CAPTURED LEGISLATURES AND PUBLIC-INTERESTED COURTS

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According to public choice, the predominant paradigm of modern regulatory theory, legislative activity provides benefits to small, organized interests at the expense of larger groups. In practice, this means that interest groups are often able to benefit themselves at the expense of the public good. This model has been extended to the courts, which are described as implicit or explicit actors in the wealth-transfer process. Applying public choice theory to the courts, however, overlooks the structural differences between the federal judiciary and Congress, as well as the insights of judicial decisionmaking theory. Not only do judges receive better and more complete information than legislators, but they also process that information differently, leading to more reliably public-interested results. This should cause us to rethink the countermajoritarian difficulty and, by extension, judicial restraint. The countermajoritarian difficulty is grounded in the presumption that Congress enacts the majority will, which courts disrupt through judicial review. Where courts act with the public interest in mind, and therefore implement the majority will, while the legislature serves private interests, the case for judicial restraint based on the countermajoritarian nature of the courts is significantly undermined.

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INTRODUCTION

Several prominent authors have used public choice theory to argue for enhanced judicial review in cases of legislative capture.[1] However, these authors take an essential premise for granted—that courts are comparatively more public interested than the branches whose activities they review.[2] The viability of this presumption has been thrown into doubt as the standard explanation of government regulatory motivations has shifted from the classical model, which viewed government as an agent of the public good, to the modern

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[1] *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS (1985); MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW (1966); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980); Erwin Chemerinsky, *Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989); Frank H. Easterbrook, *Forward: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Richard A. Epstein, *Toward a Revitalization of the Contract Clause,* 51 U. CHI. L. REV. 703 (1984); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation*, 86 COLUM. L. REV. 223 (1986); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980); Thomas W. Merrill, *Does Public Choice Theory Justify Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219 (1997); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT'L REV. L. & ECON. 191 (1992); David A. Skeel, Jr.*, Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647 (1997); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1997); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*]; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); John S. Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

[2] *See* Skeel, Jr., *supra* note 1, at 662 (observing that the advocates of subjecting private-interested statutes to increased judicial review "tended to assume that judges are somehow above the fray and can be wholly objective in interpreting the statutes that come before them").

model, which views the government as a forum in which interest groups fight for favorable regulatory policies.[3]

This Article makes two claims. First, contrary to the view advanced by scholars of the modern paradigm of government activity, courts generally act in the public interest, both because they receive different information than the legislature due to the nature of the judicial process, and because the insights of judicial decisionmaking theory indicate that judges process the information they receive differently than legislators or administrative agents.[4] Judicial decisionmaking theory provides a means of examining the influences into the judicial process—litigants, lawyers, and third parties—and the legal results of that process; it describes the manner through which inputs turn into outputs.[5] By illuminating the way judges process data, judicial decisionmaking theory gives us a picture of which influences actually have an effect on judicial outcomes, therefore explaining why private interests are unable to capture the judiciary in the same way they are generally understood to be able to capture the legislature.

Second, this Article argues that a comparative institutional analysis of captured legislatures with public-interested courts has strong implications for the countermajoritarian difficulty.[6] Because Congress generally makes policies with an eye toward satisfying interest-group wealth-transfer demands, while federal courts act in the public interest, there is a larger role for judicial review of legislative policymaking.

This Article proceeds in three parts. Part I discusses the classical model of regulation, known as public interest theory, which was based on a view of government as public interested, and public choice theory, which has replaced that model as the dominant paradigm for describing government activity. This Part also examines the particular conclusions public choice theory reaches regarding both legislative and judicial activity. Part II applies and analogizes the theoretical discussion from Part I to the actors in the judicial branch and critically evaluates the existing

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[3] *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 34 ("The litigation process cannot be treated as exogenous to interest group theory because that process is also subject to forms of interest group influence that would be exacerbated if judicial review became more intrusive.").

[4] While the conclusion that courts are public interested may seem prosaic—after all, this is the expected outcome of judicial independence, and we tend to think that our judges are fairly independent—as the discussion that follows will make clear, this is by no means a foregone conclusion. *See infra* Parts I.C and II.B.

[5] *See infra* Part II.A.

[6] The foundational statement of this principle comes from ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–17 (2d ed. 1986).

literature on capture of the judiciary. This Part challenges public choice theory as applied to courts and concludes that the nature of both the litigation process and judicial decisionmaking produce more public-interested results than the legislative process. Finally, Part III discusses the conclusions from Part II as they relate to the countermajoritarian difficulty and suggests a framework based on the principle of majoritarianism for considering the actions of Congress and the propriety of judicial review. It concludes that judicial review of congressional policymaking is both appropriate and necessary and argues for the importance of robust procedural rules conducive to court access and the free flow of information among parties and the courts.

Before going further, however, some preliminary points are in order. First, this Article takes for granted that public choice theory, as it relates to legislative decisionmaking, is useful in identifying and explaining the presence of private interests in the regulatory processes. However, it should be recognized that coherence is often purchased at the expense of comprehensiveness, a criticism to which public choice theory is rightfully subject. Similarly, this Article will speak to legislative and judicial decisionmaking in binary terms—I will often speak of courts as being public interested, or of Congress being private interested.[7] Yet I recognize the difficulty of reducing the motivations of a single individual, much less a deliberative group like an appellate court panel or a chamber of Congress, to a single variable. Such an approach inevitably does a disservice to the nuance that is present in decisionmaking behavior, whether on a small or large scale.[8] Second, this Article focuses on legislative as opposed to administrative agency capture, both because of the complexity of the variables discussed and because the prescriptions in Part III mainly concern relations between the legislative and judicial branches. Finally, my analysis is mostly focused on the federal courts, especially appellate level courts, although this Article notes where a distinction between state and federal courts, or trial level and appellate level courts, is relevant to my analysis.

I. THEORIES OF REGULATION

The theories discussed in this Part provide competing conceptions of the legislative and administrative decisionmaking

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[7] I expand on the distinction in Part I.

[8] This problem is addressed admirably in LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 5–8 (1997).

processes.[9] Generally, the scholarship on regulation attributes one of two goals to regulatory actors (defined as both the implementers and the shapers of policy): (1) the promotion of the public good, or (2) the provision of wealth to private interests. This Part discusses the differences between the classical explanation for regulation and the modern paradigm, as well as the implications this newer view may have for the judiciary.

A. Distinguishing Between Public and Private Interests

At the outset, it is useful to examine the distinction between public and private interests, which denote different types of policymaking motivation.[10] Individuals serve their private interests when they act as rational maximizers of their own good, regardless of how that maximization affects others. Public interests, on the other hand,

> are derived from preferences held by individuals . . . about the private or collective behavior or condition of others, including the behavior of the government toward the polity at large or toward some subset of it. . . . They differ from private preferences in that they are "other-regarding" . . . .[11]

We should therefore expect that the general public would ratify public-interested policies, a conclusion that will be important for the discussion of the countermajoritarian difficulty in Part III.[12]

In determining whether the public would ratify a particular regulatory policy, we can consider whether the policy provides a net social benefit. Public-interested regulation

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[9] As mentioned above, this Article focuses on the legislative—especially the federal legislative—branch of government.

[10] Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 174 (1990).

[11] *Id.* at 175; *see also* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 57 (2008) ("[T]he public interest view . . . postulates that legislators also have other-regarding goals.").

[12] Levine & Forrence, *supra* note 10, at 176 ("General-interest policies or actions are those policies or actions adopted or undertaken by a regulatory agent that would be ratified by the general polity according to its accepted aggregation principles if the information, organization (including exclusion costs), and transaction and monitoring costs of the general polity were zero."). Judge Easterbrook describes the difference between private-interest and public-interest legislation as whether it is "pie-slicing" (private interest) or "pie-enlarging" (public interest). Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540–41 (1983).

> is not the result of regulatory decisions intended to improve the interests of a select few at the greater expense of the many. Public-interested regulation delivers no rents or, if it does, the gains to those who benefit from the regulatory decision outweigh any losses to the rest of society.[13]

If barriers to collective action could be overcome, public-interested policies would be ratified by the general public (even where the individuals voted in their private interests), whereas private-interested policies would not.[14]

B. The Classic View of Regulation: Public Interest Theory

Traditionally, regulation was thought to be motivated by a desire to enhance the public good, which policymakers sought for two reasons: altruism and the quest for reelection.[15] In economic terms, the classical model—the public interest theory of regulation—is premised on the idea that the public good is best provided through efficient markets, which require a number of properties:

> (1) many buyers and sellers (enough so that no single buyer or seller alone can affect price by changing purchase or output unilaterally); (2) no coalitions among buyers or among sellers (no cartels or trusts); (3) perfect information of product quality, and of all available factor and product

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[13] CROLEY, *supra* note 11, at 10; *see also* BARRY M. MITNICK, THE POLITICAL ECONOMY OF REGULATION 259–79 (1980) (cataloging conceptions of the public interest).

[14] For a discussion of collective action problems, see *infra* Part I.C.

[15] *See* CROLEY, *supra* note 11, at 58 ("Legislators may [pursue public interests] out of benevolence, because for other-regarding reasons they want to effectuate those regulatory policies the citizenry wants. Or they may do it for selfish reasons, simply to reap the political benefits that public support brings with it."). With respect to the latter motivation, however, some might conclude that its presence would indicate a well-functioning representative democracy. A representative who acts in such a way that garners public support is one whose actions are in line with public desires, and a public who reelects that representative is doing so because its interests have been represented well. Naturally, this adulation would be misplaced in those situations describable as "tyranny of the majority," and there may be situations where Burkean representatives would be preferable. Generally speaking, however, a representative who acts in the public interest in order to get reelected is nevertheless a responsive one.

> prices and technological alternatives; (4) free entry and exit ("free" meaning that cost of entry or exit is not different from that offering a "market" rate of return, and government policies do not erect barriers to entry or exit); and (5) locationally and qualitatively homogeneous goods (no spatial monopolies and a market for "wheat" instead of "Wheaties").[16]

Under public interest theory assumptions, regulation ensures that these features are present in particular markets. In addition to correcting market failures, regulation can serve the public good by redistributing wealth, implementing collective aspirations, preventing social subordination, and facilitating consumers in revealing their preferences or promoting preference formation.[17] Under the classic model, then, regulation was explained either as presenting obstacles to actions impairing one or more of these factors,[18] or as taking action to positively encourage the presence of these factors.[19]

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[16] Peter H. Aranson, *Theories of Economic Regulation: From Clarity to Confusion*, 6 J.L. & POL. 247, 249 n.9 (1990). Aranson divides these factors into three categories: regulation of externalities, information problems, and competition problems. *Id.* at 258. Cass Sunstein includes a fourth: "collective action problems." CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 49 (1993). *See also* CROLEY, *supra* note 11, at 14 (identifying six categories: "concentrated market power, imperfect information, externalities, undelineated property rights, collective-action problems, and high transaction costs"); *see also* STEPHEN BREYER, REGULATION AND ITS REFORM 15–35 (1982) (discussing the rationales behind regulation); ANTHONY OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 29–54 (1994) (exploring the "public interest grounds for regulation"). The absence of any of these factors can also be problematic because it hinders consumers from revealing their preferences through their consumption choices. *See* Aranson, *supra*, at 261 ("Markets may 'fail' . . . because they do not fully reveal subjectively-determined costs and preferences.").

[17] SUNSTEIN, *supra* note 16, at 55–64.

[18] Say, by prohibiting agreements in restraint of trade.

[19] For example, antidiscrimination legislation may seek to prevent discrimination and to shape public views on discrimination, both by forcing behavioral changes and by signaling to society what acceptable attitudes on discrimination are. *See also* Levine & Forrence, *supra* note 10, at 168 ("[W]e can see regulation as the necessary exercise of collective power through government in order to cure 'market failures,' to protect the public from such evils as monopoly behavior, 'destructive' competition, the abuse of private economic power, or the effects of externalities. Something like this account, explicitly or implicitly, underpins virtually all public-interest accounts of regulation.").

The distinction between the two scenarios can also be seen in terms of negative versus positive rights. *See* OGUS, *supra* note 16, at 1–2 (distinguishing between systems in which "individuals and groups are left free, subject only to

C. The Modern View of Regulation: Public Choice Theory

Whereas regulation was traditionally viewed as a means of serving the public good, the public choice paradigm views regulation as a tool that private interests can use to extract rents—"payment[s] to factors of production . . . greater than required to bring the units of the good or service into existence"—from the public.[20] Rents "serve[] no economic function" since they exceed the amount that a competitive market would set and fail to provide a corresponding benefit to the purchaser.[21] Interest groups are able to achieve these rents because they can provide policymakers two essential resources: votes and money.[22] The modern view of

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certain basic restraints, to pursue their own welfare goals," and systems where "the state seeks to direct or encourage behaviour which (it is assumed) would not occur without such intervention").

[20] Aranson, *supra* note 16, at 272*; see also* CROLEY, *supra* note 11, at 10 (describing rents as "profits to interest groups that exceed the efficient, competitive return to the members of such groups"); SUNSTEIN, *supra* note 16, at 48 (explaining rent seeking as "the dissipation of otherwise productive energies through wasteful, self-interested political behavior"); *see also id.* at 69–71. For a more technical discussion of rents and rent seeking, see DENNIS C. MUELLER, PUBLIC CHOICE III 333–58 (2003).

[21] *See* Aranson, *supra* note 16, at 272.

[22] George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 12 (1971). These resources take the "form of efforts at persuasion, campaign contributions, or other forms of political action . . . ." Levine & Forrence, *supra* note 10, at 169. Note that the desire for reelection is present in both the classic and the modern models, but the means of achieving this end are significantly different.

Levine and Forrence suggest that legislators can induce these payments by passing regulation favorable to organized interests so that the regulation is not so much purchased as the legislators are rewarded for creating it. *See id.* at 169–70; Sam Peltzman, *The Economic Theory of Regulation after a Decade of Deregulation*, *in* A READER ON REGULATION 93, 97 (Robert Baldwin et al., eds., 1998) ("Regulatory decisions can . . . elicit campaign contributions, contributions of time to get-out-the-vote, occasional bribes, or well-paid jobs in the political afterlife. Because the more well-financed and well-staffed campaigns tend to be more successful and because a self-interested politician also values wealth, he will pay attention to these resource (money) consequences of regulatory decision as well as to the direct electoral consequences."). Although this result would seem counterintuitive given the discussion above about interest-group organization, contributions after the fact may at least give organizations too small to organize the opportunity to have an influence on regulation favorable to them by providing some resources to help the rewarded legislator retain office. *See id.* ("[G]roups that may themselves be too small to offer many votes directly in support of a regulatory policy can nevertheless affect that policy by delivering other valuable resources."); CROLEY, *supra* note 11, at 15 ("Much more often, interest groups do not themselves contribute significant numbers of votes directly to politicians, but instead contribute financial support to political campaigns, which turn money into votes through campaign advertising and the like.").

regulation is premised on the idea that politicians' "ultimate goal is securing and enhancing his power."[23] In order to do so, a politician must remain in office, and, because few politicians have the independent wealth to support their own campaigns, they must seek the necessary resources from outside groups.[24]

This paradigm for explaining government activity—public choice theory—is grounded in the idea that small, organized groups are better able to provide policymakers with these resources. As a result, these groups have a disproportionate influence over the elected branches of government, often at the expense of larger groups. The rents extracted through legislative "capture"[25] take the form of favorable regulatory policies or subsidies.[26] This theory of

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[23] Peltzman, *supra* note 22, at 97.

[24] CROLEY, *supra* note 11, at 15. In addition, legislators can induce resource contributions by threatening interest groups with unfavorable regulation. *See* Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 102 (1987). McChesney predicts that such threats will result in resource contribution when "the expected cost of the act threatened exceeds the value of the consideration that private parties must give up to avoid legislative action." *Id.* at 104. Elected-branch policymakers can also get second bite at the contribution apple by threatening to renege on deals already struck with interest groups. *See id.* at 102. ("[P]oliticians reap returns first by threatening and then by forbearing from extracting private rents already in existence."). But there are procedural rules and structures that provide the stability necessary to prevent elected officials (both the same ones responsible for the original transfer and those from successive legislative sessions) from getting repeated chances to pressure interest groups for contributions. Landes and Posner point to bicameralism, committees, and filibusters as examples of such rules. *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 878 (1975).

[25] Capture is usually used to refer to regulated-industry members exercising de facto control over the agencies created to regulate their conduct. However, I use the term more generally to denote de facto control over any policymaking process by groups whose goal is something other than the promotion of the general public interest. The idea of regulatory capture is not a new concept; "[o]n the eve of the American Revolution, Adam Smith had warned that merchants frequently conspired against the public interest, often by enlisting state power to cement their cartels." Peter H. Schuck, *The Politics of Economic Growth*, 2 YALE L. & POL'Y REV. 359, 359 (1984).

[26] Examples include decisions to not regulate an industry or to not enforce an existing regulation. I include within this category the granting of a monopoly or a cartel, although in such a situation some members of the industry group may be disadvantaged along with the consumers of the goods the industry provides. More obviously, wealth transfers can take the form of straightforward subsidies, either as grants or tax forbearances. Both transfer funds that would be used for public interests to the subsidy recipient. *See* Stigler, *supra* note 22, at 4–6 (identifying four ways regulation can transfer wealth: direct cash subsidies, control over market entry, control over substitute and complementary goods, and price fixing). We will see that regulation can also transfer wealth by

regulatory policymaking is based on the idea of exchange. Government actors sell the "basic resource which in pure principle is not shared with even the mightiest of [] citizens: the power to coerce."[27] In exchange for this resource, "[t]he industry which seeks regulation must be prepared to pay with the two things a [political] party needs: votes and resources."[28] In exchange for favorable policies, such as regulations or tax breaks, politicians receive campaign contributions and other organizational benefits, the promise of future jobs, and, occasionally, outright bribes.

The ability to provide votes and resources also gives organized groups another advantage, which derives from the access that votes and resources ensure. Elected branch officials are busy, and the more information they get from a particular organized interest, the more likely they are to enact policies in favor of that interest purely because of the disparity between the amount of information that a small, organized group is able to convey to policymakers compared to large, unorganized groups.[29] Simply put, organized groups tell their side of the story, and unorganized groups do not. As a result of these access and information disparities, smaller groups have a lopsided influence over the legislative process, which is problematic under a majoritarian view of government.[30]

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disproportionately burdening members of the same group, even though it applies equally to all members.

[27] Stigler, *supra* note 22, at 4. Note, however, that this definition of economic regulation does not preclude public interest regulation (there is nothing about the nature of economic regulation that would prevent it from being public interested). But as we will see, in understanding regulation as a good for which there is a market, it will often be the case that private interests are better able to pay for that good. *See, e.g.*, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 36 (20th prtg. 2002).

[28] Stigler, *supra* note 22, at 12; *see also* CROLEY, *supra* note 11, at 16 ("Politicians receive the political resources necessary for their continued political survival, and interest groups enjoy the benefits of the policies they favor.").

[29] E.g., Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1111–13 (1988); Susanne Lohmann, *An Informational Rationale for the Power of Special Interests*, 92 AM. POL. SCI. REV. 809, 811–21 (1998).

[30] First, we naturally expect a connection between influence inputs and policy outcomes. Second, we think that government representatives should act as our agents and therefore ought to be working toward providing for the public interest. That is, whatever the public interest ultimately is, elected-branch officials ought to be concerned first with discerning the public interest, and second with deciding how best to achieve it. (I put to one side those scholars who think all governmental activity is rightly interest-group warfare, perhaps under the assumption that willingness to organize and pay shows best the value of governmental action to particular parties or groups—never mind that perhaps there are conceivably better allocations of resources than purchasing

These influences made possible through group organization can be divided into two types: informational influences and purchase influences. Informational influences enable groups to provide policymakers data relevant to the decisionmaking process.[31] Purchase influences, on the other hand, ensure access to policymakers and allow groups to reward them for policy results that favor group interests.[32] These latter influences are especially potent because, in addition to reelection, legislators seek "self-gratification from the exercise of power" and "postofficeholding personal wealth."[33]

Public choice theorists conclude that the sale/purchase relationship described above provides the causal link between external policymaking inputs and ultimate policy outputs. In other words, public choice holds that legislators make the decisions they do *because of* the purchase influences I have described. According to this theory of regulation, the effect of disproportionate influences is regulation that favors smaller groups at the expense of larger ones and creates wealth transfers from the larger to the smaller group.[34] Most obviously, these transfers are from the general public to a smaller group, although some consumers may also benefit from rent-seeking regulation.[35] Most simply, these transfers can take the form of direct subsidies. These are cash payments (or their equivalent through tax forbearances), which the government pays for through general taxation. More subtle transfers can result from how a particular regulation distributes the benefits and burdens (or risks) of a particular activity.

Public choice also explains why the parties injured by wealth transfers are generally left out of the policymaking process. For a number of reasons, smaller, like-minded groups of individuals and

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government action.) In other words, they should occupy themselves with establishing policy goals and identifying the means to achieve them. Because interest-group inputs lead to policies that favor private interests at the expense of the public good, and because such a result is contrary to the view of the government as a public agent, the relationship between interest groups and the actors in the state regulatory apparatus is problematic. *See infra* Part III.

[31] *See* Lohmann, *supra* note 29, at 824.

[32] *Cf.* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 63–64 (1994). The choice of the word "purchase" to describe this latter category reflects the economic angle that much interest-group theory takes, rather than a suggestion that interest-group transfers are attributable to something so vulgar as pure venality, even if the ultimate motivations attributed to policymakers are far from public interested.

[33] Levine & Forrence, *supra* note 10, at 169.

[34] *See, e.g.*, Peltzman, *supra* note 22, at 103 ("Compact, well-organized groups will tend to benefit more from regulation than broad, diffuse groups.").

[35] *See id.* ("[T]he dominant coalition usually also includes subsets of consumers."). Within this dominant coalition, "[r]egulatory policy will seek to preserve a politically optimal distribution of rents across this coalition." *Id.*

entities are better able to organize than are larger, more diverse groups. Most often, disproportionate small-group influence is due to collective action problems.[36] First, smaller groups are better able to coordinate. The fewer the people, the easier it is to communicate and agree on courses of action. Second, smaller groups naturally have more focused interests. Imagine the number of different and competing interests aggregated in society generally, and compare that with a small segment of society with similar characteristics. This commonality of interests inherently occurs with producers that are equally or similarly affected by government action. If such producers act rationally, they will realize that rents may benefit all of them.

Third, groups that are united by a particular interest have a greater incentive than the general public to lobby based on that interest because policymaking affecting that issue will, on average, affect the typical individual in the group more than it will the typical person in society.[37] Because these smaller groups with aligned preferences (industry and trade groups, for example) are better able to organize than diffuse groups (the general public), they are able to exert disproportionate influence on legislators.[38] In addition, these organized groups are better able to collect and disperse the political donations that are essential to modern elections—the purchase influences described above—which can also create pressures for legislators to reward donating groups. Because of these various factors, discrete groups are able to obtain

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[36] For the seminal work on collective action problems, see OLSON, *supra* note 27.

[37] *See, e.g.*, William Bishop, *A Theory of Administrative Law*, 19 J. LEGAL STUD. 489, 499 (1990) ("One implication of the theory—that regulation is often grossly inefficient but useful for some self-seeking group—is that, if the victims of regulation could somehow overcome transactions costs and form a coalition, they would be able to outvote and outspend those who currently benefit from partisan measures."); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 35 (1998) ("[T]he regulatory interests of the individual voter (or the consumer) are dominated by the regulatory interests of organized sub-groups of the citizenry because the latter have incentives to influence regulatory decisionmaking which the former lacks. The individual voter lacks such incentives given the benefit-cost trade-off of pursuing her regulatory interests: The benefits are low; the costs relatively high."); *see also* GEORGE J. STIGLER, *Can Regulatory Agencies Protect the Consumer?*, *in* THE CITIZEN AND THE STATE 178 (1975); JAMES Q. WILSON, POLITICAL ORGANIZATIONS 332–37 (1995) (discussing, among other permutations, regulatory policies with concentrated benefits and diffused costs, and concentrated benefits and concentrated costs); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213–14 (1976).

[38] *See* SUNSTEIN, *supra* note 16, at 69–71.

regulatory results that favor them at the expense of the general public.[39]

One part of the organization problem is transaction costs—in this case, the costs that are required in order for individuals to organize into groups.[40] However, as economist Mancur Olson intuited, another problem has to do with the nature of private-interest transfers.[41] These transfers take the form of favorable regulation via legislation action. But legislation[42] is a public good—"a good that can be consumed without reducing any other person's consumption of it."[43] As a result, an individual will only join an interest group when the group is large enough that the act of organizing can be expected to result in dividends, but small enough that individuals will perceive their participation to be necessary to achieving those dividends.[44]

Bundling problems also limit the ability of individuals to obstruct private-interested regulation.[45] Aside from interest-group action (or contacting representatives directly), the most direct means for citizens to indicate their demand for particular governmental actions is through elections. But votes for representatives (as distinguished from plebiscitary votes on amendments and referenda) are necessarily votes for a bundle of policies that the representative will support if elected.[46] As a result, elections are poor tools for shaping particular policies because they

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[39] *See* Stigler, *supra* note 22, at 3.

[40] *See* Bishop, *supra* note 37, at 499.

[41] *See generally* OLSON, *supra* note 27.

[42] That is, the passage of legislation, but not necessarily its contents.

[43] RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 52 (8th ed. 2011); *see also* MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 4 n.12 (2009) ("Public goods are characterized by two features: (1) value is not diminished by consumption; and (2) once the goods are provided, noncontributors cannot be effectively excluded from receiving the benefits of those goods.").

[44] *See, e.g.*, Schuck, *supra* note 25, at 362 (noting that individuals will only join an organization that is "sufficiently small that an individual member can expect to appropriate a share of the organizational product that exceeds the costs to her of helping to produce it").

[45] Bundling problems are also problematic in the realm of the countermajoritarian difficulty because they make it difficult to deduce voter preferences on issues from voter preferences on candidates. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 639–40 (1993).

[46] The same factors that can inhibit the proper functioning of economic markets can also impair the political branches of government from functioning properly, therefore inhibiting the passage and implementation of public-interested regulations. *See* Aranson, *supra* note 16, at 262 (interpreting his study and observing that "the very problems that created a failure of markets to reveal information about preferences—benefits, costs, or willingness to pay—for corrective action in the external-cost case afflict governmental processes as well").

rarely allow voters to voice their preferences on single issues. Instead, we vote for representatives, whom we select based on a calculation of how well we perceive a candidate's policy platform to conform to our own ideal slate of policy choices.[47] Therefore, individual voting behavior, which tends to be a vote on a bundle of policies, some of which an individual voter would approve and some of which the voter may not, fails to fully express that voter's policy preferences on the range of issues that will confront the representative.[48]

Interest-group transfers are problematic because, under the definition of rents advanced above, "the benefit to the [advantaged group] will fall short of the damage to the rest of the community."[49] This in itself is a problem because our system of government is premised on the idea that a legislature's promotion of the public good is a necessary condition. In situations of capture, then, there are reasons to doubt the public interestedness of the policymaking process. As Part II will show, in contrast to the elected branches, structural as well as attitudinal factors suggest that courts are comparatively less likely to be captured by private interests and are therefore more likely to act in the public interest.

D. Public Choice and the Courts

Scholars later applied public choice theory to the courts, arguing that they were subject to the same interest-group pressures

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[47] *See, e.g.*, Elhauge, *supra* note 3, at 41.

[48] As Aranson observes,

> an election, whether held as a "town meeting" to choose policy directly, or as a poll to choose a representative body of instructed delegates, may contain no motion on tax rate and pollution abatement simultaneously that defeats or ties all other motions. That is, the election may have no equilibrium. Even "universal chaos" might prevail, leading the electorate to choose vastly inferior policies, far from the status quo. Furthermore, the policy outcomes of elections are susceptible to various forms of manipulation. All of these problems are likely to arise whenever the polity votes on more than one motion at a time.

Aranson, *supra* note 16, at 263 (citations omitted).

[49] Stigler, *supra* note 22, at 10; *see also id.* at 3 ("[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."). Note, however, that rent seeking—and jockeying for political influence generally—is not limited to businesses. *See* McChesney, *supra* note 24, at 101 ("Because political action can redistribute wealth generally . . . private interest groups other than producers also have an incentive to organize, both to obtain the gains and to avoid the losses from a whole menu of government enactments.").

as the elected branches for three principal reasons.[50] First, these scholars argued that the resource advantages held by small, organized groups allowed them to purchase not just the best lobbyists, but also the best attorneys.[51] Assuming that skill in advocacy translates to results, the ability of these groups to spend more on attorneys should give them an advantage in the judiciary as well as in the elected branches.[52] Moreover, although that resource disparity might be diminished by class action litigation, which presents class counsel with incentives to spend resources sufficient to overcome the normal litigation-resource disparity, collective action problems affect individual class members. As with the relationship between citizens and their representatives, individual class members are unable to effectively police their class counsel, who, as a result of this principal-agent problem, are free to place their own interests above those of the class members.[53] Class action litigation therefore devolves into a competition between competing interests—those of class counsel and those of the defendants—that ignores the interests of the class members and that mirrors the pluralist struggle that takes place in the elected branches.

Second, scholars also argued that the adversary structure contributed to private-interest dominance of the judiciary. Although the adversarial system induces binary, opposing interests to present the best arguments in favor of and against a particular result, the public interest may not be represented by either party's preferred result, a dysfunction that amicus briefs are insufficient to

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[50] *See generally* Elhauge, *supra* note 3.

[51] *See, e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 114 (1974) (assuming that richer parties hire better lawyers, which translates into greater litigation success).

[52] *See id.*; *see also* Elhauge, *supra* note 3, at 70; Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 193 (1995) (observing that experienced Supreme Court litigators have greater litigation success); Stanton Wheeler et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970*, 21 LAW & SOC'Y REV. 403, 421 (1987) (finding parties with more resources had modest advantages at the state level); *cf.* 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, 246 (1992) (finding that the underdogs fared poorly against other categories of litigants).

[53] John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371 (2000) ("[T]he class action as an organizational form . . . has become dysfunctional because the principals cannot effectively monitor their agent."); Elhauge, *supra* note 3, at 73–74.

remedy.[54] Additionally, the one-off nature of litigation allows small, organized groups, which are often repeat players in the litigation system, to settle claims they are likely to lose and to litigate claims they are likely to win, allowing them to manipulate the development of precedent.[55]

Finally, scholars argued that interest groups influenced the judiciary through their involvement in the appointments process, based on the premise that the influence interest groups have over legislators applies no less to appointments decisions than to other types of legislative decisions.[56] The following Part will take up these arguments, which indicate a judiciary dominated by private interests.

II. ARE COURTS PUBLIC OR PRIVATE INTERESTED?

In addressing the effect of information and purchase influences on the judiciary, it is necessary to consider two separate facets of judicial decisionmaking. First, is the judicial process analogous to the elected-branch processes in terms of inputs? That is, do the factors that lead to disproportionate influence of small groups on the elected branches also exist in the judiciary? This question supplies the purported *causes* of policy outputs, and it can be considered in terms of access and resources. Second, how do judges process these inputs? This question supplies the causal *connection* between the inputs identified above and the outputs represented by legal decisions, and it can be analogized to purchase influences affecting the elected branches.[57]

In considering the role of courts as private- or public-interested decisionmakers, it will be necessary to consider the inputs into the decisionmaking process and examine whether the same information and purchase influences—or analogous influences—operate in the judiciary. This Part concludes that they

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[54] *See* Elhauge, *supra* note 3, at 77–78 & nn.176–77. *But see* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1289–92 (1976) (detailing the "[d]emise of the [b]ipolar [s]tructure" of litigation); Patrick Luff, *Risk Regulation and Regulatory Litigation*, 64 RUTGERS L. REV. 73, 103–05 (2011) (discussing the implications of Chayes's observations for court-based policymaking).

[55] *See* Elhauge, *supra* note 3, at 79; Galanter, *supra* note 51, at 101–02.

[56] Elhauge, *supra* note 3, at 81; Nancy Sherer et al., *Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Court Confirmation Process*, 70 J. POL. 1026, 1038 (2008) (finding that interest groups can turn easy confirmation processes into difficult ones, but limiting their conclusions to lower-court nominations). If true, the problem of capture in appointment decisions is exacerbated by the relative permanence of these decisions, since judges, once appointed, serve for life during good behavior.

[57] *See supra* Part I.C.

do not (or, if they do, not to more than a negligible degree). Moreover, even if the information and purchase influences described above affected judges, independent reasons based on insights from judicial decisionmaking theory suggest that such influences would still be less effective on judges than on the other branches of government.[58] The first section of this Part identifies the structural effects the judicial process has on information and purchase influences and analyzes them based on the insights of judicial decisionmaking theory. The second section identifies and responds to possible indicators of private-interest influences into the judicial process. Vitally, this Part argues that, where the data suggest the private interestedness of judicial decisions, these data result from formalist judicial philosophies about implementing the will of the elected branches. Part III shows that formalist judicial philosophies are problematic because they rely on faulty premises and are therefore suitable for more searching appellate review.

A. The Positive Case for Public-Interested Courts

1. Structural Independence

The most readily apparent means of ensuring public-interested judging come from the Constitution, which contains structural mechanisms that grant federal courts significant independence from the other branches of government.[59] Federal court judges have life tenure during good behavior;[60] once appointed, they cannot be removed from office except by impeachment, which is only allowed when a judge has committed treason, bribery, or a high crime or misdemeanor.[61] In addition, federal judges' salaries

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[58] Although not taken up specifically in the present work, this point is important for analyzing the effect of purchase influences on elected judges at the state level.

[59] This section identifies the structural advantages that courts have over legislatures; section II.B identifies and discusses the information advantages these structures create.

[60] U.S. CONST. art. III, § 1.

[61] U.S. CONST. art II, § 4. An interesting result of life tenure is that it discourages judges from accepting bribes. It does so first by increasing the expected cost of accepting one. Assuming the probability of detection is the same for limited- and life-tenured judges, the cost in terms of lost wages are higher when a judge is appointed for life, meaning the expected loss from accepting a bribe is higher for life-tenured judges. Second, "[l]ife tenure—in circumstances where the job holder intends to remain in the job for the remainder of his active life—reduces the likelihood of an important (because difficult to detect) form of bribery that consists of dangling prospects of future employment before the bribe-taker." Landes & Posner, *supra* note 24, at 886 (citation omitted).

cannot be decreased, meaning Congress cannot attempt to force judges to retire for monetary reasons.[62] This creates a judiciary with a fair amount of slack, shielding judges from interest-group politics.[63] Short of reducing salaries, Congress could punish the judiciary by decreasing appropriations. In practice, however, this turns out to be a rather blunt tool: it is very difficult to punish particular judges, or even a particular group of judges, through appropriations decisions. Instead, appropriations decisions are likely to affect all judges equally; therefore, unless Congress wants to punish the judiciary generally—or merely make a show of strength as a warning shot across the judiciary's bow—it cannot control judges through general withdrawals of funding (assuming such funding withdrawals would have an effect in the first place).

This issue presents a general structural conclusion about the role of courts in ratifying elected-branch wealth transfers to private interests. Although, as noted above, an independent judiciary provides stability to interest-group transfers,[64] this independence also leaves Congress without an effective means of policing an intransigent judiciary that refuses to ratify interest-group transfers.[65] Moreover, even if Congress had means of controlling the judiciary, the session of Congress seeking to control the judiciary would be different than the one that granted the original wealth transfer. This would occur even if some of the members of Congress might have been members in both sessions, and it would further decrease the potential for the session granting the wealth transfer to punish the judiciary for failing to ratify it.

Statutory and professional prohibitions also limit private-interested judicial decisionmaking by limiting the types of extraneous information to which judges are exposed, as well as the manner in which judges hear information relevant to the dispute. Judges are prohibited from discussing pending suits with those not party to the suit[66] or engaging in ex parte contacts.[67] This remains true even in cases like class actions, in which the role of the judge

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62 *See* U.S. CONST. art. III, § 1.

63 *See, e.g.*, W. Mark Crain & Robert D. Tollison, *Constitutional Change in an Interest-Group Perspective*, 8 J. LEGAL STUD. 165, 173 (1979) (observing that limiting judicial tenure limits judicial independence).

64 *See* Landes & Posner, *supra* note 24; *supra* Part I.C.

65 *See* Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 853 ("If judges were part of the network of special-interest contracting, then Congress or state legislatures would have some way to keep them in line. But as the system is presently constructed, judicial independence negates accountability.").

66 *E.g.*, CODE OF CONDUCT FOR UNITED STATES JUDGES CANON 3(A)(4) (2009), *available at* http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx.

67 *Id.*

has shifted from neutral observer to active manager.[68] In these cases, the normal rules against ex parte contacts regarding substantive issues are relaxed in the pretrial phase,[69] but only with the consent of the parties and for the purpose of facilitating settlement of particular litigation issues or the claim itself.[70] Finally, judges with personal interests in lawsuits that come before them are expected to recuse themselves.[71]

More importantly, "the limits of human foresight, the ambiguities of language, and the high cost of legislative deliberation combine to assure that most legislation will be enacted in a seriously incomplete form, with many areas of uncertainty left to be resolved by the courts."[72] This leads to legal indeterminacy, which provides courts with substantial leeway in interpreting legal texts.[73] While the legislature can overrule statutory constructions with new legislation, and can even overcome constitutional decisions through the amendment process, such means of

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[68] *See* Chayes, *supra* note 54, at 1302 (noting that in modern litigation, the judge plays an active role in the resolution of the dispute, with "responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome").

[69] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 427 (1982).

[70] CODE OF CONDUCT FOR UNITED STATES JUDGES CANON 3(A)(4) (2009). Moreover, as we will see shortly, the fact that courts process the information they receive differently than elected-branch officials diminishes the effect that ex parte contacts would be expected to have at any rate.

[71] However, justices have not always recused themselves in situations where many concluded that they should. Justice Scalia participated in cases affecting his friend and duck-hunting buddy, then-Vice President Cheney, and Justice Kagan has participated in cases in which she was at least nominally involved while she was the Solicitor General.

[72] Landes & Posner, *supra* note 24, at 879.

[73] *See, e.g.*, AHARON BARAK, JUDICIAL DISCRETION 7 (1987) (defining discretion in terms of choices between lawful alternatives); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113–24 (1921) (noting the gap-filling aspects of judicial decisionmaking); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31–33 (1978) (providing a more limited view of discretion); H.L.A. HART, THE CONCEPT OF LAW 136 (2d. ed. 1994) (discussing the implications of the "open texture" of law and observing that "[i]n every legal system a large and important field is left open for the exercise of discretion by courts"); Kent Greenwalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 359 (1975) ("[S]ince classification by human language cannot provide clear answers to each of the infinite variety of factual situations, some uncertainty about the application of the rules is unavoidable."). *See generally* JEROME FRANK, COURTS ON TRIAL (1949) (distinguishing between legal indeterminacy and indeterminacy attributable to the factual vicissitudes of particular cases). For a useful categorization of the types of indeterminacy, see BRAIN LEITER, NATURALIZING JURISPRUDENCE 9–12 (2007). For a general overview of legal indeterminacy, see TIMOTHY A.O. ENDICOTT, VAGUENESS IN THE LAW (2000).

controlling the judiciary are uncommon due to the same collective-action problems that affect interest groups in the normal legislative process, as well as the same procedural factors conducive to the durability of interest-group transfers.[74] These factors combine to produce a relatively independent judiciary—one where judges have significant room to make independent policy decisions, or, if they should so choose, to review legislative policy decisions (and interest-group wealth transfers). The following section explains the ways judges act given this independence.

2. Insights from Judicial Decisionmaking Theory

The literature on judicial decisionmaking provides insights on how courts evaluate the information they receive in the litigation process. How judges view their roles—whether their jobs are to give effect to congressional intent or whether they ought to play an active role in policymaking—has strong implications for the effects of interest-group influences on courts. Role orientation theory fits into the larger literature on judicial decisionmaking by providing the reasons why judges base their decisions on "what the law is"[75] (the legal model of judicial decisionmaking), or their pure policy preferences and strategic considerations about how best to incorporate these preferences into the law (the nonlegal model).

Of course, few, if any, motivations of the actors in the regulatory process are reducible to single-variable questions.[76]

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[74] *See* Crain & Tollison, *supra* note 63, at 167 (noting that legislatures can increase the stability of an interest-group transfer through the use of voting rules). Scholars also note that judicial theories of interpretation that focus on legislative intent or understanding, such as originalism, provide stability for legislative interest-group transfers. *See* Landes & Posner, *supra* note 24, at 879 ("If we assume that an independent judiciary would . . . interpret and apply legislation in accordance with the original legislative understanding . . . it follows that an independent judiciary facilitates rather than, as conventionally believed, limits the practice of interest-group politics."); *see also* Crain & Tollison, *supra* note 63, at 167 (concluding that an independent judiciary is conducive to the permanence of interest-group transfers "on the presumption that the courts will generally interpret legislation in terms of the intent of the enacting legislature").

[75] I use scare quotes for the phrase "what the law is" because of the phrase's potential for question begging. Even if we ignore questions about what it means for something to be "the law," many scholars, including this Author, would note that the law is often insufficiently precise to provide any opportunity for mechanical application of law to fact. *See supra* note 73.

[76] *See* J. Woodford Howard, Jr., *Role Perceptions and Behavior in Three U.S. Courts of Appeals*, 39 J. POL. 916, 926 (1977) (citations omitted) ("Theoretically, a person's political self-images and role perceptions are but single aspects of a vast cognitive network, which may be rooted in the irrational. Even discounting disparities between what people say and think, a direct

More so than the other branches of government, however, the judiciary is characterized by an awareness of "expectations shared by judges and related actors regarding how a given judicial office should be performed."[77] These expectations give judges the "intellectual and behavioral parameters of permissibility" within which they exercise their decisionmaking function.[78]

Role orientation theory describes how courts' decisions are influenced by a combination of "custom, common law, intellectual traditions, and specific rules for interpretation that seem to permit only minimal room for self-interest and ideology."[79] These customs develop through the interaction of various actors and the influence of their individual conceptions regarding the proper role of the actors within a particular process.[80] As James Gibson wrote,

> Role theory begins from the premise that individuals acting in relative isolation act differently from how they act in a context, and thus role theory provides a means of moving beyond an exclusive focus on individuals to consider the influence of the institutional constraints on decision making. Contexts are always associated with expectations emanating from others who share the context. . . . Institutional expectations always serve to limit choice and discretion on the part of the members of

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relationship is seldom to be expected among an individual's social roles, role perceptions, and conduct.").

[77] *Id.* at 916 (citation omitted). This includes attitudes toward, among other things, "the function of law and courts of law, the relationship between courts and other agencies or institutions of government and the criteria of judicial decision making." John M. Scheb II & Thomas D. Ungs, *Competing Orientations to the Judicial Role: The Case of Tennessee Judges*, 54 TENN. L. REV. 391, 392 (1987).

[78] Scheb II & Ungs, *supra* note 77, at 407 (studying the effects of "judicial culture" on state-court judges).

[79] William C. Mitchell & Randy T. Simmons, *Public Choice and the Judiciary: Introductory Notes*, 1990 BYU L. REV. 729, 741.

[80] *See* James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911, 917 (1978) ("Individuals who interact with role occupants have conceptions of what constitutes 'proper' role behavior for the role occupant. These are norms of behavior which constrain the activities of the role occupant."). These norms develop based on "the occupant's perception of the role expectations of significant others and his or her own norms and expectations of proper behavior for a judge." *Id.* As Gibson notes, however, "proper" refers not to the substantive outcome of the decision as much as to the factors that influence the decision itself. *Id.* at 918. For example, a decision resulting from bribery would correctly be seen as improper, even if the decision, viewed objectively and without knowledge of the bribery, might be seen as just.

> the institution. Thus, according to role theory, the ways in which individuals accommodate themselves to the institutional expectations affect their institutional behavior.[81]

A particular judge's role orientation, then, dictates the grounds upon which legitimate judicial decisions must be based.[82]

Naturally, the next question is what exactly judges view as proper and improper grounds for decisions. One study of U.S. courts of appeals judges found that the participants "shared a strong consensus, heavily influenced by official and professional prescriptions, that their central mission is to adjudicate appeals as agents of the national government."[83] This agency view of decisionmaking led judges to feel a strong commitment to enforcing acts of Congress, as well as existing precedent,[84] "[d]espite a robust commitment to rendering justice in individual cases, and recognition that Supreme Court reversal is rare in practice . . . ."[85] This study also found, however, that role perception varied based on the *type* of case being decided. For example, some judges in the study felt they had "more room for creativity in civil rights than in commercial law, which requires planning and stable rules . . . ."[86]

Another area of inquiry is whether prior personal or professional experience has an effect on role orientation. With respect to administrative agencies, for example, capture is often thought to be facilitated by the preexisting professional

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[81] James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 17 (1983) [hereinafter Gibson, *Simplicity*]. Some of Gibson's more recent scholarship, however, has questioned the extent to which elected judges can be public-interested. *See generally* James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59 (2008).

It is important to realize, however, that role orientation describes the process of judicial decisionmaking, rather than particular substantive outcomes. *See* Gibson, *Simplicity*, *supra*, at 18–19 (noting the difference between judicial inputs and judicial outcomes).

[82] Gibson, *supra* note 80, at 918.

[83] Howard, Jr., *supra* note 76, at 918.

[84] *Id.*

[85] *Id.* at 922.

[86] *Id.* at 921; *see also id.* at 928–30 ("While the direction of voting conformed to expectations in three fields—employee injuries, income tax, and civil rights—only the civil rights correlations . . . were noteworthy. In civil rights self-styled former liberals favored individuals against governments more than did self-styled conservatives by almost a three-to-one margin.").

connections that agency officials[87] have with the industries their agencies are expected to regulate. For example, an agency head chosen for his expertise in a field may have developed that knowledge as an employee of a regulated party. This individual may also expect to return to the industry after some period of time with the agency (say, at the end of the appointing president's term).[88] Thus, there are several reasons to expect the agency head to be sympathetic to the industry being regulated and why the capture is more likely. First, the agency head will have formed his views of the regulatory body in light of his experience as a regulated party, which generally has the effect of making individuals skeptical (or worse) of regulation. Second, the agency head will retain his business contacts from his previous employment, and those contacts will use their preexisting relationship to increase their access to the agency head. Third, the agency head will be wary of antagonizing his future employers and colleagues, at least compared with an agency head for whom future employment in the regulated industry is not an option. The question, then, is whether the same should be expected to take place within the judiciary.

Many judges start their careers as prosecutors, and if the sympathy-to-industry account above is correct, former prosecutors should issue harsher sentences and more proprosecution rulings during trial than judges without prosecutorial experience.[89] The same trends would be expected for former elected-branch officials, who should "be more deferential to the other branches of government often being challenged in civil rights cases."[90] Additionally, former elected officials are more likely to support claims by labor unions,[91] and judges with prior judicial experience have been found to be less likely to rule in favor of the government in fiscal cases[92] and more liberal in economic cases generally.[93]

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[87] I use the term here to indicate both "officers of the United States" and "inferior officers," although not necessarily "employees," those "lesser functionaries subordinate to officers of the United States." Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976). For a general overview of the distinction, see ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 15.3 (2d ed. 2001).

[88] In politics, this cycle is referred to as the "revolving door."

[89] Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 274 (1995).

[90] *Id.*

[91] James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1681 (1999).

[92] Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 501–03 (1975).

Finally, prior experience as an academic does not correlate with liberal or conservative ideological preferences, but it does correlate with a more activist role-orientation.[94] Overall, however, there seems to be mixed evidence as to whether prior career has an effect on judges' behavior.[95]

As one might expect, political orientation can correlate with role orientation.[96] But surprisingly, many studies show no connection between ideology and substantive outcome.[97] This result is unexpected because political orientation, role orientation, and substantive outcome should be at least partially transitive. Role orientation dictates how one views facts, and how one views and processes facts—in other words, one's preexisting views on what facts count—should to some extent dictate substantive outcome.[98]

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[93] C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355, 362–63 (1981).

[94] Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 14 (2001).

[95] *See id.* at 358 (evaluating the literature); *see also* Ashenfelter et al., *supra* note 89, at 281 (finding that "[i]n the mass of cases that are filed, even civil rights and prisoner cases, the law—not the judge—dominates the outcomes" but that "[i]n the select few cases that are appealed or lead to published opinions, individual judges have a greater role in shaping outcomes"); Gibson, *Simplicity*, *supra* note 81, at 21 (noting that "[g]enerally . . . *career experiences* seem to have the greatest impact on the substantive values of judges," while accepting that "the problem of causality is very difficult for research of this sort to resolve").

[96] Howard, Jr., *supra* note 76, at 923–25.

[97] *Id.* at 935 ("[D]ifferent role perceptions, though untested in exclusively lawmaking situations, were moderately associated with liberal-conservative voting behavior; different political orientations were not."). Howard, Jr. concludes that "neither political nor professional orientations, alone or in concert with the other, were totally consistent with voting behavior." *Id.* at 936. Thus, "past political orientations and role perceptions may be useful conceptual prisms to order complex values and experience, [but] these ideological constructs are too generalized to control or to explain individual decisions in doubtful cases on the three tribunals." *Id.* Substantive outcome, however, is generally beyond the scope of role orientation theory. *See supra* note 81 and accompanying text.

[98] *Cf.* Tate, *supra* note 93, at 363 ("[J]udges' attitudes such as socio-political values or role orientations, which have been assumed to be crucial intervening variables between their attributes and decisions, may be such proximate causes of judicial decisions that they are, for many analytical purposes, all but indistinguishable from decisional behavior.").

In addition, the causal direction between role orientation and political identity is difficult to disentangle. For example, with respect to previous political involvement, a person's involvement in a political campaign may influence his views on particular policy question. On the other hand, that person's involvement in a campaign may be a *result of* preexisting views on the policies that the candidate supports—she may merely wish to help the candidate whose views most closely mirror her own to get elected. *See* Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86

Viewing role orientation in light of the broader theoretical framework of legal and nonlegal theories of judicial decisionmaking explains this seeming anomaly, as well as the presence of decisions that uphold private-interest wealth transfers. Roughly put, legal theories argue that law matters in judicial decisionmaking,[99] whereas nonlegal theories argue that law is not a meaningful constraint on judicial decisionmaking.[100] Judges with legalist role orientations decide cases based on rules, which constrict and channel their decisions; these rules are derived from elected-branch policy pronouncements.[101] Since these rules are the very same instruments by which the elected branches execute private-interest wealth transfers, legalist judicial decisions ratify these transfers.[102]

Judges with nonlegal role orientations, on the other hand, will decide cases based on their pure policy preferences—what they think is best for them or the public.[103] However, if a particular decision might have a nontrivial effect on a judge—for example, when the judge could receive tangible benefits a decision that would differ from those the decision provides for the public generally—judges would be expected to recuse themselves.[104]

N.C. L. REV. 1333, 1353 (2008). George observes that the same is true with respect to one's profession. *Id.* Nevertheless, it does not appear that role orientation is particularly linked to past experiences. *E.g.*, Scheb II & Ungs, *supra* note 77, at 406–07; *see also* George, *supra* at 1352 ("[M]ost studies fail to find that sex or race have a consistent or substantial effect on judges' votes in cases in which we might expect sex or race to play a role.").

[99] *See generally* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (examining the forms legalistic models of judicial decisionmaking take). The legal/nonlegal theory dichotomy of judicial decisionmaking essentially mirrors the distinction between legal formalism and legal realism.

[100] *See, e.g.*, BAUM, *supra* note 8 (presenting a strategic model of judicial decisionmaking); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (presenting an attitudinal model of judicial decisionmaking). For a general overview of models of judicial decisionmaking, see THE PIONEERS OF JUDICIAL BEHAVIOR (Nancy Maveety ed., 2003). For the purposes of simplicity, I discuss both the attitudinal and strategic models under the heading of "nonlegal."

[101] *See* Schauer, *supra* note 99, at 510. Assume for the purposes of this discussion that the rule is sufficiently determinate to derive the desired policy result from it.

[102] Such a role orientation is in line with the views of Landes and Posner, who recognized that in employing legislative-intent-based theories of decisionmaking—which would be implicit in an agency-minded role orientation—courts could become participants in interest-group transfers. *See* Landes & Posner, *supra* note 24, at 878.

[103] *See, e.g.*, SEGAL & SPAETH, *supra* note 100, at 6–12.

[104] On the other hand, judges likely receive intangible benefits, for example, those arising from the satisfaction of doing one's job well. *See* Landes & Posner, *supra* note 24, at 887 ("A possibility is that judicial decision-making

Moreover, in acting for the public, the judge will only be deciding in the public interest as he perceives it—a subjective determination—but that is intrinsic in judicial decisionmaking. Judges with nonlegal role orientations are therefore public interested by definition, even when they misinterpret or misunderstand what the public interest actually is.[105]

Nonlegalist judges may also act strategically, however, resulting in decisions that diverge from their ideal policy positions.

> While circuit judges and [Supreme Court] Justices may not regularly interact with elected officials, they have to anticipate the position and likely reaction of Congress and the President to their decisions, particularly in the area of statutory interpretation. On the other hand, they need not fear termination as reprisal because they are protected by life tenure during good behavior. . . . Justices will behave ideologically, but not beyond a point that prompts Congress to overturn a statutory ruling or attempt to restrict a constitutional one.[106]

Whether a judge ratifies or overturns private-interested legislation depends largely on whether the judge's personal role orientation pushes the judge in the direction of legalist or nonlegalist decisionmaking. Significantly, as the research discussed above shows, the role orientation a judge gravitates toward varies depending on the level of court where the judge sits. Generally speaking, the higher the court—and hence the greater the independence from reversal—the greater the incidence of nonlegal role orientations;[107] this fact will be significant for Part III,

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should be viewed as a consumption activity from the judge's standpoint. He decides in a certain way not because it will get him something else but because he derives personal satisfaction from preferring one party to the lawsuit over the other or one policy over another, a form of satisfaction that individuals routinely seek in a variety of areas.").

[105] This possibility does not affect a characterization of the decision as public interested, although it may have implications for our consideration of comparative institutional legitimacy and the countermajoritarian problem. This problem would be resolved by considering whether, because of the judge's miscalculation, the public is worse off than if the regulatory result had been achieved through private-interested legislation.

[106] George, *supra* note 98, at 1359 (citations omitted).

[107] *See* John R. Quinn, *"Attitudinal" Decision Making in the Federal Courts: A Study of Constitutional Self-Representation Claims*, 33 SAN DIEGO L. REV. 701, 731 (1996) (finding that, with respect to the claims studied, "attitudinal factors do not measurably influence decisions on the lower courts, at least not nearly to the degree that they affect Supreme Court deliberations").

which discusses judicial review. This is not to say, however, that judges with legalist role orientations are influenced by private interests to a greater degree than nonlegalist judges. Rather, legalist judges make decisions divorced from their policy implications, an extreme version of which Justice Holmes captured when he wrote, "[I]f my fellow citizens want to go to Hell I will help them. It's my job."[108] To attribute private-interested intentions to decisions based on legalist role orientations is therefore to misunderstand the nature of legalist decisionmaking. In addition, as shown in the following section, private interests have little to offer judges. Because the legal process lacks the purchase influences prevalent in the elected branches, judges with nonlegal role orientations are unlikely to exercise their independence in a way that favors private interests unless they perceive that doing so will serve some broader policy goal. As a result, neither legal nor nonlegal role orientations leave room for private-interest influences.

B. Criticisms and Responses

Several reasons have been advanced to suggest why the judiciary would be expected to act in the private interest. First, as noted above, judicial independence can cut both ways. An independent court "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."[109] If private interests are able to pursue their goals in courts rather than legislatures, moreover, they can cloak their rent seeking in legal abstractions, lessening public scrutiny of the group seeking the rent.[110] However, the special interests have less to offer to judges than they do to legislators. If the medium of exchange is resources to get votes, then the lack of need for votes means special interests must offer something else in order for the market concept to apply to courts.[111] In addition, judicial independence is arguably limited to some extent for lower federal court judges who aspire to higher judicial office, because promotions often take

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[108] Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), *in* 1 HOLMES–LASKI LETTERS, at 249 (Mark DeWolfe Howe ed., 1953).

[109] Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 372 (1999) (citing Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 450).

[110] *See id.* at 374 (highlighting the example of a tobacco company filing suit in opposition to a policy aimed at reducing underage smoking "when direct political action [was] not politically feasible").

[111] Clearly, this conclusion is diminished with respect to elected judges. *See, e.g.*, Gibson, *Simplicity, supra* note 81, at 23.

place within the judicial ranks. Courts of appeals judges are often former district court judges, and Supreme Court judges are now usually selected from the courts of appeals.[112] Given the high level of congressional polarization, however, "the impact of a particular decision on the prospects for promotion is normally very slight," since a "decision may offend as many influential people as it pleases."[113]

One might argue that to the extent that regulated parties correctly perceive their ability to bend regulatory channels to their will, their behavior suggests they are able to pursue their goals in the judiciary. Interest groups advocate for stronger judicial review of agency actions. If interest groups are able to capture the elected branches but not the judiciary, these groups should disfavor judicial review because of its potential to upset the transfers they have been able to broker with the elected branches. At least for administrative agency action, though, "experience is precisely the opposite; interest groups have consistently favored 'an active, easily triggered role for the courts in reviewing agency decisions.'"[114] However, it is quite possible that favoring enhanced judicial review is a function of interest groups merely wishing to give themselves a shield should they receive negative administrative treatment.

More evidence of court complicity in private-interest wealth transfers comes from the types of cases federal courts overturn on constitutional grounds. For example, when the Supreme Court declares statutes constitutionally invalid, "ordinarily it does so when the challenged legislation involves no interest group—concentrated beneficiaries—in particular and all members of Congress in general."[115] At the same time, "the Court tends to uphold those acts of Congress supported by existing rent-seeking interest groups."[116] In addition, "courts have consistently struck down efforts to reform legislative procedure and reduce the

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[112] Of the current Supreme Court justices, all except Justice Kagan are former federal appellate court judges. For a comprehensive (although slightly outdated) view of intrajudiciary promotion, see sources cited in Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 6 n.9 (1993).

[113] *Id.* at 5.

[114] Cross, *supra* note 109, at 380 (citing Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 276 (John E. Chubb & Paul E. Peterson eds., 1989)). On the other hand, this may be attributable to interest groups' desire to build in a second structural chance at capture into the regulatory system, although then one might wonder how this affects the literature's conclusions on agency capture.

[115] Peter H. Aranson, *Models of Judicial Choice as Allocation and Distribution in Constitutional Law*, 1990 BYU L. REV. 745, 810.

[116] *Id.* at 811.

influence of special interests."[117] Both older cases like *Buckley v. Valeo*[118] and more recent cases such as *Bell Atlantic Corp. v. Twombly*[119] and *Citizens United v. Federal Election Commission*[120] have the effect of increasing the power of interest groups compared with that of individuals. *Twombly*, for example, increased the pleading standards a claimant must meet in order to survive a motion for summary judgment under Rule 8 of the Federal Rules of Civil Procedure.[121] By limiting claimants' ability to bring claims, and therefore decreasing plaintiffs' access to courts,[122] *Twombly* diminishes the access benefit courts have over the elected branches for individuals. This includes individuals who are usually the constituent parts of the groups this Article describes as large and unorganized, and who can be contrasted with businesses, as well as those individuals who are the usual constituents of small, organized groups and are more commonly beneficiaries of the shield *Twombly* presents to the targets of claims. As with precedent manipulation, this result would tend to move court outcomes in the direction of the private interest.[123] As a result, "[t]he 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."[124] Given the lack of identifiable purchase influences in the Supreme Court and the generally nonlegal role orientations of its justices, it seems more likely that these decisions are a function of judicial policy preferences aligning with those of the successful parties.

As discussed above, the ability of corporate litigants to settle cases strategically, with an eye toward establishing precedent favorable to their interests, has the potential to skew litigation

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[117] Cross, *supra* note 109, at 378.

[118] 424 U.S. 1 (1976).

[119] 550 U.S. 544 (2007) (reaffirmed by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

[120] 558 U.S. 310 (2010).

[121] The literature from roughly the first year after *Twombly* was decided—which generally argues that *Twombly* heightened the former pleading standard—is collected in Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 875 n.4 (2009). However, Bone sees *Twombly* more as "address[ing] a general problem of institutional design: how best to prevent undesirable lawsuits from entering the court system." *Id.* at 876.

[122] I intentionally switch between "claimant" and "plaintiff" here because while Rule 8 and *Twombly* apply to all claims—including defendants' cross- and counterclaims—the access issues attributable to *Twombly* are unique to plaintiffs.

[123] *See supra* note 55 and accompanying text.

[124] Cross, *supra* note 109, at 379.

results toward private interests.[125] Individual litigants will, for the most part, only have an interest in achieving compensation for their injuries. There may be asymmetric interests in establishing favorable precedent even in the case of group litigation, or when the plaintiff is a public-interest organization. Admittedly, however, this may be less true for national-scale public-interest organizations, which will be repeat players in litigation affecting their interests and will also be looking to settle (or dismiss) cases strategically. In these latter cases, the industry party (defendant) may choose to lose the battle—even a significant one—by settling while waiting for more favorable circumstances under which to establish what they view as satisfactory precedent.[126]

Despite this problem of repeat-player bias, the litigation system contains significant structural advantages for individual parties over the elected branches in terms of increased access. Recall that, aside from the ability to participate in the market for favorable regulatory policies—for example, by contributing funds and organizational resources to cooperative members of Congress—the other main advantage that organization gives groups of individuals is access to policymakers.[127] Because individuals can bring lawsuits for relatively little cost, and especially because lawyers can take cases on a contingency basis, individuals can get a hearing about their regulatory goals before a policymaker (the judge) without the collective-action costs necessary to access and lobby legislators or administrative agents.[128] More importantly, even where there are large resource

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[125] *See* Yeon-Koo Che & Jong Goo Yi, *The Role of Precedents in Repeated Litigation*, 9 J. L. ECON. & ORG. 399, 400 (1993) ("For a repeat player, . . . going to trial means not only facing a particular court decision, but also setting a good or bad precedent for future cases. Recognizing this, the players will alter their strategies in pretrial bargaining, based on their expectation of the precedent."); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 53–56 (1977) (comparing situations where both parties and only one party is interested in the precedential effect of a decision and concluding that "[i]f only one party to a dispute is interested in future cases of this sort, there will be pressure for precedents to evolve in favor of that party which does have a stake in future cases"). Moreover, "when the parties can influence a trial outcome through litigation efforts, they will front-load their efforts to the initial (precedent-setting) stage, because setting a favorable precedent is more effective than fighting against an unfavorable one already set." Che & Yi, *supra*, at 401.

[126] *See also* Aranson, *supra* note 115, at 807 (discussing Rubin's conclusions regarding parties' symmetric and asymmetric interests in establishing precedent).

[127] *See supra* Part I.C.

[128] Cross, *supra* note 109, at 363 ("[T]he minimally necessary costs of litigation are less than the costs of lobbying . . . .") (citing Merrill, *supra* note 1,

disparities between the parties, the empirical data indicate that, contrary to what was once thought, the effect of these disparities is minimal.[129]

Moreover, public-interest organizations—interest groups that seek to serve the other-regarding preferences[130]—are also capable precedent manipulators and can therefore blunt the effects of private-interested precedent manipulation.[131] Another factor that tends to distort the litigation process in favor of small, organized interests is that superior lobbying resources also mean superior litigation resources. However, as with the capacity for courts to advantage repeat players, this resource advantage is less pronounced in the judiciary when compared with the costs of achieving favorable results through legislative lobbying. Lobbying is considerably more expensive than litigation, giving the courts an institutional advantage over the elected branches.[132]

With respect to the problems that would seem to follow from the adversarial system, what at first glance appears to be a weakness turns out to be a strength. First, the requirement of stating a legal claim and supporting it with facts presents the courts with narrowed, binary policy questions. In essence, a judge deciding a legal claim considers the best policy result under the set of circumstances giving rise to the claim. In contrast, the policy questions facing legislatures are broad. For example, whereas the legislature faces the general policy question "How do we regulate emitters of pollution?" a court may face a question like "Under

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at 222–24). Additionally, "the marginal benefit of additional litigation expenditures is rather small." Merrill, *supra* note 1, at 222.

Moreover, when lawyers make contingent-fee agreements, there is an initial screening mechanism in place, since the lawyer must make a determination of the likelihood of success of the case, even if this decision may in some cases be little more than a decision on the likelihood of settling. If judges only hear cases that are plausible, this initial screening would weed out some weak cases where the justification for judicial intervention (regulation) is weak. And recall that for repeat-player defendants, the prevalence of settlement may be more their fault than the plaintiffs'. *See supra* note 125 and accompanying text.

[129] *See* Reginald S. Sheehan et al., *Ideology, Status, and the Differential Success of Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464, 469 (1992) (finding only a negligible correlation between litigant resources and experience and actually outcomes in Supreme Court litigation).

[130] *See supra* note 11 and accompanying text; *see also* Elhauge, *supra* note 3, at 67–68.

[131] The mechanism, however, is slightly different; plaintiffs merely choose not to bring cases or have them dismissed without prejudice.

[132] *See* Merrill, *supra* note 1, at 222–24 (estimating that the cost of achieving positive regulatory policies through the judiciary is about $250,000, whereas the cost of achieving the same policy through lobbying is about $2,000,000).

such and such circumstance, is the emission of pollution a reasonable (and therefore a desirable) policy choice?"

As the public choice model of judicial decisionmaking rightly points out, a policymaking process that only included the views of two opposed interests would be cause for concern, because the decisionmaking process would inevitably miss out on the nuance that additional parties' views would provide. But this is only a problem when the policy question is broad. When the policy issue is framed narrowly and presents a binary choice (some discrete policy X is or is not desirable), the binary adversarial system provides an ideal forum in which to consider the pros and cons of that policy. This forum has the added benefit that each side has a strong incentive to give the best case for each side of the question—one which is improved by the information-forcing nature of litigation through discovery.[133]

Moreover, in those situations where a judge must consider additional interests within this narrow policy question (that is, where there are third party interests who are not similarly situated to one of the two parties to the suit and therefore would not be adequately represented by one of those parties), courts have the benefit of amicus briefs. True, small, organized interests may be able to slant the number and quality of amicus briefs in their favor, but because courts process information differently than legislatures—since they are free from the purchase influences that skew how they view information—the value of these briefs is limited to the information they contain.[134] And since the information disparity is already diminished by the access the litigation system provides, the value of any additional information from interest-group-motivated amicus briefs is likely to be low. This is especially true when balanced against the fact that the opportunity for amicus participation also increases participation of interested but traditionally underrepresented parties, who can contribute at a much lower cost than that incurred by lobbying the elected branches, leading to approximately equal representation in amicus briefs between liberal and conservative positions.[135]

For similar reasons, interest groups active in the judicial nomination process are unlikely to have a significant effect on

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[133] *See generally* Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693 (2007) (citing several examples of the information-producing benefits of litigation).

[134] *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 750 (2000) (interpreting their data to reject the idea that interest-group-influenced amicus briefs affect judicial decisionmaking in any meaningful way).

[135] *See* PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT 54 fig.3.3 (2008).

nomination outcomes. While interest-group activity in the nomination process is likely to be high, enough interest groups are likely to be active that the information- and purchase-influence imbalances normally present in the legislative processes will be remedied by the presence of myriad groups. More centrally, it is doubtful that interest groups will have much effect on the process at all. Conservative senators will support conservative judges and oppose liberal ones, and vice versa.[136] Interest-group influence will only be useful where it can switch this general behavior, which, for reasons of party loyalty, will be rare.[137]

Finally, the seriatim nature of legal decisions creates a system that promises to be more deliberative than legislative policymaking. Whereas legislatures—limited by partisan and interest-group pressures, as well as bounded rationality and rational ignorance—have little time to deliberate in a meaningful way about most policy choices, the incremental nature of common law development, with its variegated litigants and judges, allows for an extended discussion about the policies appropriate to a group of activities which would be dealt with legislatures in one fell swoop (and which can additionally be dealt with on an experimental basis in the courts, since precedent is not immutable).

Overall, then, the factors suggesting private-interest capture of the judiciary are unconvincing. In those situations where we can identify private-interested *results*, these cases at most indicate a fidelity to legislative decisionmaking based on role orientation, rather than the type of systematic capture that affects legislative policymaking. In contrast, both legal and nonlegal judicial role orientations—as well as the structures of the judicial process, which provide access and information benefits that the elected branches lack—strongly indicate public-interested courts. The final Part of this Article discusses the implications of this conclusion for the countermajoritarian difficulty, and by extension, judicial review.

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[136] *See supra* note 112 and accompanying text.

[137] For further support of this conclusion, see generally Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935 (1990) (finding generally little merit in the belief that interest groups influence Supreme Court confirmation decisions). Elhauge grants Shapiro this point, but suggests that to the extent this is true, it is because "judges today are not major sources of economic regulation." Elhauge, *supra* note 3, at 81. This argument, however, would be persuasive only if courts could only affect economic regulation by setting economic policy directly, a proposition that is clearly false. Were that the case, it would be incongruous for interest groups to attempt to influence litigation outcomes through amicus brief writing. *See* Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 793 tbl.2 (1990).

III. THE JUDICIAL ROLE IN A PUBLIC CHOICE WORLD

Just as the history of Western philosophy has been no more than a footnote to Plato, the history of modern constitutional theory has been no more than a footnote to Alexander Bickel.[138] In explicating his theory of the countermajoritarian difficulty, Bickel provided a justification for judicial restraint. Where courts exercise judicial review of the acts of the elected branches, they overturn precisely those policy choices that are presumed to be the best expressions of the popular will. But Bickel's concerns reflect a formalist view of separation of powers that, while perhaps correct when written, stands in stark contrast with modern political theory—and, more importantly, with modern political reality. As discussed in Part I, public choice theory provides a powerful theoretical critique of the public interestedness of the elected branches, which, if taken at face value, severely undermines premises that Bickel treats as essential to his theory, premises that are fundamental in justifying judicial restraint. In contrast, the discussion from Part II shows that courts are significantly more likely to pursue the public interest in their decisionmaking.

Whether courts are subject to interest-group capture has important implications for court (and governmental) legitimacy. After all, the independent judiciary was designed as the bulwark against overzealous majorities and factionalism in the legislature.[139] Moreover, current concerns against judicial activism are not grounded in fears about special-interest capture of the judiciary, but rather in fears about judges substituting their policy choices for the policy choices of legislatures (and, ultimately, the people). In guarding against tyranny of the majority, the separation-of-powers system ironically created a system that allowed for tyranny of the minority in the form of special interests. This Part provides a framework grounded in the principle of majoritarianism for evaluating the courts and the elected branches of governments, and argues that such a principle provides a neutral

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[138] *See, e.g.*, Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1014 (1984) (describing Bickel's conclusion on the countermajoritarian difficulty as "the starting point for contemporary analysis of judicial review"); Chemerinsky, *supra* note 1, at 46 ("For several decades, the scholarly literature about judicial review has been dominated by a quest for objective constitutional principles and a conviction that judicial review is a deviant institution in a democratic society.").

[139] *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1442–43 (1987) (discussing the changes in the judiciary between the Articles of Confederation and the Constitution); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 344 (1998) (observing that "the Framers appear to have constructed the judiciary in a deliberately countermajoritarian fashion").

criterion for evaluating their decisions. It then applies this principle to judicial minimalism, concluding with a brief discussion of structural suggestions conducive to a majoritarian judiciary.

A. The Countermajoritarian Difficulty

The crux of the countermajoritarian difficulty is that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."[140] This statement provides three essential premises to Bickel's view of the countermajoritarian difficulty: (1) that there exists a majority will on some issue, (2) that the elected branches implement that will through their policymaking actions, and (3) that in exercising judicial review, the courts prevent the majority's will from becoming controlling policy.[141]

The first two premises resonate with prevailing social views on representative democracy.[142] Under the standard formulation of representative government, citizens give up some political power to agents—representatives appointed through election—who are then responsible for implementing the will of the people.[143] In other words, the public at large delegates to its representatives for

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[140] BICKEL, *supra* note 6, at 16–17.

[141] *Cf.* Friedman, *supra* note 45, at 628 (identifying two premises: "that the bedrock principle of constitutional government is accountability to the people, and that judicial review conflicts with this principle"). Friedman criticizes these premises by denying the existence of a majority will and by arguing that even if there were a majority will, judicial decisions are insufficiently final to disrupt it. *See id.* at 629–53; *see also* Mashaw, *supra* note 1, at 858–59 (criticizing the legislative process's ability to enact the majority will but not the value of enacting the majority will per se).

[142] This was not always the case, however. One need only look at the history of the Constitution (particularly its franchise-based amendments) to realize the extent to which society has moved in the direction of direct democracy that seeks to implement the majority will. *See* Friedman, *supra* note 45, at 620–22; Chemerinsky, *supra* note 1, at 67–68 (observing a trend beginning in the Progressive Era toward majoritarianism).

[143] I treat the concepts "will of the people" and "will of the *majority* of the people" as interchangeable. Barry Friedman has critiqued the idea of majority viewpoints because of the nature of political decisionmaking and its inability to effectively reveal preferences. *See* Friedman, *supra* note 45, at 638–39. Friedman treats this observation as a criticism on the *idea* of a majority will. His argument, however, does not lead to the conclusion that the government ought not implement the majority will, but rather that discerning it raises seemingly intractable problems.

the purpose of achieving its interests.[144] But in all but the most homogenous societies, interests diverge. This realization was the impetus for separation of powers and bicameralism. At the same time, the Framers put these restraints in place because they thought such a restrained government to be the best path to the public interest.[145] In recognizing that each competing interest in a heterogeneous society has the incentive to seek its own gain at the expense of a contrary interest, the government was structured in a way that each interest—whether governmental branch, individual legislator, or discrete interest group—would be hindered in its pursuit to achieve its goals at the expense of other groups.[146] The resultant system, though often inefficient, was thought to be the one most conducive to achieving some compromised public interest via legislative action that would balance the various needs of a heterogeneous society. This general principle carries over into discussions about particular policies, as well as the role of regulation generally; disagreements are not at the level of *whether* to govern in the public interest, but rather how best to achieve it.

For reasons unforeseen by the Framers, however, there are strong reasons to doubt that such a system is actually conducive to the public interest. Indeed, public choice theory suggests that the present system of elected-branch policymaking is often inimical to the public interest.[147] Founding era writings, and the general structure of the federal government, indicate a strong fear of tyranny of the *majority*, and it was the concern of giving the majority what it wanted that resulted in the structural checks on governmental action achieved by separating powers among the three branches of the federal government.[148] Ironically, the greater

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[144] *See, e.g.*, Mashaw, *supra* note 1, at 867 ("There is hardly an idea of greater moment in the whole of the constitutional structure than the notion that public legislation should provide for the *public* welfare." (emphasis in original)).

[145] *See* THE FEDERALIST NO. 10 (James Madison) (arguing that where the problem of faction lies in the majority, the resolution must come from restraining the majority).

[146] *See, e.g.*, Aranson, *supra* note 115, at 815 ("[T]he Constitution's overall structuring of the federal branches of government . . . suggests that the Framers understood the possibilities for various forms of 'illfare' (rent-providing) legislation and sought to protect against it through procedural, institutional artifices."); Epstein, *supra* note 65, at 849–50 ("The founders of our Federal Constitution . . . were well aware of the power of faction and its ability to generate special interest deals."); Sunstein, *Interest Groups*, *supra* note 1, at 29 ("Madison made control of factions the centerpiece of his defense of the proposed Constitution.").

[147] *See supra* Part I.C.

[148] The Framers recognized that providing what the public wanted could lead to unchecked trampling on minority rights. For example, Madison wrote that "the evidence of known facts will not permit us to deny" the conclusion that "the public good is disregarded in the conflicts of rival parties; and that

concern today is that the policymaking branches of government are captured by private interests—*minority* groups—with the implication that such capture is normatively undesirable given the reasons for which citizens transfer political power to their representatives. Except in circumstances where apparently capture-driven income transfers can be ascribed to long-term public interest (say, short-term subsidies that encourage industrial growth, leading, for example, to increased employment capacity, and net[149] public economic good), such transfers are inimical to the ultimate goals of representative government.[150]

The third premise—that courts prevent the majority's will on some policy from becoming controlling—is at the heart of most literature on the countermajoritarian difficulty. Under the classic account of U.S. government, courts exist to determine what the law is—what policy choices the legislature has made. When courts execute the intent of the legislature, they are "faithful"; when they overturn statutes (or, for that matter, prior precedent), they are "activist." This raises the fundamental problem Bickel identified. Judicial review allows courts to overturn the public's policy preferences, which is problematic because of the structural inability to hold the judiciary accountable for decisions with which we disagree. At the same time, judicial review has its benefits. The prevailing view is still that courts ought to be able to declare acts of Congress unconstitutional, for much of the same reasons expressed in *The Federalist Papers* and cases like *Marbury v.*

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measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." THE FEDERALIST NO. 10; *see also* KOMESAR, *supra* note 32, at 57 ("The *Federalist Papers* reflect greater fear of majoritarian bias than on minoritarian bias . . . ."); Eskridge, Jr., *supra* note 1, at 280 (describing government decisionmaking as a response to "inflamed passions or transient coalitions" as the nightmare Madison sought to avoid through representative government).

[149] Meaning the ultimate public gain from the subsidy is greater than the initial public cost of the subsidy.

[150] Indeed, one might even conclude that capture is categorically bad from the standpoint of representative government, even in those situations where short-term income transfers to small groups at the expense of the public ultimately result in net rewards for the general public. Strictly speaking, any instance of capture represents a failure of representation, at least so far as representatives are seen as agents for the collective good. This is because capture, by definition, requires a decision to advantage small groups at the expense of larger ones. Whether such capture is ultimately beneficial to society is nothing more than an accident. This situation can be contrasted, as above, with those situations where there is a conscious policy decision to temporarily advantage a small group for the long-term benefit of some larger group. Naturally, discerning the intent of policymakers, both individually and in the aggregate, is difficult.

Madison.[151] Regardless of the answer to the question of *when* courts should overturn acts of the legislature, it seems uncontroversial that the courts should not overturn legislative expressions of the public will, provided that the legislative action does not violate a preexisting constitutional restriction.

At the same time, as we saw in Part II, judicial independence can serve as a structural means to inhibit private-interested policymaking. As William Landes and Richard Posner observe,

> [t]he existence of an independent judiciary seems inconsistent with—in fact profoundly threatening to—a political system in which public policy emerges from the struggle of interest groups to redistribute the wealth of the society in their favor, the view of the political process that underlies much of the recent economic work, as well as an older political-science literature, on the political system. The outcomes of the struggle can readily be nullified by unsympathetic judges—and why should judges be sympathetic to a process that simply ratifies political power rather than expresses principle?[152]

The effect of judicial independence, combined with nonlegal role orientations, then, is to supply a structural check not just against a tyrannical majority, but also against policymaking dominated by interest-group politics—a tyrannical minority.[153]

More centrally, concerns about the propriety of judicial review are premised on the faith that the legislative enactments *actually* implement the public's policy preferences.[154] If, on the other hand, the policymaking branches of government are captured by private

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[151] 5 U.S. (1 Cranch) 137 (1803).

[152] Landes & Posner, *supra* note 24, at 876. Landes and Posner cite Supreme Court hostility to early New Deal legislation as an example of just such unwillingness to toe the line. *See id.* ("The Supreme Court's policy toward economic legislation during a period of roughly 50 years ending in the late 1930's illustrates the power and proclivity of an independent judiciary to nullify the legislative results of interest-group politics." (citation omitted)).

[153] *See* Epstein, *supra* note 65, at 850 (arguing that, in order to inhibit interest-group transfers, the Framers "introduced an elaborate set of jurisdictional limitations and substantive protections designed to *reduce* the opportunities for these [transfers]" (emphasis in original)).

[154] *See* Friedman, *supra* note 45, at 630 ("[O]nce one disclaims reliance on the argument that legislatures *actually* represent majority will, or that courts *actually* override it, the countermajoritarian difficulty loses force." (emphasis in original)). However, Friedman dismisses the notion that as a result, one branch might be legitimate and the others might not be. *See id.*

interests, there is no public policy preference to implement. Rather, there is merely an interest-group wealth transfer, which the court ratifies in upholding the statute at issue. Thus, when statutes represent wealth transfers to interest groups, judicial activism—defined for the purposes of this discussion as the judicial invalidation of some statute or prior precedent—takes on a positive light, at least when viewed purely in terms of the criterion of governmental responsiveness to the public interest.[155] That is, if legislative actions provide private-interested wealth distributions and courts overturn them, it is the courts that are acting in the public interest, therefore providing a check on the elected-branch propensity to frustrate the public interest. As a result, courts exercising such review under these circumstances are performing the role of agent to the public better than the elected branches.

Of course, the immediate response to a suggestion justifying judicial activism is that, comparatively speaking, legislatures are more accountable than courts. After all, members of the federal judiciary are appointed for life during good behavior, whereas legislators face reelection every two to six years. That being the case, even if some statutes represent interest-group transfers, one might prefer a system—even an obviously imperfect one—of elective popular control to an institutional system of judicial control. This conclusion is based on the difficult-to-establish comparison between the effectiveness of electoral control and that of judicial control. Aside from information difficulties—the difficulty of attributing a particular policy result to a particular legislator—representative control via election is also hindered by bundling problems: one may disagree with a clear wealth transfer to an interest group, and yet agree with the overall job that one's representative is doing. Regardless of the precise reasons to which we attribute electoral stability, the simple fact is that most incumbents are relatively secure.[156] Once again, given the goal of fidelity to the public interest, it is essential to consider whether courts reviewing legislative policy choices would be more likely

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[155] In practice, there are other issues at play. Even if, for example, we would applaud judicial activism in the abstract, or in discrete instances, we might nevertheless deride judicial activism as a structural mechanism for achieving the governmental fidelity in its role as an agent of the public interest.

[156] *See, e.g.*, John N. Friedman & Richard T. Holden, *The Rising Incumbent Reelection Rate: What's Gerrymandering Got to Do With It?*, 71 J. POL. 593, 593 (2009) ("In each of the four Congressional elections up to 2004, more than 97.9% of incumbents who ran again were reelected."). Even if we add to the calculations members of Congress who chose not to run due to poor reelection chances, retention rates remain staggeringly high. For data from the 2012 election explaining this phenomenon, as well as historical data, see Nate Silver, *So Few Swing Districts, So Little Compromise*, N.Y. TIMES, Dec. 28, 2012, at A16.

than the legislature to produce public-interested policy results, which would justify a conclusion that judicial review has a legitimate role in our system of government.

In addition, we may distrust court review of such statutes for an epistemological reason: we doubt the ability of courts to determine whether these statutes serve private interests.[157] The evaluation becomes even more difficult when we recall that some statutes may represent temporary wealth distribution in favor of private interests, but with the goal of ultimately achieving a net public wealth increase due to the positive effects of economic growth.[158] However, if we doubt the courts' ability to make such determinations, we ought to doubt even more the ability of individual citizens to make them, limited as they are in their incentives to monitor their representatives. Though we might think that the executive branch, with its administrative army, could provide such a check on the legislature,[159] there are two criticisms to this conclusion. First, the argument is susceptible to the same role legitimacy argument as judicial review. If we are to criticize courts for substituting their policy choices for those of the legislature, we ought to criticize the executive for substituting its policy preferences as well, since the role of the executive is to implement policy choices, not make them.[160] Second, although the

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[157] Cross, *supra* note 109, at 360 ("[J]udges may be unable to distinguish between illegitimate government action and public-regarding legislation." (citing DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 64 (1991))); *see also* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 911–12 (1987) ("[A]lthough courts are appropriately concerned about the role of special interests in the political process, judges ordinarily will be unable to identify, in any principled fashion, individual instances in which that process has malfunctioned because of undue influence by special interests. Judges are better able to examine the structures and procedures through which public policy is adopted.").

[158] Consider, for example, grants offered for research and development. While they represent wealth transfers in their most basic form to private interests, they are justified (and accepted by the public) as investments for the future benefit of the public. We might also be tempted to include tax breaks, although whether a tax incentive is properly categorized as a wealth transfer will be context dependent and will require a counterfactual determination on whether the tax would have accrued in the absence of the incentive. For example, a tax break to a business without a preexisting plant in a particular area might not be a wealth transfer, because absent the tax break there would have been no property to tax. The question is whether there is some difference in public wealth or income between the time prior to the tax policy and the time after it has been accepted.

[159] The most obvious check, to which the first criticism presented does not apply, is the veto power.

[160] Granted, the open texture of statutory language may be a legislative invitation to the executive to make policy. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 131 (1980) ("Much of the law is . . . effectively left

executive is electorally accountable—albeit less so than the legislature—that electoral dependence creates the same incentives for regulatory exchange that make the legislature susceptible to private-interest capture, making the executive an equally likely target of capture and undermining its role as a reliable check on legislative interest-group transfers.

Those who would base their desire for more robust judicial review on the private interestedness of legislatures have been criticized because their arguments are based on "normative baselines" about appropriate amounts of interest-group influence.[161] The concerns underpinning the countermajoritarian difficulty, though, provide just such a criterion for evaluating the normative implications of public choice theory and suggest prescriptions for ensuring the courts' abilities to pursue the public interest.[162] Although the claim that public choice critics are misguided in arguing for more intensive judicial review is compelling on its face, it misses the heart of the problem. Even if it is conceded that interest groups have as much a right as individuals to seek to influence elected-branch officials, the ultimate complaint against interest-group capture is not about the influence itself (the policy inputs), but rather about the countermajoritarian results of that influence (the substantive outputs).

That is not to say, however, that majoritarianism represents a trump card when it conflicts with other fundamental values. Majoritarianism works as a one-way ratchet that provides a baseline criterion for evaluating elected-branch policymaking, but it would nevertheless give way to fundamental rights such as those enshrined in or deduced from the Bill of Rights, many of which are clearly antimajoritarian by design.[163] Moreover, majoritarianism is

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to be made by the legions of unelected administrators whose duty it becomes to give operative meaning to the broad delegations the statutes contain."). But in adopting such an argument, one is also forced to recognize that the open texture equally invites courts to make policy. Moreover, at least in principle, the nondelegation doctrine prevents wholesale delegations of policymaking power to the executive. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (arguing that even though federal courts rarely employ the nondelegation doctrine in its broad form, they "commonly vindicate . . . a series of more specific and smaller, though quite important, nondelegation doctrines").

[161] Elhauge, *supra* note 3, at 48.

[162] *See infra* Part III.C.

[163] *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) (acknowledging this understanding as conventional wisdom and part of the story, but arguing that the Bill of Rights also includes structural prescriptions and protections for state and majority rights); Chemerinsky, *supra* note 1, at 75 ("Because majority rule is instrumental, it should not be regarded as superior to those values it serves.").

already a basic element of judicial review. For example, majoritarianism stands at the heart of rational basis review. This level of scrutiny presumes that policymaking with some rational relation to a legitimate government purpose is legitimated by majoritarian control of the elected branches.[164] Heightened scrutiny is likewise justified by majoritarian concerns. In the case of intermediate scrutiny, the review is majoritarian in nature, but the public interest asserted is examined to ensure that it is not merely a reiteration of existing stereotypes or power structures.[165] Heightened scrutiny can also serve to ensure participation in government decisionmaking processes.[166] Thus, majoritarianism serves as a transsubstantive criterion for evaluating elected-branch activities—and one that is in fact already entrenched (albeit far from perfectly) in existing constitutional law.

As mentioned above,[167] the allocation of power between the elected branches and the courts should be evaluated in light of the abilities and propensities of the various branches to implement the majority will. Given the comparative superiority of the courts for acting in the public interest, the means of ensuring and strengthening the courts' powers to do so remains to be considered. First, the comparative institutional analysis presented above suggests a powerful critique of judicial restraint and therefore calls for a larger role for judicial review. Second, this analysis suggests a new means of viewing procedural rules and indicates areas of procedure that are particularly important bulwarks against capture of the judiciary.

B. Judicial Review

When post-Warren courts have exercised judicial restraint, they have done so under the presumption that rational basis review

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[164] *See* Chemerinsky, *supra* note 1, at 73–74; Sunstein, *Interest Groups*, *supra* note 1, at 49–50 ("In the rationality cases, the Court requires some independent 'public interest' to justify regulation." (citation omitted)).

[165] *See* Sunstein, *Interest Groups*, *supra* note 1, at 57.

[166] *See* ELY, *supra* note 160, at 77 (arguing that heightened scrutiny is appropriate where the opportunity to participate in the political process is unjustifiably limited); Chemerinsky, *supra* note 1, at 53–54 ("[T]he judicial role is especially to reinforce majority rule, for example, by ensuring equal representation in the electoral process, by protecting discrete and insular minorities, and by assuring fair processes of government decisionmaking."). I diverge from Ely's interpretation of *Carolene Products*'s famous Footnote Four, *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938), in arguing that Footnote Four, and judicial review generally, are not just about ensuring participation in pluralist government decisionmaking, but about perfecting decisionmaking institutions.

[167] *See supra* Part I.B.

is intended to reinforce democracy.[168] However, because public choice theory shows that the elected branches often fail to serve the public interest, judicial restraint has the effect of reinforcing antimajoritarian wealth transfers. As a result, increased judicial review of elected-branch policymaking has the capacity to increase the public interestedness of government.[169] Judicial review is particularly warranted where that policymaking is related to economic issues or deals with tax benefits and burdens.[170] Since judges with legal role orientations are more likely in lower level courts and more likely to ratify capture-driven policies, the responsibility for judicial review will fall particularly to appellate level courts, especially the Supreme Court.[171]

Although I advocate increased judicial review of economic legislation, I do not intend to advocate a return to *Lochner v. New York*.[172] In contrast, my suggestions for increased judicial review are based in majoritarianism, a concept that may ultimately be incorrect to characterize as a right at all, and yet it should still be used as a decision principle for judicial review. Those who would object to legislative decisions made by coin flip surely should also do so when the result is patently private interested. One may respond that the repugnance of the coin flip is its arbitrariness, but I would rejoin by saying that at least with a coin flip—so long as an issue could be framed in a suitably binary way—the legislature would have a 50% chance of achieving what is in the public interest. On the other hand, one may respond that the prohibition of coin flips is merely a mechanism to force legislatures to deliberate. But to make such an argument is to concede mine. Such an argument would value deliberation not as an end in itself but rather as a means to achieving some end, which would inevitably be posited to be some formulation of the public good.

I would hesitate to attempt to cabin such review within the traditional dichotomy of substantive-versus-procedural due process review. First, it is ultimately more distracting than helpful to

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[168] *See* Mashaw, *supra* note 1, at 858 ("By refusing to review the substance of state economic legislation, the Court asserts the preeminence of the democratic political process."). The development of rational basis review and rejection of substantive due process has continued the trend of judicial deference to the elected branches under the presumption that they are the best protectors of majoritarianism.

[169] *See* Macey, *supra* note 1, at 225 (concluding that judicial review is appropriate, in part, where it "result[s] in making legislation more public-regarding by serving as a check on legislative excess").

[170] More able scholars than I have made a variety of suggestions on the exact contours of increased judicial review warranted by a public choice view of elected-branch policymaking. *See* sources cited *supra* note 1.

[171] *See supra* note 107 and accompanying text.

[172] *See* Lochner v. New York, 198 U.S. 45 (1905).

attempt to label majoritarianism as either a substantive or a procedural right.[173] Whether we characterize majoritarianism as a substantive right to which we are entitled, or a procedural right that imposes deliberative requirements on legislatures in allocating legislative benefits and burdens, the ultimate conclusion is that majoritarianism is a constitutional value. To date, courts may have favored a view that legislatures are the best *guardians* of that value, a conclusion based on countermajoritarian fears that, if correct, would strongly support judicial restraint. But the conclusions from Part II show that this belief is in fact false.

C. Structural Suggestions

The factors that lead to interest-group capture of the elected branches suggest ways to limit the influence of interest groups in the judiciary. This Part briefly discusses two particular categories of rules that stand out and are analogous to the purchase and information influences identified in Part II: rules that increase access to courts, and rules that diminish informational disparities between parties to a lawsuit.

Most prominent among the federal rules having an effect on court access are Rule 8 and Rule 23 of the Federal Rules of Civil Procedure. Rule 8 requires no more than a short and plain statement of jurisdiction and the claim entitling the party to the demanded relief.[174] As mentioned earlier in Part II.B, *Twombly* and *Iqbal* increased the level of factual allegation required for the statement of the claim.[175] But it is cases concerning economic activities—cases like *Twombly*—in which the propensity for elected-branch capture is the greatest, and therefore the need for judicial scrutiny is at its utmost.[176] Returning to the pre-*Twombly* pleading standard from *Conley v. Gibson*,[177] which merely required the defendant to be put on notice of the facts and law forming the basis of the complaint, would increase court access for the types of cases likely to involve implicit interest-group wealth transfers.[178]

Even more important for court access is Rule 23, which governs class actions.[179] As we saw in Part I, a predominant factor

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[173] *Cf.* Mashaw, *supra* note 1, at 858.

[174] Fed. R. Civ. P. 8(a).

[175] *See supra* notes 119–123 and accompanying text.

[176] Economic cases are also the ones most likely to survive judicial review. *See* Macey, *supra* note 1, at 224 ("[T]he Constitution is rarely used to invalidate a statute, especially an economic one.").

[177] 355 U.S. 41 (1957).

[178] For a general discussion of the effects of *Twombly* on court access, see Bone, *supra* note 121.

[179] Fed. R. Civ. P. 23.

of elected-branch capture is the organizational advantage of small groups united by a common interest. By serving as a device for aggregating individual claims, class actions provide a mechanism for overcoming the collective action difficulties that injured individuals face.[180] Class action suits are often the result of regulatory failures that can be attributed to interest-group transfers.[181] Therefore, proposals seeking to limit the availability of class actions should be viewed warily, with an eye to the value of class actions as mechanisms for combatting interest-group transfers.

Finally, liberal discovery rules are vital for two reasons. First, the public choice literature indicates how important control over information is to the ability to influence decisionmakers, a fact no less true in the case of litigation.[182] More importantly, defendants who have access to negative information about their preferred policy positions, or their own internal affairs, can usually avoid divulging that information to policymakers in the elected branches. A robust discovery process forces parties (usually defendants) to produce this information, increasing the quality of the regulatory decisions made in the courts.[183]

CONCLUSION

Because legislative policymaking exhibits a general trend of private-interest influences, whereas judicial policymaking is generally public interested, the prevailing allegiance to the elected branches when it comes to policymaking ought to be softened, even if not abandoned. Collective action problems are seemingly unavoidable given our system of government and the size of the polity. This means not only that legislatures are less responsive to the public interest, but also that voters are less able to discipline members of Congress when they fail to serve their function as agents. Recognizing this reality, we should be more open to the salutary functions both of judicial review and of positive judicial policymaking, rather than merely dismissing them out of hand as illegitimate judicial activism.

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[180] *Cf.* Merrill, *supra* note 1, at 225 ("Those able to transmit only a feeble demand . . . will elicit no response from either the legislature or the courts.").

[181] *See* Luff, *supra* note 54, at 81–87 (identifying shortfalls between governmentally provided and socially demanded levels of risk regulation).

[182] *See* Galanter, *supra* note 51, at 119 (observing the importance of information to the litigation process).

[183] *See generally* Wagner, *supra* note 133.