miller et al., *A Note on Centralized Regulatory Review*, 43 PUB. CHOICE 83, 86 (1984) (suggesting that centralization of review in the presidency empowers more diffuse interests); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1193 (1994) (arguing that the President is less vulnerable to special interest appeals).

87. Posner, *supra* note 79, at 960.

they should work better.”⁸⁸ Wittman contends that democratic “markets” work about as well as economic free markets.⁸⁹ The presence of imperfections is undeniable but should not cause us to ignore the successful functioning of democratic government.

Some more conservative public choice advocates might suggest that all government action is illegitimate rent-seeking. If so, government action would be *per se* bad, and activist judicial review that restricted government action would be presumptively good. But it is clear that not *all* government action is so illegitimate, and the theory of public choice indicates that special interests devote considerable resources to fighting beneficial government action. Indeed, there is reason to believe that special interests are at their most influential when it comes to blocking beneficial government action (rather than creating undesirable government action).⁹⁰ If this is so, much government action is desirable, and public choice theory implies that we have too little of it. Under these circumstances, activist judicial review that restricts government action is counterproductive.

Judicial review functionally gives the factions another bite at the apple, a backstop enabling them to frustrate the public good, even after their efforts have failed at the legislative and executive levels.⁹¹

88. Hovenkamp, *supra* note 80, at 100.

89. See generally WITTMAN, *supra* note 13. Other economists have made much this same point. See, e.g., Peter J. Coughlin, *Pareto Optimality of Policy Proposals with Probabilistic Voting*, 39 PUB. CHOICE 427 (1982) (demonstrating how even imperfectly informed voters can produce efficient policies); Stephen Anthony Baba, *Democracies and Inefficiency*, 9 ECON. & POL. 99 (1997) (demonstrating how democratic structures will sometimes produce efficient outcomes, rather than bowing to special interest pressure); Amihai Glazer, *The Electoral Costs of Special Interest Politics When Voters Are Ignorant*, 1 ECON. & POL. 225 (1989) (demonstrating how even uninformed voters will yield efficient policies).

90. See SCHLOZMAN & TIERNEY, *supra* note 85, at 395-98 (reviewing evidence on influence of organized interest and concluding that such factions are more effective at blocking legislation than at procuring legislation); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2218 (1996) (noting that the result of special interest collective action is often “not that bad regulation becomes law, but rather that good regulation fails to become law”); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 32 (1997) (explaining that “because in our checked and balanced government an interest group needs to control only one institution (the House, the Senate or the presidency) to block legislation or to derail implementation in the bureaucracy or the courts, it seems quite reasonable to predict that even more public interest legislation may be blocked than private interest legislation is passed”). See also Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 199 (1991) (reporting observation that much legislation involves redistribution from the politically powerful to the powerless).

91. See Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 450 (1985) (observing that judicial review enables “those special interests

Consider the recent decision in *National Credit Union Administration v. First National Bank & Trust Co.*⁹² The 1934 passage of the Federal Credit Union Act may have involved a special interest deal to protect banks from credit union competition, but the language was sufficiently ambiguous that the executive National Credit Union Administration could interpret the law in order to enable relatively broad credit union competition. A conventional bank that sought to limit competition from credit unions challenged this interpretation. The Supreme Court ruled for the banks, precluding small unrelated employee groups from forming credit unions. In the process, the Court handed a major competitive advantage to large employers, disadvantaging smaller companies.⁹³ This is a classic special interest victory made possible by judicial review.⁹⁴

The judiciary, susceptible to narrow collective interests for the reasons set forth above, lacks some of the key countervailing factors that exist in legislative and executive decisions, most critically the electoral accountability.⁹⁵ Other features of the judicial process also favor special interest influence. Schlozman and Tierney found that interest groups were most effective when attempting to block rather than create action, when the issues had relatively low visibility, and when the group is able to select a favorable forum.⁹⁶ These three features characterize most judicial action.⁹⁷

Jerry Mashaw provides yet another reason why the judicial process is particularly susceptible to special interest litigation. Typical factions have some concern about their own public image – they may depend on the public as consumers or for contributions. Special interest appeals to the legislature or agencies may “appear to

with the capacity to use the courts to achieve judicially what they could not obtain politically”).

92. See 522 U.S. 479 (1998).

93. See Brief of Amicus Curiae of Ad Hoc Small Employers Group *et al.* (May 12, 1997) (explaining how decision hurts small employers' ability to form credit unions which in turn hurts their ability to compete for employees).

94. I suppose that some might argue that it is the credit unions that are the special interest group, rather than the banks. In this case, however, the public interest appears to lie on the side of the credit unions. See Brief of Amicus Curiae of Consumer Federation of America and U.S. Public Interest Research Group (May 12, 1997) (describing how decision undermines price competition for bank customers).

95. Cf. Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 969 (1995) (observing that the features of the judicial system “do not provide positive inducements to behave in a desirable manner, particularly with respect to the enhancement of social welfare”).

96. See also SCHLOZMAN & TIERNEY, *supra* note 85, at 395-97.

97. Courts are well-suited to blocking action, through vacation and injunction, are relatively lower in media visibility than the Congress or the President, and provide a wider variety of forum choices for special interests.

be (or be portrayed by their opponents or the press to be) seeking quasicorrupt political favors."⁹⁸ Fear of this appearance may deter some appeals to the elected branches, thereby limiting special interest influence. Pursuing a court action, by contrast, is portrayed as a vindication of some abstract legal right, often a procedural one. This is a safer posture for the factions, as the public may not begrudge even a special interest's efforts to vindicate its "legal rights." Tobacco companies could not publicly favor underage smoking, but they could file suit against a particular government policy aimed at reducing underage smoking. Judicial review thus offers an alternative avenue for special interests when direct political action is not politically feasible.

B. Comparative Advantages of the Elected Branches

I am unsure how to design a rigorous empirical study to test the relative influence of factions on the various branches of government. Considerable experiential evidence, though, suggests that judicial review may aggravate the public choice problem. In this section, I briefly review such experience in brief case studies of environmental law, deregulation, and legislative procedural reform. I also consider additional experiential tests of the comparative institutional characteristics of the judiciary and the elected branches of government.

(1) *Environmental Law*

Environmental issues are among the most litigated in administrative law. The very existence of environmental law, which has public benefits and concentrated costs on discrete groups, is evidence of the limitations of public choice theory.⁹⁹ Paul Rubin suggests that traditional common law contained an inefficient bias for special interests, and that environmental legislation has in part overcome this bias and improved public welfare.¹⁰⁰ Scrutiny of the attempted implementation of environmental laws suggests that special interests have found the judiciary far more amenable to their pleas than the legislative or executive branches.

Some suggest that environmental regulation reflects rent-seeking by some special interests at the expense of other businesses and the

98. MASHAW, *supra* note 90, at 187.

99. Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J. L. ECON. & ORG. 59, 60 (1992) (noting that collective action theory "appears to have a straightforward implication for environmental legislation: there should not be any").

100. See Rubin, *supra* note 64, at 218-19. A similar point is made in Fritz Sollner, *The Role of Common Law in Environmental Policy*, 80 PUB. CHOICE 69 (1994).

market generally.¹⁰¹ While there are persuasive examples of individual environmental regulations that are explicable by special interest rent-seeking, the public choice theory cannot explain the vast bulk of such regulation. The broad costs of regulation are too great and its negative effects on company value too profound to make environmental rules appear pro-business.¹⁰² Corporate interests have consistently fought for less environmental regulation, before the legislature, at the agencies, and in the courts.

Special interest litigation in environmental law is primarily directed at blocking public-regarding legislation or administrative action. But interests have been able to use the courts affirmatively to create rents. For example, a court compelled the infamous prevention of significant deterioration (PSD) rule under the Clean Air Act.¹⁰³ The consequent rule had the effect of protecting industrialized eastern states and industries from competition that might arise in less-polluted regions of the country.¹⁰⁴

Non-environmental interests have found other ways to use the courts and environmental law to advance their interests. Unions, for example, intervene in environmental permitting decisions in order to smooth the way for unionized projects and deny permits to nonunionized companies.¹⁰⁵ The National Environmental Policy Act is notorious for special interest abuse. The Act's extensive procedural commands can be used by anyone interested in frustrating or delaying a major government action.¹⁰⁶ Ranches and irrigation

101. See discussion in Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280, 281 (1990).

102. See *id.* at 308-11.

103. See *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd sub nom.*, *Fri v. Sierra Club*, 412 U.S. 541 (1973).

104. See Michael S. Greve, *Introduction to ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS* 11 (Michael S. Greve & Fred L. Smith Jr. eds., 1992) (explaining how the PSD program "amounted to an enormous wealth transfer from small, nonunionized to large, unionized firms and from the Sun Belt to the Rust Belt").

105. See Herbert R. Northrup & Augustus T. White, *Construction Union Use of Environmental Regulation To Win Jobs: Cases, Impact, and Legal Challenges*, 19 HARV. J. L. & PUB. POL'Y 55, 61-62 (1995).

106. See Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929, 972 (1993) (describing "sandbagging" use of NEPA to interfere with projects); R. Timothy McCrum, *NEPA Litigation Affecting Federal Mineral Leasing and Development*, NAT. RESOURCES & ENV'T 58 (1986) (discussing abuse of NEPA by special interest groups); Roger Nober, *Federal Highways and Environmental Litigation: Toward a Theory of Public Choice and Administrative Reaction*, 27 HARV. J. ON LEGIS. 229, 250-57 (1990) (describing how NEPA gives various special interest groups a virtual veto over highway construction); Eugene Bardach & Lucian Pugliaresi, *The Environmental Impact Statement vs. The Real World*, 49 PUB. INTEREST 22, 24 (1979) (describing how special interest groups use NEPA as an "instrument of legal and political warfare"). For example, a company who lost a contract for helium used NEPA as a tool

districts have used Endangered Species Act litigation to limit efforts to protect endangered species.¹⁰⁷ CERCLA is commonly employed in disputes among private companies.¹⁰⁸

While the above examples involve factional action by businesses or unions, even litigation by environmental groups may often be considered to be on behalf of a special interest rather than the general public. Litigation may be used as an aid to fundraising efforts.¹⁰⁹ Litigation may directly raise funds through attorneys fee awards.¹¹⁰ Some groups have brought citizen suits for law violations and then settled the actions in exchange for a payment to such a group.¹¹¹ Within the field of environmental law, judicial action appears only to exacerbate any political tendencies to favor special interests.

(2) *Deregulation*

Deregulation typically takes the form of eliminating regulatory controls on free enterprise, such as price controls, quality requirements, or entry barriers. Under the traditional conservative public choice position, deregulation is presumed a beneficial thing, as the eliminated regulation reflects rent-seeking special interest deals.¹¹² Under a more progressive public choice position, deregulation may conceivably be positive or negative in effect.¹¹³ Even under this theory, economic deregulation is presumptively

to recover the business. See *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971).

107. See *Bennett v. Spear*, 520 U.S. 154 (1997).

108. See generally Jose R. Allen & Karen L. Peterson, *Private Party Litigation Under Superfund: Claims for Cost Recovery and Contribution*, in ENVIRONMENTAL LITIGATION 663 (ALI-ABA Course of Study, June 23, 1997); Jane E. Lein & Kevin M. Ward, *Private Party Response Cost Recovery Under CERCLA*, 21 ENVTL. L. REP. 10322 (1991).

109. See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 334.

110. The Natural Resources Defense Council, for example, received over \$600,000 in legal fees in 1987. See JONATHAN ADLER, ENVIRONMENTALISM AT THE CROSSROADS 45 (1995).

111. See, e.g., Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 195 (1997) ("A portion of settlement awards and attorney fee awards from citizen suits are typically returned to environmental interest groups, which then use these resources to fund additional litigation, scientific and policy research, lobbying, and education.").

112. See Kahn, *supra* note 101, at 288-91 (describing conventional public choice view of deregulation); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 513-15 (1985) (discussing economic argument for courts giving greater deference to deregulatory action).

113. See Hovenkamp, *supra* note 90, at 2218-19 (observing that "public choice standing alone nevertheless takes an essentially 'neutral' position on the appropriateness of regulation as a general matter").

positive.¹¹⁴ Under no conception of public choice theory, though, is deregulation presumptively dubious.¹¹⁵ Yet this position is precisely that taken by the courts applying administrative law, thereby enabling special interests to protect special deals from subsequent judicial rethinking and executive branch reversal in the general public interest.

Deregulation almost by definition requires a reversal of prior agency policy. Any change in agency policy tends to be given close scrutiny by the courts.¹¹⁶ The Supreme Court has held that an agency "rescinding a rule" has analytical obligations that go "beyond" those initially required in promulgating the rule.¹¹⁷ Thus, deregulatory efforts may merit a particularly hard look on judicial review, easing the path of special interests who seek to protect their rent-seeking statutory bargains.

The heightened judicial review of deregulation has been used in a series of cases to frustrate deregulatory efforts.¹¹⁸ A study of the Federal Energy Regulatory Commission's efforts to deregulate demonstrate how the Commission was frustrated by the courts' particularly strict review.¹¹⁹ Many of the Reagan Administration deregulatory efforts were frustrated by judicial review.¹²⁰ Courts have proved almost uniformly suspicious of deregulation, which has limited its effects.¹²¹

114. See John Birritt McArthur, *Cost Responsibility or Regulatory Indulgence for Electricity's Stranded Costs?*, 47 AM. U. L. REV. 775, 931-32 (1998) (noting that deregulation is contrary to theory of interest group politics).

115. See Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI-KENT L. REV. 1039, 1071 (1997) (suggesting that deregulation is a "normative position generally associated with public choice theory").

116. See Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI-KENT L. REV. 1187 (1997).

117. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983).

118. See, e.g., *AFL-CIO v. Brock*, 835 F.2d 912, 913 (D.C. Cir. 1987) (enabling union to vacate Labor Department deregulation); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986) (successful corporate challenge to FCC rule rescission); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983) (upholding union challenge to deregulation); *Public Citizen v. Steed*, 851 F.2d 444 (1988) (striking down NHTSA efforts to deregulate tire treadwear standards); *Office of Com. Of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (striking down portion of FCC rules that would limit burden on radio licensees to maintain programming logs).

119. See Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J. L. ECON. & ORG. 114, 116-28 (1998).

120. See Larry W. Thomas, et al., *The Courts and Agency Deregulation: Limitations on the Presidential Control of Regulatory Policy*, 39 ADMIN. L. REV. 27, 31-40 (1987) (discussing how judicial review at least partially undermined six major deregulation efforts); Gregory Bradshaw Foote, *Judicial Review of Rescission of Rules: A 'Passive Restraint' on Deregulation*, 53 GEO. WASH. L. REV. 252 (1984).

121. See Garland, *supra* note 112, at 540 (noting that courts overturned a "substantial

The existence of economic deregulation and elimination of federal agencies is testimony to the ability of the elected branches to act in the public interest.¹²² Economic regulation is often cited as evidence of the influence of special interests over government policy. The elimination of such regulation is, correspondingly, evidence of the ability of the elected branches to overcome such special interest pressures. Courts, however, have provided the special interests with a sometimes effective constraint on public-minded deregulatory action.

(3) *Legislative Procedural Reform*

Legislatures have intermittently taken steps to limit special interest influence in the legislative process, through actions such as campaign financing reforms. While the adequacy of these steps might surely be questioned, they represent at least small steps toward reform, presumably at the behest of frustrated voters. Campaign contributions have been regulated, the outside income of legislators has been limited, many gifts have been banned, and terms have even been limited. The presence of these restrictions is testimony to the at least occasional ability of ideology and public opinion to overcome interest group pressures.

Yet courts have consistently struck down efforts to reform legislative procedure and reduce the influence of special interests. In *Buckley*, the Supreme Court famously struck down federal statutory limitations on expenditures of political action committees.¹²³ The Court likewise struck down a Massachusetts law that would prohibit corporate expenditures aimed at influencing plebiscites.¹²⁴ The Court also eliminated the ability to term limit federal representatives, entrenching existing legislators and enhancing their ability to demand tribute.¹²⁵ In general, "on those rare occasions when legislatures have attempted to curb special interests, the Supreme Court has . . . invalidated on first amendment grounds limitations on PAC campaign expenditures."¹²⁶ The Court has likewise commonly struck down Federal Election Commission efforts to enforce those laws that survived facial attack in the courts.¹²⁷ Most recently the Court has cut

percentage" of deregulatory decisions, save for those of the FCC).

122. See Kahn, *supra* note 101, at 286. Kahn notes that interest groups generally favored deregulation of social regulation and opposed deregulation of economic regulation, yet the deregulation that occurred was primarily economic. See *id.*

123. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

124. See *First National Bank v. Belotti*, 435 U.S. 765 (1978).

125. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

126. Farber & Frickey, *supra* note 15, at 912.

127. See, e.g., *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996) (ruling that political party expenditure limits cannot be applied to party's independent expenditures); *Federal Election Comm'n v. Massachusetts*

back significantly on the impact that anti-bribery laws will have on special interests providing gratuities to federal officers.¹²⁸

Legislatures have not exactly been eager to reform the political process, just as public choice theory suggests. Many campaign reform bills have been obstructed in Congress. However, public political pressure at least occasionally forces the enactment of campaign reform legislation. The courts have not proved effective in forcing legislative procedural reform, but they have proved powerful in restricting those reforms that survive the political process. Judicial review is thus a one way ratchet that serves only to frustrate reform and shelter interest group influence with the political branches.

* * *

If the above case studies are insufficiently persuasive, rigorous statistical analysis demonstrates the disadvantages of judicial review and show the effect of special interests on the courts. One study found that the Supreme Court was more likely to grant certiorari when review was sought by interest groups participating as *amicus curiae*.¹²⁹ Indeed, "commercial interests . . . dominated pressure group activity in the Court," participating more than all other non-governmental interests combined.¹³⁰ A study of challenges to EPA hazardous waste rules issued from 1988-1990 found that 91% of the groups participating in litigation were corporations or trade associations.¹³¹

The influence of factions in court is confirmed by a recent study of Court of Federal Claims decisions on international trade policy.¹³² The author hypothesized that "a concentrated industry is expected to possess the ability to exert meaningful influence on court decisions through superior case selection, preparation, and legal advocacy."¹³³ After reviewing over one hundred decisions and running statistical analysis, the hypothesis was confirmed: "companies that represent a

Citizens for Life, 479 U.S. 238 (1986) (finding that application of statute precluding nonprofit corporation from influencing elections was unconstitutional); Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985) (striking down provision of law criminalizing political action committee expenditures of more than \$1,000 to candidates receiving public financing).

128. United States v. Sun-Diamond Growers of California, No. 98-131, 1999 WL 241704 (U.S. April 27, 1999).

129. See Gregory Caldeira & A. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988).

130. Lee Epstein, *Courts and Interest Groups*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 354 (John D. Gates & Charles A. Johnson eds., 1991).

131. See Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & SOC'Y. REV. 735, 742-43 (1996).

132. Isaac Unah, *Specialized Courts of Appeals' Review of Bureaucratic Actions and the Politics of Protectionism*, 50 POL. RES. Q. 851 (1997).

133. *Id.* at 861.

highly concentrated industry are far better able to convince Federal Circuit judges to rule in favor of protection than are those from industries that are less concentrated and therefore politically weak."¹³⁴

A particularly relevant empirical study examined the actions of governors and compared those potentially up for reelection with those precluded from reelection by term limits.¹³⁵ It specifically considered the exercise of the governor's veto power over special interest legislation, analogized to the role of review by an independent judiciary.¹³⁶ The fundamental conclusion of the study was that "where the governor is less independent in the sense of having to stand for reelection (unlimited succession rights), the less likely he is to use the veto to uphold special-interest contracts."¹³⁷ In short, political accountability counteracts special interest bargains, while political independence furthers them.

If the above evidence is unpersuasive, the sockdolager should be an examination of the behavior of interest groups bargaining for judicial review provisions before the Congress. If the conventional theory were correct, one would expect such groups to disfavor judicial review, which could undo their interest group bargain with the legislature and their lobbying before the agencies. Yet experience is precisely the opposite; interest groups have consistently favored "an active, easily triggered role for the courts in reviewing agency decisions."¹³⁸ The Administrative Procedure Act itself is the product of industry groups trying to resist bearing the costs of regulation.¹³⁹ Charles Shipan's thorough review of communications legislation demonstrates how affected parties fought over judicial review provisions in order to enhance their substantive positions.¹⁴⁰ Trade associations recently have urged the adoption of strong judicial review provisions in regulatory reform legislation.¹⁴¹ While the

134. *Id.* at 869.

135. See W. Mark Crain & Robert D. Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555 (1979).

136. See *id.* at 557-60.

137. *Id.* at 564-65. Regression results also verify this theory. See *id.*

138. Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 276 (John E. Chubb & Paul E. Peterson eds., 1989).

139. See George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* (1992).

140. See CHARLES R. SHIPAN, *DESIGNING JUDICIAL REVIEW: INTEREST GROUPS, CONGRESS AND COMMUNICATIONS POLICY 79-95* (1997); Charles R. Shipan, *Interest Groups, Judicial Review, and the Origins of Broadcast Regulation*, 49 ADMIN. L. REV. 549 (1997).

141. See Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 271 (1996).

drafting of these judicial review provisions is an illustration of special interest influence on legislatures, it reflects a belief that judicial review can expand factional interest beyond even that level achievable through legislative action alone.

Conclusion

Public choice theory logically calls for less, not more judicial involvement in law-making. Some claim, perhaps accurately, that there is far more gross special interest influence on legislatures and the executive than in courts. But this is the issue to examine when evaluating the judicial role. To assess the net benefits requires consideration of the circumstances when the judiciary combats improper special interest influence, as weighed against the circumstances when the judiciary furthers such influence.

This article has catalogued reasons and evidence why the judiciary will often create rulings favoring special interests and obstruct the legitimate public-regarding actions taken by the other branches. Courts introduce considerable special interest benefit into the legal system. To justify judicial involvement would require at least comparable evidence of the courts' willingness and ability to combat laws and executive action taken at the behest of special interests.

The analysis of this and other articles gives reasons to doubt the special interest fighting capabilities of the courts. An excellent illustration of this inability can be found in *City of Columbia v. Omni Outdoor Advertising, Inc.*¹⁴² Confronting a new entrant in the outdoor advertising market, a local monopolist conspired with city government to enact a zoning ordinance restricting new billboard construction. One can scarcely imagine a better example of special interest influence and improper government action from the public choice perspective. The new entrant brought an antitrust action and won a jury verdict against the city's actions. After the district court overruled the jury, the Fourth Circuit reversed the district court, applying a conspiracy exception to the state action antitrust law defense. The Supreme Court reversed the appellate court, essentially ruling that the Fourth Circuit had been too activist in applying such an exception and protecting the special interest deal of the local monopolist. Institutionally, the judiciary is not generally capable of correcting special interest group influence on government.

My indictment of the courts has relatively little to do with the incentives or shortcomings of judges, rather it has everything to do with the structure of the litigation process. Public choice analysis has

142. 499 U.S. 365 (1991).

focused too often upon the individual decision maker and not on the structure in which she operates. Considering the institution is critical. The problematic structure of public law litigation is largely unavoidable, making greater judicial involvement inherently undesirable. Expanded judicial involvement is especially inappropriate in the field of administrative law.