COLUMBIA LAW REVIEW

VOL. 86 MARCH 1986 NO. 2

PROMOTING PUBLIC-REGARDING LEGISLATION THROUGH STATUTORY INTERPRETATION: AN INTEREST GROUP MODEL

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INTRODUCTION

We live in a time of widespread dissatisfaction with the legislative outcomes generated by the political process.[1] Too often the process seems to serve only the purely private interests of special interest groups at the expense of the broader public interests it was ostensibly designed to serve. While the current distrust of government represents a major shift away from the dominant public perception of "government as helper"[2] that existed from the time of the New Deal until the present decade, the current attitude is not new by any means. As Professor Sunstein has observed, "[t]he problem of faction has been a central conceru of constitutional law and theory since the time of the American Revolution."[3] In fact, a basic justification offered by the framers for their new Constitution centered around its usefulness in controlling interest groups.[4]

Academics, however, have only recently applied the tools of

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1. See Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 29 (1985).

2. This conception of government is also known as the public interest theory of legislation. It is a theory more often assumed than articulated. Posner, Theories of Economic Regulation, 5 Bell J. Econ. & Mgmt. Sci. 335, 335 n.1 (1974). The public interest theory of legislation was developed and formally set forth in the economics literature by Baumol and Pigou. See W. Baumol, Welfare Economics and the Theory of the State (2d ed. 1965); A. Pigou, The Economics of Welfare (4th ed. 1950). Baumol and Pigou perceive legislation as designed to correct imperfections in the functioning of the market economy. For example, free-rider problems might thwart private efforts at obtaining optimal pollution control. Baumol and Pigou would argue that the government can increase societal wealth by enacting legislation that taxes those who pollute.

3. Sunstein, supra note 1, at 29.

4. See infra notes 92–94 and accompanying text.

microeconomics to predict the effect such groups will have on the lawmaking process.[5] According to the so-called interest group or economic theory of legislation,[6] market forces provide strong incentives for politicians to enact laws that serve private rather than public interests, and hence statutes are supplied by lawmakers to the political groups or coalitions that outbid competing groups.[7] The widespread acceptance of interest group theory has led to suspicion about much of what Congress does, creating, in turn, a climate hospitable to judicial interference with legislative outcomes.

Much has been written of the circumstances under which courts should strike down legislative enactments.[8] As a practical matter, however, the Constitution is rarely used to invalidate a statute, especially an economic one.[9] This judicial restraint has led economists to conclude erroneously that the concept of an independent judiciary is only an illusion and that federal judges, as agents of the legislative branch, simply "enforce the 'deals' made by effective interest groups with earlier

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5. The economics of legislation applies the laws of supply and demand to the provisions of economic legislation. "The 'interest group' theory asserts that legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare . . . ." Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263, 265 (1982).

6. The development of the economic theory of legislation can be traced to two seminal publications: J. Buchanan & G. Tullock, The Calculus of Consent (1966), and Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971). The theory is now almost universally accepted among economists. See Kalt & Zupan, Capture and Ideology in the Economic Theory of Politics, 74 Am. Econ. Rev. 279 (1984).

The theory is also referred to as "public choice" theory and as "rent-seeking." Public choice has its antecedents in the literature of game theory. Rent-seeking refers to the attempt to obtain economic rents (i.e., payments for the use of an economic asset in excess of the market price) through government intervention in the market. A classic example of rent-seeking is a corporation's attempt to obtain monopolies granted by government. Such monopolies allow firms to raise prices above competitive levels. The increased income is economic rent from government regulation.

7. As interest group theory has developed, it has gained increasing academic support. See R. Posner, The Federal Courts 271 (1985) (describing "the shift in scholarly thinking about legislation from a rather naive faith in the public-interest character of most legislation to a more realistic understanding of the importance of interest groups in the legislative process"). The shift away from a public interest view of the legislative process is not tied to any particular political perspective. The interest group theory of legislation is "[e]spoused by an odd mixture of welfare state liberals, muckrakers, Marxists, and free-market economists." Posner, supra note 2, at 335.

8. One commentator has noted that "the question of the legitimacy of judicial review has claimed more discussion and more analysis than any other issue in constitutional law." P. Bobbitt, Constitutional Fate 3 (1982); see, e.g., A. Bickel, The Least Dangerous Branch (1962).

9. See Landes & Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875, 895–901 (app.) (1975). Between 1789 and 1972, only 97 acts of Congress were held unconstitutional. Id. at 895.

legislatures."[10]

The reluctance of article III courts to strike down interest group legislation as unconstitutional finds its source in two seeemingly irreconcilable components of American constitutional theory, both derived from the separation of powers embodied in articles I, II, and III.[11] The first is the system of checks and balances, which is intended to raise the decision costs of government by requiring that the various branches share power.[12] The second is the basic constitutional premise, embodied in article I, that the legislature has the power to make law. These two constitutional principles, taken together, imply that judicial interpretation is consistent with the constitutional scheme only if two conditions are satisfied: the interpretive act must (I) result in making legislation more public-regarding by serving as a check on legislative excess, and it must (2) not intrude on the constitutional authority of the legislature to make law.

Condition Two ensures that the Constitution's allocation of the lawmaking function to the legislature will remain intact,[13] while Condition One reflects the constitutional premise that federal courts improve the operation of the democratic process by serving as a structural check on the tendency of Congress to engage in factionalism.[14] Condition One is justified by the need to mitigate the harmful effects of interest group domination of the political process. Condition Two is justified by the basic principle of democratic theory that the power to make law ultimately should reside in representative institutions such as

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10. Id. at 894; see also id. at 877 ("[T]he independent judiciary is . . . essential to the interest-group theory of government.").

11. See Aranson, Gellhorn & Robinson, A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 2 (1982) (first three articles of the American Constitution "plainly embod[y] a system of separation of powers"). The Federalist Nos. 47 and 48 (J. Madison) articulated the justification for the version of separation of powers ultimately adopted in the Constitution. The arguments for separation of powers "find their most complete expression in Montesquieu." Aranson, Gellhorn & Robinson, supra, at 2.

12. See Aranson, Gellhorn & Robinson, supra note 11, at 2–3; Sunstein, supra note 1, at 44.

13. When a federal court declares an act of Congress unconstitutional, it is encroaching on the legislature's authority to make law. A. Bickel, supra note 8, at 16–17. This observation caused Bickel to dismiss Federalist 78, which advocates giving judges the power of judicial review. See The Federalist No. 78, at 468 (A. Hamilton) (C. Rossiter ed. 1961) ("[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.").

Whatever one's position may be on the question of judicial review, judicial review is not now a major obstacle to special interest legislation. See Mashaw, Constitutional Deregulation: Notes Toward a Public, Public Law, 54 Tul. L. Rev. 849, 849 (1980).

14. For the purposes of the argument that follows, it is important to distinguish between Condition One, which is an implied condition inherent in the structure of the Constitution, and Condition Two, which is explicit in article I. This distinction strengthens the argument that the judicial function of serving as a check on the legislature (Condition One) is an institutional by-product of the act of judging.

Congress.[15]

These conditions appear to be irreconcilable. On one hand, any action by a court to check the legislature appears to intrude on the constitutional authority of the legislature to make law. On the other hand, a refusal to check the legislature seems to be an unconstitutional abdication of the judiciary's obligation to curb legislative excess.

As developed in this Article, these two constitutional features may be reconciled by recognizing that the constitutional requirement that the judiciary serve as a check on Congress' excesses often is fulfilled by the very act of statutory interpretation itself. The judiciary, using traditional methods of statutory interpretation, *inevitably* checks legislative excess by serving as a mechanism that encourages passage of public-regarding legislation and impedes passage of interest group bargains.[16] In other words, there need not be overt confrontation between the judicial branch and the legislative branch in order for checking and balancing to take place. As shown below, checking legislative abuse is an institutional by-product of the judiciary's traditional role as interpreter of statutes in the resolution of specific legal disputes.

When called upon to interpret a statute, a court has three alternatives. First, it can look beyond the terms of the statute and seek to enforce the terms of the deal between the interest group and the legislature. This "legislation-as-contract" method of statutory interpretation is the approach advocated recently by Judge Frank Easterbrook.[17] I will argue that this approach to statutory interpretation is illegitimate because it violates the first condition described above. Specifically, it denies the federal judiciary its proper role in the constitutional scheme as a check on factionalism and legislative excess.

Conversely, a court can identify what it perceives to be a special interest group bargain and strike the deal down on constitutional grounds. Variations of this activist approach to non-public-regarding statutes are advocated by Jerry Mashaw,[18] Bernard Siegan,[19] and Richard A. Epstein,[20] among others.[21] While this approach satisfies the

15. See A. Bickel, supra note 8, at 19.

16. See infra notes 129–44 and accompanying text.

17. See Easterbrook, The Supreme Court, 1983 Term—Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4 (1984).

18. Mashaw, supra note 13.

19. B. Siegan, Economic Liberties and the Constitution (1980).

20. Epstein, Taxation, Regulation, and Confiscation, 20 Osgoode Hall L.J. 433, 438 (1982); Epstein, Toward a Revitalization of the Contract Clause, 51 U. Chi. L. Rev. 703 (1984); Epstein, Needed: Activist Judges for Economic Rights, Wall St. J., Nov. 14, 1985, at 32, col. 4.

21. See, e.g., Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 20–21, 23 (1972); Michelman, Politics and Values or What's Really Wrong with Rationality Review?, 13 Creighton L. Rev. 487, 500–02 (1979); Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984).

terms of Condition One by constraining the legislature, as Alexander Bickel observed, it violates Condition Two by usurping the lawmaking prerogatives of Congress.[22]

Finally, there is what is best called "the traditional approach," which, as the name implies, refers to the classic, time-honored methods of statutory interpretation that judges actually employ to decide cases. This approach differs from Easterbrook's approach in that it counsels judges to interpret statutes based on what the statutes actually say, rather than on what the judges believe the bargain was between the interest group and the legislature. The traditional approach, I will argue, encourages more public-regarding legislation by frequently transforming statutes designed to benefit narrow interest groups into statutes that in fact further the public's interests. Unlike the other two approaches, this one enables the judiciary to serve as a check on Congress without interfering with Congress' constitutionally granted authority to make law.

Important constraints upon the legislature, this Article argues, derive from aspects of the judicial process other than judicial nullification of legislative enactments on constitutional grounds. Given the constraint on Congress that derives from the interpretive act of judging, the reluctance of the judiciary to declare statutes unconstitutional does not suggest that the judicial process is not a siguificant obstacle to the pursuit of special interest legislation. Although legislative acts are only infrequently declared unconstitutional, more subtle constraints are imposed upon the legislature by the judicial process itself. The thesis of this Article, then, is that the very act of statutory construction often transforms statutes desigued to benefit narrow interest groups into statutes that in fact further the public interest.

After describing the economic theory of legislation in Part I, this Article considers alternative theories of statutory interpretation as they relate to rival constitutional theories. Using economic analysis, the Article posits that the Constitution was desigued to serve public rather than private interests and explains how the traditional method of statutory interpretation is an integral part of this desigu. The final section suggests ways in which judges can improve the operation of the legislative process through the traditional approach to statutory interpretation.

I. The Economic Theory of Legislation

Interest group theory treats statutes as commodities that are purchased by particular interest groups or coalitions of interest groups that outbid and outmaneuver competing interest groups.[23] The cur-

22. See A. Bickel, supra note 8, at 16 (The "ineluctable reality" is that "judicial review is a counter-majoritarian force in our system.").

23. See supra note 6.

rency through which laws are bought and sold consists of political support, promises of future favors, outright bribes, and whatever else politicians value.[24]

The arguments in this Article do not hinge on an assumption that all legislation is best explained as self-serving behavior narrowly construed. Indeed, they assume not only that laws are passed for a wide variety of reasons, but also that, as a general matter, it is impossible for judges to reconstruct the complex array of motives that prompted the passage of a particular statute. Some legislation serves the public interest by maximizing society's welfare from an economic perspective.[25] Some legislation serves legitimate, public-regarding, noneconomic goals.[26] Other legislation seems to defy any rational explanation and can only be based on "public sentiment rather than on either an objective weighing of demonstrable pros and cons or on cartel-like pressures for redistributing wealth."[27] Hence, some legislation serves the public interest, while some can only be described as "amorally redistributive."[28] One purpose of the third branch is to serve as a natural filter through which public-regarding legislation[29] passes undisturbed, while

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24. See Landes & Posner, supra note 9, at 877. A subtle yet fundamental confusion exists in the public choice literature regarding the precise identity of the suppliers of interest group legislation. If one imagines simple supply-and-demand curves for interest group legislation, everyone agrees that it is the interest groups themselves that are making the demands for favorable legislation. The as yet unanswered question pertains to the supply side of the equation. According to Landes and Posner, interest group legislation is supplied by the legislators. See id. McCormick and Tollison argue, however, that it is the public that supplies the favorable legislation; the legislators act only as brokers in the transaction, taking a commission for their efforts. See R. McCormick & R. Tollison, Politicians, Legislation and the Economy: An Inquiry into the Interest-Group Theory of Government (1981).

25. See Posner, supra note 5, at 270.

26. See id.

27. Id. at 271.

28. Id. at 268. Posner uses the term "amorally redistributive" not to refer to every legislatively imposed transfer of wealth from one group to another, but only to wealth transfers enacted by legislators that are inefficient in the Kaldor-Hicks sense; that is, if it makes one group better off but makes some other group worse off by an even greater amount. It would be efficient for the second group to pay the first group in order to prevent the transfer from being made. Because of the impossibility of making interpersonal comparisons of utility, it is difficult to specify with certainty which wealth transfers are amorally redistributive and which are morally redistributive.

29. The term "public-regarding" is taken from Mashaw, supra note 13, at 868. One of the central arguments made in this Article is that courts are not competent to judge whether a particular statute is public-regarding or not because statutes designed to benefit narrow interest groups are often couched in public interest language. See infra notes 47–48 and accompanying text. If a precise, easily applied definition of the term "public-regarding" could be devised, then a constitution would best serve the public if it simply required that judges declare all statutes not meeting this test to be unconstitutional. It is precisely because it is so difficult to decipher legislative motive and to determine public-regardingness that constitutional theory is an interesting and difficult discipline.

Although the phrase "public-regarding" is admittedly rather vague, it is not com-

rent-seeking legislation is cast aside. But this filtering process must be accomplished in such a way that the courts do not intrude on the law-making authority of the legislature. To see how this filtering process works to decrease the relative incidence of amorally redistributive legislation requires an understanding of the process by which special interest groups tend to dominate the legislative process.

A. *The Assumptions of the Economic Theory of Legislation*

The high information and transaction costs associated with representative government enable interest groups to obtain wealth transfers from society as a whole to themselves. Information costs are incurred by an individual or group in the process of discovering the impact of an issue on the wealth of that individual or group, as well as the costs of identifying similarly situated individuals or groups who are likely to share the costs of obtaining political action.[30] Transaction costs, which include, inter alia, the cost of overcoming free-rider incentives,[31] are the costs of organizing these similarly situated individuals into effective political coalitions.[32] Pre-existing coalitions and groups of allied individuals will be more effective than dispersed individuals in obtaining transfers of wealth from society as a whole to themselves.

Because some groups enjoy lower information and transaction costs than others, they will succeed in obtaining wealth transfers to themselves at the expense of other groups.[33] These differential costs are the sine qua non of rent-seeking. It is costly to acquire and disseminate information about these wealth transfers, and any gains from ef-

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pletely devoid of meaning. Legislation may be said to be public-regarding if it serves some purpose other than obtaining for particular legislators the pecuniary advantage of the political support of some narrow interest group, even if this purpose is the transfer of wealth from one group to another.

Public-regardingness is best thought of in procedural terms. If the statute in question is the result of a reified, deliberative congressional process in which conceptions of the public good were considered, then the statute is public-regarding. If, however, the statute simply represents legislative acquiesence to raw political power, it is not public-regarding. The advantage of this process-oriented approach to public-regardingness is that it avoids the pitfall of selecting among statutes solely on the basis of outcome. At the same time, if a statute promotes the general welfare or if it serves the interest of a group that is not well organized and has no access to the political process (such as poor people), it is likely that the statute will be found to be public-regarding under a process-based definitional approach. On the other hand, it is improbable that a statute that distributes wealth on an ad hoc basis to a group that is well organized and can fend for itself in the marketplace without legislative protection is public-regarding. Regulations that protect commercial banks from competition or erect barriers to entry to the profession of optometry fall into this category. In any event, the analysis presented in this Article applies regardless of what conception of public-regardingness is adopted.

30. R. McCormick & R. Tollison, supra note 24, at 17.

31. See M. Olson, The Rise and Decline of Nations 18 (1982).

32. R. McCormick & R. Tollison, supra note 24, at 16.

33. Id. at 25 ("[D]ifferential organization costs among individuals and groups are the basis for wealth redistribution . . . .").

forts in this regard must be shared with everyone. Consequently, rational members of the public will not try to acquire information about these transfers even though it would be in the interests of the public as a whole that they do so.[34]

This analysis suggests that politicians can advance their own private interests by identifying and helping enact legislation that transfers wealth from groups with high information and transaction costs to groups with low information and transaction costs. Interest groups will be willing to "pay" politicians up to the amount of the wealth transfer for such brokerage services.[35]

B. *The Mechanics of Interest Group Theory*

The major implications of interest group theory are that legislation transfers wealth from society as a whole to those discrete, well-organized groups that enjoy superior access to the political process, and that government will enact laws that reduce societal wealth and economic efficiency in order to benefit these economic groups. The economic theory of legislation does not predict that all laws will enrich the few at the expense of the many, but it does predict that this will be the dominant outcome and that there will be a trend in this direction.[36]

Interest groups influence the political process by such overt methods as promises of political support, campaign contributions, and outright bribes, and by slightly more subtle methods such as investing in congressional retirement funds.[37] Another common method of influence is paying congressmen honoraria for speaking engagements.[38] Interest groups also impose their will upon the general public by controlling the flow of information to legislators on particular issues.[39] This control of information, particularly regarding complex issues, en-

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34. See M. Hayes, Lobbyists and Legislators: A Theory of Political Markets 69–70 (1981) ("Members of the mass public will generally find it irrational to obtain the information necessary to identify their interests on any given issue and moreover will be ill equipped to interpret any information they do obtain . . . ."); RePass, Issue Salience and Party Choice, 65 Am. Pol. Sci. Rev. 389 (1971) (Voters generally show interest in only one or two issues of immediate concern to them but remain apathetic and uninformed on most others.).

35. See M. Hayes, supra note 34, at 18–25.

36. The principal exponent of this trend is Mancur Olson, who has attempted to demonstrate this implication empirically. See M. Olson, supra note 31, at 75–117.

37. See G. Easterbrook, What's Wrong With Congress?, The Atlantic, Dec. 1984, at 57, 70–72.

38. See id. Payments for speaking engagements are desirable because they do not have to be filtered through a campaign fund. The payments can be quite substantial: in 1983, 11% of United States senators earned more from speaking fees than from their salaries; 21% earned more than $50,000 from speaking fees. Id.

39. See N. Ornstein & S. Elder, Interest Groups, Lobbying and Policymaking 75–76 (1978); see also G. Wilson, Interest Groups in the United States 113–14 (1981) (quoting senator remarking on the essential function of lobbying groups in supplying information, particularly on technical subjects).

ables interest groups "to distort congressmen's thinking on an issue—normally all an interest group needs to achieve its ends."[40] Those affected by the regulation (the general public) cannot overcome the free-rider problem that prevents the presentation of information favorable to the public interest.[41] Thus, the cost of obtaining and disseminating information about legislative issues often results in passage of special interest legislation by legislators who really believe they are acting in the public interest.[42]

The economic theory of legislation predicts that laws are likely to benefit the few at the expense of the many, because no one has an incentive to enact laws that benefit the people in general.[43] This is the classic "free-rider" problem that inevitably plagues public interest legislation in a representative democracy.[44] Because the benefits of such legislation are spread among everyone in the population, individual members of the public lack sufficient incentives to promote public interest laws since all the costs of such promotion must be absorbed by the promoters themselves. Hence, the laws that are enacted will tend to benefit whichever small, cohesive special interest groups lobby most

40. G. Easterbrook, supra note 37, at 70.

41. See M. Olson, supra note 31, at 17–19.

42. As such, the popular use of words like "deal" and "contract," which appear in the academic literature to describe interest group type legislation, is somewhat misleading. The economic theory of legislation describes statutes the passage of which represents a conscious decision by legislators to support legislation favoring some interest group as a quid pro quo for political or financial support as well as statutes for which legislative support is obtained because legislators erroneously believe the statute will advance the public interest. While terms such as "deal" and "contract" are misleading for these latter statutes because they imply the existence of an agreement when in fact none exists, the terms are not wholly inaccurate. To achieve passage of either type of statute, interest groups must spend resources in the legislative arena in exchange for favorable legislation. If interest groups do not spend resources on political or financial support, then they must spend resources on things such as "information campaigns," "fact sheets," and "position papers" to achieve their goals.

The analysis of the interplay between statutory interpretation and interest group behavior set forth in this Article applies with particular force to situations where legislators act with benign motives yet produce amorally redistributive statutes. In such cases, the traditional process of statutory interpretation provides legislators with useful information as to tbe true consequences of their actions. See infra notes 145–54 and accompanying text; see also infra notes 129–33 and accompanying text (describing traditional approach to statutory interpretation).

43. M. Olson, supra note 31, at 41–47.

44. See P. Aranson, American Government: Strategy and Choice 79–82 (1981). By definition, the benefits from public spirited legislation fall on the public generally. As such, it is extremely unlikely that any individual will find it advantageous to devote privately the necessary resources to obtain such legislation. Those members of the public who spend nothing will have a free ride at the expense of those who invest in public-regarding legislation. Since any gain goes to the group as a whole, those who contribute nothing benefit just as much as those who have contributed a great deal. Thus it pays for each individual to do nothing and to hope that others will make an effort upon which he can "free ride."

effectively.[45] To use a familiar illustration, everyone who buys milk is harmed by milk price supports, but the small cohesive lobby of milk producers nonetheless is able to obtain these subsidies.[46]

The most disturbing feature of interest group theory is that the cost to the legislature of supplying favorable laws to special interest groups appears to be quite low. All of the tangible expenses incurred in the process are borne by the taxpayer. The only costs to the legislators consist of the loss of support from individuals and groups who are aware that they are harmed by the legislation, plus the opportunity costs of the legislators' time.

Where it is difficult to discern the nature of the wealth transfer embodied in a particular statute, loss of public support will be a small part of a legislator's cost calculation. Interest groups and politicians have incentives to engage in activities that make it more difficult for the public to discover the special interest group nature of legislation. This often is accomplished by the subterfuge of masking special interest legislation with a public interest facade.[47] To the extent that this can be carried out successfully, the political costs to legislators of enacting special interest legislation will decline.

Thus, statutes generally can be divided into three distinct categories. The first are those designed to advance some public purpose, such as protection of the environment or providing for national defense. Besides these public interest statutes, there are two types of special interest statutes—"open-explicit" statutes and "hidden-implicit"

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45. This is because small groups can more easily resolve the free-rider problems described above. See M. Olson, supra note 31, at 41 ("Members of 'small' groups have disproportionate organizational power for collective action . . . ." (emphasis omitted)); Posner, supra note 2, at 345 ("[T]he fewer the prospective beneficiaries of a regulation, the easier it will be for them to coordinate their efforts to obtain the regulation.").

46. See 7 U.S.C. § 1446(c), (d) (1982) (authorizing milk price supports). Even regulations that have long been thought to accomplish such worthy goals as improving the environment recently have been shown to benefit special interests. See B. Ackerman and W. Hassler, Clean Coal/Dirty Air 44–48, 98–100 (1981); Kalt, The Costs and Benefits of Federal Regulation of Coal Strip Mining, 23 Nat. Resources J. 893, 908–09 (1983); Maloney & McCormick, A Positive Theory of Environmental Quality Regulation, 25 J.L. & Econ. 99 (1982); Pashigian, The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares, 27 J.L. & Econ. (1984).

47. "[T]he question [of] whether the legislative action has a public purpose is always one that the legislature purports to have decided affirmatively." Mashaw, supra note 13, at 868.

Legislators have incentives to search for issues in which the winners (special interest groups) are easily identified, while the losers (the general polity) cannot be easily identified. See R. McCormick & R. Tollison, supra note 24, at 17. By masking the true purpose of a statute and claiming that it is actually in the public interest, legislators and interest groups lower the cost of passing statutes that transfer wealth to themselves. Cf. M. Olson, supra note 31, at 35 (Passage of costly legislation protecting the professions has been facilitated by the "susceptibility of the public to the assertion that a professional organization . . . ought to be able to determine who is 'qualified' to practice the profession.").

statutes. Open-explicit statutes are naked, undisguised wealth transfers to a particular, favored group. By contrast, hidden-implicit statutes are couched in public interest terms to avoid the political fallout associated with blatant special interest statutes.

Hidden-implicit statutes exist because the political costs of enacting them is lower than the political costs of enacting open-explicit statutes. We observe open-explicit statutes because they are less ambiguous and therefore more likely to be enforced in precisely the way the relevant interest groups prefer. As described below, in deciding whether to lobby for one type of statute or another, interest groups must make a trade-off between the higher political costs associated with open-explicit statutes and the greater uncertainty associated with hidden-implicit statutes.[48]

Where statutes are accompanied by extensive committee hearings and debates that extol the advantages of the statute from the public perspective, reliance on such public statements is likely to lead judges to take the legislature at its word, and to interpret the statute in the way the legislature said that it wanted. Thus, the traditional reliance on legislative history raises the political cost of special interest legislation by increasing the probability of nullification. This in turn forces the legislature to be explicit about the deals it is making, if it wants to be sure those deals will ultimately be enforced.

II. The Judiciary As Enforcer of Legislative Deals: Legislation as Contract

The previous section set forth the basic premises of the economic theory of legislation. This theory of legislation makes strong predictions about the efficacy of interest groups in determining outcomes generated by ordinary political processes. But the legislative process cannot be analyzed in a vacuum. The Constitution plays a large role in determining the total mix of interest group and public interest statutes. After all, the Constitution establishes the procedure for enacting statutes, and thus formulates the rules of the game for politicians and interest groups. This section considers one view, developed by Landes and Posner, that the Constitution was designed to promote interest group domination of the legisative process and that the judiciary, by enforcing the deals struck by such groups, was part of this design. The section then describes an approach to statutory interpretation developed by Judge Easterbrook that complements this theory by providing a guide for judicial conduct that provides assurance to interest groups that the "deals" they strike will be enforced.

The historical champion of the interest group theory of the Constitution was Charles Beard, whose well-known view was that the Constitution was an antimajoritarian act in which a small number of well-

48. See infra notes 136–44.

organized economic interest groups "successfully strangled our popular revolution."[49] Writing in the Beardian vein, William Landes and Richard Posner claim that the establishment of an independent federal judiciary is evidence of the triumph of special interest groups at the constitutional level.[50] They assert that "the independent judiciary is not only consistent with, but essential to, the interest-group theory of government."[51]

Viewing legislation as the result of bargains struck between special interest groups and lawmakers,[52] Landes and Posner observe that if the parties to a contract believe that the bargain they are striking is unenforceable, the value of that contract will be significantly diminished. Thus, special interest groups and politicians have a strong incentive to ensure the enforceability of the deals they make.[53] According to Landes and Posner, the independent judiciary facilitates interest group activity by providing the "stability or continuity necessary to enable interest-group politics to operate in the legislative arena."[54] The ability of legislators to offer special interest groups permanent, rather than short-term, deals increases demand for the legislators' services and increases the income of legislators who enact such rules. Thus, according to Landes and Posner, interest group theory best explains why the framers enacted article III. Because the costs imposed by an independent judiciary in the form of uncertainty are less than the benefits to the legislature of longevity, value-maximizing legislators and interest groups will thus prefer an independent judiciary. The insight of

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49. This description of Beard's outlook on the Constitution is contained in Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1015 (1984).

50. See Landes & Posner, supra note 9, at 894 (The Court's role is to enforce the special interests protected by the Constitution.).

51. Id. at 877. The assertion that an independent judiciary is essential to the operation of interest groups or to the interest group theory of government is demonstrably false. As Gordon Tullock has shown, interest groups thrive under dictatorships, which of course do not have independent judiciaries. See Tullock, Rent Seeking in Dictatorships (unpublished manuscript) (on file at the offices of the Columbia Law Review). Perhaps Landes and Posner mean that rent-seeking is less costly in governmental systems in which the judiciary is independent than in governmental systems in which it is not. They do not provide any support for this hypothesis, however, nor is there support for this theory in the literature. See id.

52. See Landes & Posner, supra note 9, at 877 (presenting a model in which "legislation is 'sold' by the legislature and 'bought' by the beneficiaries of the legislation [and] [p]rivate sales, and other private contracts, carry legal sanctions for non-performance"); see also id. at 879 (describing the buying and selling by Congress of legislation for dairy industry).

53. Id.

54. Id. at 878. This stability or continuity enables a member of the current legislature to capture his full share of the present value of an entitlement scheme designed to run in perpetuity, even if he plans to leave the legislature at the end of the current session. See Aranson, Judicial Control of the Political Branches: Public Purpose and Public Law, 4 Cato J. 719, 731–32 (1985) (describing the Landes & Posner theory).

Landes and Posner was that the existence of an independent judiciary is not necessarily inconsistent with an interest group theory of politics.[55]

Landes and Posner observe that the judiciary enhances the efficacy of interest group statutes by providing the stability, continuity, and assurance of enforcement necessary to maximize the value of legislative enactments that transfer wealth to interest groups. They fail, however, to provide any model of judicial behavior beyond judicial reluctance to declare legislation unconstitutional. The legislation-as-contract approach espoused by Judge Frank Easterbrook provides the model of judicial behavior that the Landes-Posner model lacks. Judge Easterbrook suggests that a good judge is one who interprets the law in the way the legislature *really meant* for it to be interpreted, not in the way that the legislature *says* that it is to be interpreted.[56] This is referred to

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55. As Landes and Posner themselves recognize, their explanation of article III fails to account fully for all of the constraints imposed by an independent judiciary on deals enacted by Congress. Their test is empirical, not theoretical, and their sole measure of judicial independence is the number of times that the Supreme Court has nullified acts of Congress as unconstitutional. Landes & Posner, supra note 9, at 895. In their own words: "Nullification is an extreme example of judicial unreliability, and for this reason is likely to be deficient as an overall measure of the costs of judicial independence." Id.

The incidence of judicial nullification of legislation on nonconstitutional grounds dwarfs the incidence of judicial nullification on constitutional grounds. See infra text accompanying notes 129–72 (cataloguing nonconstitutional ways that an independent judiciary thwarts the deals made between interest groups and the legislature); see also G. Calabresi, A Common Law for the Age of Statutes (1982):

> Constitutional adjudication and use of the passive virtues, though not unusual reactions to anachronistic laws, are not the most common judicial responses. The traditional judicial weapon in dealing with statutes has always been interpretation of what the written law means. Just as the increasing prevalence of statutes gave a new impetus . . . to constitutional adjudication, so interpretation has been totally recast in the twentieth century to increase its capacity to deal with statutorification of the American legal system.

Id. at 31.

There are several additional shortcomings to the measure of judicial independence that Landes and Posner use. When a federal court declares a state statute unconstitutional, it will be clear that the same statute would also be unconstitutional if enacted by Congress. Thus, observed nullifications of state statutes sigual Congress that its authority to make deals is limited. As Landes and Posner themselves point out: "If nullification of a *particular* law can be anticipated, legislators and groups are likely to be deterred from enacting that law in the first place, thereby saving the costs of enactment." Landes & Posner, supra note 9, at 895 n.41 (emphasis added).

Landes and Posner also observe that when lower court rulings "gut the law in question, a Supreme Court bent on nullification may accomplish this purpose simply by not granting certiorari." Id. As they point out, this phenomenon also tends to bias their study so as to provide a deficient measure of the costs of judicial independence on legislative deals. In sum, the test of constitutionality that Landes and Posner use to measure judicial independence does not come close to measuring the true extent of the constraints imposed by the third branch on legislative deal-making.

56. See Easterbrook, supra note 17, at 14–18, 42–60. Actually, Easterbrook advocates a dual approach to statutes. He argnes that judges should interpret public interest statutes in the traditional manner advocated in this Article. But when judges are called upon to interpret special interest statutes, he believes that judges "should take the

as the "legislation-as-contract" approach to statutory interpretation because it calls upon the judge who is interpreting a statute to engage in the same sort of interpretive exercise as the judge who is interpreting a private contract between two parties.[57] Judge Easterbrook concludes that the quality of a judge construing a statute is determined by his ability to seek out and enforce the nature of the original agreement between the legislature and the special interest group.[58]

Recognizing that many legislative special interest bargains are enacted as legislation with a public interest mask (what I call "hidden-implicit legislation"), Judge Easterbrook suggests three methods of discovering the rent-seeking purpose of such legislation. According to him, once judges discover this purpose they will be able to interpret the statutes "correctly." The first method is to inquire whether the statute is general or specific. The more general the statute, the more likely it is to be in the public interest; the more detailed the law, the more evidence of interest group compromise.[59] Courts should look for such clues as limitations on entry, subsidies from one group to another, and the inability of the parties to contract around the provisions of a new statute.[60] Finally, Judge Easterbrook urges his fellow judges to look at the process by which the particular bill became law. Of particular interest are the identities of the lobbyists and even "[w]hat deals were struck in cloakrooms."[61]

Following his chosen approach to statutory interpretation, Judge Easterbrook evaluates Supreme Court cases of the 1983 term, praising or condemning them on the basis of whether they conform to his own interpretation of the terms of the original bargains between the legislators and the interest group that produced the statutes.[62] *Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomac Telephone Co.*[63]

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beady-eyed contractual approach." Id. at 15. Easterbrook is dismayingly vague as to the normative basis for his approach to statutory construction. Implicit in his argument that judges should treat special interest statutes like contracts is the erroneous premise that article III judges are agents of the legislature. See id. at 60 ("Judges must be honest agents of the political branches."). Judges are not agents of the legislature: they are agents of the people. See The Federalist No. 78, at 464–72 (A. Hamilton) (C. Rossiter ed. 1961) ("[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former . . . ."); id. at 468. In fact the reason federal judges are given life tenure rather than periodic appointments renewable by the executive or the legislature is to avoid "improper complaisance" to whichever branch was given such power. Id. at 471.

57. Easterbrook, supra note 17, at 15.

58. See id. at 60; see also supra note 42 (discussing use of the word "contract" in reference to legislation).

59. See Easterbrook, supra note 17, at 60.

60. Id. at 17.

61. Id.

62. Id. at 54–58.

63. 464 U.S. 30 (1983).

wins praise because "the Court did not set off in search of the 'purpose' of the legislators. The Court instead looked to see what coalition of interests had obtained the statute."[64]

On the other hand, Judge Easterbrook criticizes the Court for its decision in *Securities Industry Association v. Board of Governors (Bankers Trust)*,[65] because it failed to recognize the nature of the special interest group bargain incorporated in the Glass-Steagall Act.[66] While a persuasive argument can be made that the Glass-Steagall Act is in fact a special interest statute,[67] one cannot reach this conclusion by examining either the statute itself[68] or its legislative history.[69] The statute is framed conspicuously in public interest terms, its stated purpose being to promote bank safety and to eliminate conflicts of interest in the delivery of banking services.[70]

Judge Easterbrook, however, counsels judges to ignore the stated objectives of the Glass-Steagall Act and to decide instead whether the plaintiff, a special interest group called the Securities Industry Association, could properly claim "the spoils of victory in the legislative process."[71] Because the Court evaluated the Glass-Steagall Act as a public interest statute rather than as an interest group statute, Judge Easterbrook calls it "the most troubling economic decision of the Term."[72]

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64. Easterbrook, supra note 17, at 54.

65. 104 S. Ct. 2979 (1984).

66. The Glass-Steagall Act is the popular name for the Banking Act of 1933, ch. 89, 48 Stat. 162 (codified in scattered sections of 12 U.S.C.); see Easterbrook, supra note 17, at 57–58.

67. See Macey, Special Interest Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall, 33 Emory L.J. 1, 15–21 (1984).

68. Sections 16, 20, 21, and 32 of the Glass-Steagall Act, Pub. L. No. 73-66, 48 Stat. 162 (codified in scattered sections of 12 U.S.C.), deal with the separation of commercial banking and investment banking. These sections are "usually the intended reference when the name Glass-Steagall Act is used." Note, A Banker's Adventures in Brokerland: Looking Through Glass-Steagall at Discount Brokerage Services, 81 Mich. L. Rev. 1498, 1501 n.12 (1983).

69. See Operation of the National and Federal Reserve Banking Systems: Hearings on S. 71 Before the Subcomm. on Banking of the Senate Comm. on Banking and Currency, 71st Cong., 3d Sess. (1931); 75 Cong. Rec. 9887 (1932) (remarks of Sen. Glass, principal drafter of the Glass-Steagall Act); id. at 9913 (remarks of Sen. Bulkley). Senator Bulkley's remarks "have been treated as authoritative by courts, in part because he was addressing Congress on the subject of the separation of commercial and investment banking at the specific request of the chairman of the Senate Banking Committee, Senator Glass." Note, A Conduct-Oriented Approach to the Glass-Steagall Act, 91 Yale L.J. 102, 105 n.19 (1981).

70. The most complete analysis of the legislative intent behind the Glass-Steagall Act, and a classic example of what this Article calls the "traditional" method of statutory interpretation is contained in Investment Co. Inst. v. Camp, 401 U.S. 617 (1971).

71. Easterbrook, supra note 17, at 57.

72. Id. The Court's decision in fact seems benign. The narrow holding did not itself bar the entry of commercial banks into the business of investment banking, and the resultant competition in the delivery of investment banking services undoubtedly benefitted the public. The Court held that commercial paper was a "security" for the

The flaw in Judge Easterbrook's approach is that it diminishes the legitimate role of the judiciary as a check on legislative excess. Where a special interest group has negotiated a low-cost, hidden-implicit deal with the legislature, there is no reason why it should receive the benefits of the more expensive open-explicit deal. Indeed, to award such benefits encourages a shift toward the vague sort of legislation that increases the information costs the public faces in evaluating legislation. As compared with the traditional approach, the legislation-as-contract approach leads not only to more special interest legislation, but also to legislation that is less honest as to its special interest antecedents. The allocation between the two types of interest group statutes—open-explicit and hidden-implicit—will depend on the relative costs to the interest groups of getting these statutes enacted. As the cost of hidden-implicit deals goes up, the relative value of open-explicit deals goes up.[73] Thus, under the traditional approach to statutory interpretation, there will be not only less special interest legislation than under Judge Easterbrook's approach, but also the percentage of special interest deals that are hidden-implicit will decline because of the higher probability that they will not be enforced by the judiciary.[74]

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purposes of the Glass-Steagall Act. See *Bankers Trust*, 104 S. Ct. at 2981. This holding appears to be consistent with the theory that the federal judiciary acts as enforcer of interest group bargains, because the holding endorsed the position of the plaintiff—the Securities Industry Association—which was a special interest group trying to keep commercial banks from competing with investment banks for commercial paper business. The Court, however, left open the question of whether the defendant, Bankers Trust Company, was "underwriting" commercial paper as that term is defined by Glass-Steagall. See id. at 2992 n.12. Subsequently, the Board of Governors of the Federal Reserve System held that commercial banks could engage in a wide variety of sales activities without being deemed to be underwriting. This ruling made it possible for commercial banks to enter the commercial paper market and compete with investment banks. See Nash, Fed. Backs Sale of Paper, N.Y. Times, June 5, 1985, at D1, col. 6. Recently, however, Bankers Trust Company's sale of commercial paper was held to be a "distribution" of securities for the purposes of the Glass-Steagall Act, and the bank was prohibited from selling commercial paper. See Securities Indus. Assoc. v. Federal Reserve Board, 1986 Fed. Sec. L. Rep. (CCH) ¶ 92,456 (D.D.C. Feb 4, 1986). Even if the district court's decision is ultimately upheld, which is subject to doubt, Bankers Trust was able to enter the commercial paper market and compete for nine years. Thus, the traditional approach used by the Supreme Court permitted, at least for a time, the entry of commercial banks into the commercial paper market. Judge Easterbrook's approach, which counsels seeking out and enforcing the special-interest group bargain, would arrive at an opposite conclusion, resulting in less competition for the delivery of investment banking services.

73. This is because open-explicit and hidden-implicit legislation are substitutes for one another. Interest groups will seek the type of legislation that provides the greatest benefit for the least cost. If hidden-implicit and open-explicit deals are equally likely to be enforced in the courts, then there will be no open-explicit deals because the political cost of such deals is higher.

74. As courts become more unreliable as enforcers of hidden deals, fewer such deals will be made. Some interest groups will find it advantageous to make open deals. Others will abandon the legislative process as a source of income, and resort to market processes. The switch from the legislature to the market is clearly preferable, since all

Even if the legislation-as-contract approach could be legitimized, it is beyond the competence of the judiciary to conduct the kind of inquiry advocated by Judge Easterbrook.[75] Judges interpret statutes; they are not investigative reporters. The idea that Congress passes statutes "with a wink," and that courts should dig behind the scenes to find out the "real story," is both unwarranted and dangerous. The danger lies in the fact that judges may mistakenly interpret public interest statutes as special interest statutes. When this occurs, some interest group receives a windfall at the expense of the public. Where judges make mistakes in the other direction, interpreting a special interest statute as being in the public interest, the public rather than an interest group receives the windfall.

On the other hand, when an interest group bargain is explicit, courts should uphold the bargain. It is well settled that it is illegitimate for judges to impose their own values in place of those of the legislature, because such a substitution thwarts Congress' constitutional authority to make law. The legislature, and not the judiciary, is the forum through which societal preferences are aggregated. Statutory decisions are legitimate only when judges enforce the law as enacted by the legislature. This general maxim that judges must respect the legislature's will is subject only to the judicial power to review statutes for constitutional infirmity.[76]

The interest group nature of a statute will not generally be available on the statute's face or in the legislative history.[77] The tobacco price support system, which is a patent wealth transfer to the tobacco industry, is the exception and not the rule. The interest group roots of most other laws are not so clear.

This ambiguity is not accidental. The cost of a statute that is a pure wealth transfer to some well-organized special interest group is much higher than the cost of a wealth transfer that is masked in public interest terms. For this reason, many of the statutes that Judge Easterbrook identifies as unambiguous private interest statutes are couched just as unambiguously in public interest terms.[78] Where a statute is

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market transactions are efficient while many legislative deals are not. Market transactions (transactions characterized by voluntary, uncoerced exchange) are efficient because both parties to such a transaction are by definition at least as well off as they were prior to the transaction or else the transaction would not have occurred. Government regulation, which by definition is coercive, often will not be efficient in this sense. Cf. Posner, An Economic Theory of the Criminal Law, 85 Colum. L. Rev. 1193, 1195 (1985) ("[T]he market is a more efficient method of allocating resources than forced exchange.").

75. See Posner, supra note 5, at 272.

76. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the power of judicial review).

77. See infra text accompanying notes 133–44.

78. See, e.g., supra notes 65–70, infra notes 136–44 and accompanying text (discussing Judge Easterbrook's treatment of Silkwood v. Kerr-McGee Corp., 464 U.S. 238

framed in public interest terms it should be treated by courts as a public interest statute.

By taking Congress at its word when interpreting the terms of a statute, courts inevitably serve as obstacles to the goals of the rent-seekers. Although Judge Easterbrook sees this as a failure of the judiciary, it is, I will argue, precisely the result the constitutional structure was designed to produce. The very presence of an independent judiciary serves as an inevitable and legitimate obstacle to the interest group's objectives. The value to the public of this obstacle will be significantly diminished if judges begin to act as investigative reporters or economists rather than as judges.

The understanding that much lawmaking is the outcome of struggles among interest groups does not lead to the conclusion that the lawmaking process should be unbridled. True, the economic approach to legislation clearly suggests that statutes can be viewed as contracts between special interest groups and Congress, but it does not follow from this that it is the job of article III judges to substitute microeconomic principles for statutory language and legislative history in order to seek out and enforce interest group bargains.

III. An Alternative Vision: Private-Regarding Statutes and Public-Regarding Constitutions

Judge Easterbrook's approach complements the conclusion of Landes and Posner that the framers intended article III judges to act as agents of the legislature by enforcing the interest group bargains forged there. Nonetheless, there is clear evidence that the Constitution was designed to discourage special interest legislation through institutions such as the independent judiciary. This section will argue that the purpose of the constitutional separation of powers is to raise the very costs that Judge Easterbrook advocates lowering. A fundamental precept of constitutional law is that the separation of powers built into the first three articles is "designed to limit the power of self-interested groups or factions by ensuring that government power would be exercised in accordance with certain predetermined constraints."[79] While

(1984), and Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984), both of which treated statutes that are couched unamhiguously in public interest terms and that are deemed by Easterbrook to be special interest statutes). While I happen to agree with Judge Easterbrook's assertion that these statutes are in fact special interest statutes, the fact remains that there is no proof of this assertion.

79. Sunstein, supra note 21, at 1691; cf. The Federalist No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961) (discussing the particular tendency of legislatures to usurp the powers of the other branches). The most complete expression of the value of the separation of powers in this regard is contained in B. de Montesquieu, The Spirit of the Laws 151–52 (T. Nugent trans. 1949). There is evidence that Montesquieu's ideas influenced the framers. See, e.g., The Federalist No. 9, at 76 (A. Hamilton) (C. Rossiter ed. 1961) (quoting Montesquieu); id. No. 78, at 466 (A. Hamilton) (citing Montesquieu); id. No. 47, at 301 (J. Madison) (same).

the framers' view of the nature and sources of legislation may have been less economically sophisticated than our own, it can hardly be said that they were unaware of the problems posed by coalitions of interest groups. In fact, as Gordon Wood has pointed out,[80] and as *The Federalist Papers* themselves make clear,[81] the views of the framers were influenced to a significant extent by the problem of factions that plagued the state legislatures of the day.

A. *The Activist Approach*

Starting with the premise that legislation is or should be public-regarding, the activists would empower the courts to declare unconstitutional legislation that subordinates the interests of the public to the interests of a special interest group.[82] I will not attempt to summarize the voluminous literature rejecting this approach,[83] because since 1937 courts have refused to nullify economic regulation on constitutional grounds.[84]

The activists' view of the Constitution as vesting in the federal courts broad authority to strike down special interest statutes has not explained why judges are any better than legislators at regulating. The activist theory embodies the premise that legislators frequently use their lawmaking power to serve private rather than public interests. Yet without any theory to predict how judges would deal with the unbridled power to declare special interest statutes unconstitutional, the activist theory is incomplete.

Alexander Bickel argued that, however telling the criticisms heaped upon the legislative process may be, alternative processes and

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80. See G. Wood, The Creation of the American Republic 273–82 (1969); see also Mashaw, supra note 13, at 858 ("It is commonplace that the 'founding fathers' did not wholly trust legislatures." (citations omitted)).

81. See The Federalist No. 48, at 310–13 (J. Madison) (C. Rossiter ed. 1961). Interestingly, Hamilton in Federalist 17 and Madison in Federalist 45 express the fear that the states will be more likely to encroach on the national government than the national government on the states. See id. No. 17, at 118–22 (A. Hamilton); id. No. 45, at 288–94 (J. Madison). History has proven them wrong.

82. The spokesman-in-chief for the opposition view that preaches judicial restraint was Alexander Bickel. See A. Bickel, supra note 8, at 16–17; Ackerman, supra note 49, at 1014. Bickel's criticism of judicial activism was based on the fact that legislators represent a majoritarian force in society, because they are elected, whereas federal judges, who are merely appointed, do not. Any judicial attempt to invalidate an act of Congress is thus subject to what Bickel termed the "counter-majoritarian difficulty."

83. See, e.g., McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 Sup. Ct. Rev. 34.

84. G. Gunther, Cases and Materials on Constitutional Law 472 (11th ed. 1985) ("The modern Court has turned away due process challenges to economic regulation with a broad 'hands off' approach. No such law has been invalidated on substantive due process grounds since 1937." (citation omitted)); Mashaw, supra note 13, at 849 ("The Supreme Court has said . . . often and loudly ever since 1937 [that] '[s]ubstantive due process' is dead where 'economic' issues are concerned.").

rival institutions such as the judiciary are likely to be even worse at ordering public preferences. After all, the Constitution places the power to make law in the legislature, and allowing the courts to trump legislative acts on constitutional grounds would usurp this authority:

> [N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of the *representative institutions*, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.[85]

Thus, just as Judge Easterbrook's approach to statutory interpretation is likely to be ignored because it gives too much power to Congress, the activist approach, by ignoring the separation of powers, is likely to be iguored because it usurps congressional authority and creates harmful friction between the branches. Because the federal judiciary depends on Congress for its jurisdictional authority (indeed the lower federal courts depend on Congress for their very existence),[86] it is simply unrealistic to think that Congress would permit the courts systematically to eradicate the rents it receives from interest groups.

The implication is that—quite apart from the real or imagined merits of judicial activism—it is highly improbable that the Constitution will be the major instrument courts use to mitigate the problem of special interest legislation.[87] This does not mean that the power of judicial review ought never to be used; but rather that it is a complement to, rather than a substitute for, the traditional judicial techniques discussed below.[88]

B. *The Constitution as a Public-Regarding Document*

Inasmuch as the public is often adversely affected by special interest legislation, it has a strong incentive to devise institutional mechanisms—like constitutions—that make passage of such legislation more

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85. A. Bickel, supra note 8, at 19 (emphasis added).

86. See U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); see also P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 11 (2d ed. 1973) ("[I]t seems to be a necessary inference from the express decision that the creation of inferior federal courts was to rest in the discretion of Congress that the scope of their jurisdiction, once created, was also to be discretionary.").

87. The framers, by vesting the power to make law in the legislature, did not envision the courts exclusively using the Constitution as a weapon with which to hack away at interest group deals. It is well known that the Constitution does not even specifically confer upon judges the power of judicial review. See G. Gunther, supra note 84, at 13; see also The Federalist No. 78, at 470 (A. Hamilton) (C. Rossiter ed. 1961) ("[I]t is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society.").

88. See supra notes 129–44 and accompanying text.

difficult.[89] Because of the information and transaction costs described above,[90] mechanisms to constrain interest group behavior must be installed, if at all, at the constitutional level.[91] In the legislative arena, interest group pressures are likely to prevail in a struggle to implement constraints on the efficacy of rent-seeking.

Before one can gauge whether a constitution is designed to promote the general welfare of the public by impeding the efficacy of interest groups or to advance the interests of particular groups or classes within society, it is necessary to establish guidelines by which the "public-regardingness" of a constitution can be evaluated. There are two ways to make such an evaluation. The first is to examine the stated intentions of the framers as those intentions are preserved in the public record. A second, more objective means of evaluating a constitution is to examine the actual effects of the document on interest group behavior. If the constitution establishes mechanisms that facilitate rent-seeking and interest group activity, it is reasonable to infer that the framers intended to encourage this result. If, on the other hand, the constitution establishes mechanisms that retard such activity by making it more costly, one can also infer that these costs were intended.

Madison's formal, publicly articulated pronouncements indicate that controlling the ability of interest groups to achieve anti-majoritarian outcomes in the legislature was a primary goal of the new Constitution.[92] Perhaps the most familiar is his statement in Federalist 10 that "[a]mong the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction."[93] Indeed, a dominant theme of *The Federalist Papers* is the desirability of adopting

89. See R. McCormick & R. Tollison, supra note 24, at 126–27.

90. See supra notes 30–35 and accompanying text.

91. See Ackerman, supra note 49, at 1013–31.

92. See Sunstein, supra note 1, at 39–40.

93. The Federalist No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961). See also Federalist 55, which indicates the desire to design a constitution that will not be "an unsafe depository of the public interests . . . [and] will sympathize least with the feelings of the mass of people and be most likely to aim at a permanent elevation of the few on the depression of the many." Id. No. 55, at 341 (J. Madison); cf. id. No. 78, at 468 (A. Hamilton) (indicating the possibility that the will of the legislature sometimes "stands in opposition to that of the people").

The argument that the Constitution serves to prepare the way for a time of politics as usual by setting up constraints on special interest groups is a theory developed most fully by Bruce Ackerman. See Ackerman, supra note 49, at 1020–31. Ackerman emphasizes, however, the constitutional authority of courts in this regard. See id. at 1029–30 ("Given the danger that normal government will be captured by partisans of narrow special interests, Publius proposes to consolidate the Revolutionary achievements of the American people through the institution of judicial review."). This Article shares Ackerman's premise that the Constitution was designed to promote "public-regardingness" in politics, but argues that this is done through traditional methods of statutory interpretation, rather than through constitutional judicial review. See infra notes 129–44 and accompanying text.

the Constitution as a means of controlling interest groups.[94]

As we see from examining hidden-implicit legislation, however, it is often impossible to draw conclusions about the intentions of those who make law simply by evaluating their public pronouncements. This is particularly true when the lawmakers, who spoke a long time ago, did so not as individuals but as a collective body. Thus while the framers made it absolutely clear in their public pronouncements that reducing the political power of factions was a central feature of their constitutional design, an even more convincing indication that the Constitution was intended to promote the public interest is found by examining the *results* of the framers' work.

One who observes the impressive success of interest groups in obtaining favorable legislation might be tempted to conclude either that the Constitution has failed in its attempt to impede interest groups or that it was not designed to impede their activities in the first place.[95] The first part of this section explains why such a conclusion is erroneous. The second part suggests economic reasons why constitutions are more likely to promote the public interest than are ordinary laws. Finally, the section evaluates the United States Constitution to determine whether it is designed to impede the success of interest groups or to facilitate interest group bargains.

1. *Agency Costs and Representative Government.* — The formation of a representative democracy, where voters elect legislators to run the enterprise of government, establishes what economists refer to as an "agency relationship." An agency relationship calls for one person or group of people (the principal) to hire another person or group of people (the agent) to perform services and make decisions on the principal's behalf.[96] The contract is successful from the standpoint of the contracting parties if it accurately anticipates likely postcontractual problems and establishes mechanisms to deal with these problems in cost-effective ways.

In a representative democracy, the contract that initiates this agency relationship is its constitution. The principals are the citizens, and the agents are the officials they elect. Assuming that elected officials, like all agents, are rational economic actors, they are inevitably more concerned with maximizing their own utility than with maximizing the utility of their principals. This divergence of interests (called "agency costs")[97] is an unwanted but inevitable feature inherent in any

94. See Sunstein, supra note 1, at 29.

95. Cf. id. at 221 ("It is clear that constituent pressures play a significant role in many legislative decisions and that the federalist idea of national responsibility to a national constituency does not exist in practice.").

96. Jensen & Meckling, Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 308 (1976).

97. Id. In the context of public corporations, Jensen and Meckling define "agency costs" as the sum of (1) monitoring expenditures by the principal (in the political pro-

principal-agent relationship—including, perhaps especially, the one that exists between voters and their elected representatives.

The study of agency costs, particularly in publicly held corporations, has generated an enormous literature in the field of economics. An important segment of this literature describes the innovative mechanisms that market forces have developed to reduce the magnitude of agency costs by more closely aligning the interests of principals and agents.[98]

The agency costs inherent in representative democracy manifest themselves in the side bargains between interest groups and legislators described above.[99] Because of the high cost of monitoring the behavior of elected officials, the expected costs to the officials of such behavior is low, and the benefits are high. The goal of a public-regarding constitution, then, is to establish mechanisms (such as the separation of powers)[100] and institutions (such as the independent judiciary)[101] that make rent-seeking by interest groups more costly by reducing the benefits that legislators can realize. However, there are inevitable costs associated with establishing the very mechanisms and institutions that retard rent-seeking.[102]

Because rent-seeking cannot be eliminated without cost, one cannot conclude that a constitution seeks to facilitate rent-seeking merely because it fails to eliminate it entirely. Such criticism suffers from the fallacy noted first by Ronald Coase, and characterized by Harold Dem-

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cess this is the cost of contributions to legislative "watchdog" organizations plus the net cost of keeping informed about political affairs); (2) the bonding expenditures by the agent (this is the cost to politicians of putting their assets in a blind trust and the cost—in foregone opportunities—of campaign promises and pledges; when politicians pass laws making political bribery illegal they are bonding their behavior); and (3) the residual loss.

The residual loss from rent-seeking is likely to be quite large. This is due to the fact that it consists of not only the extra income of the legislators from political favors, but also the value of the wealth distributions made to interest groups.

98. See K. Arrow, Essays in the Theory of Risk Bearing 223–28 (1974); Fama, Agency Prohlems and the Theory of the Firm, 88 J. Pol. Econ. 288 (1980); Klein, Crawford & Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J.L. & Econ. 297 (1978); Smith & Warner, On Financial Contracting: An Analysis of Bond Covenants, 7 J. Fin. Econ. 117 (1979); Smith & Watts, Incentive and Tax Effects of Executive Compensation Plans, 7 Austl. J. Mgmt. 139 (1982).

99. See supra notes 30–48 and accompanying text.

100. See supra note 11 and accompanying text.

101. See infra notes 129–44 and accompanying text.

102. One such cost is the danger that the institutional arrangements imposed will filter out "good" (public-regarding) law along with "bad" (special interest) law. The framers were aware of this cost and believed that the benefits of reducing the amount of special interest legislation outweighed it. See The Federalist No. 73, at 444 (A. Hamilton) (C. Rossiter ed. 1961); infra note 118. In addition, there are costs associated with having an independent judiciary that must evaluate and interpret statutes, and to having an executive with the power to veto laws passed by Congress.

setz as the "Nirvana" form of analysis.[103] In fact, rational principals will expend resources to control the behavior of their agents only up to the point at which the marginal costs of such expenditures equals the marginal benefit in terms of reduced rent-seeking.[104]

The test of whether the framers intended to eliminate rent-seeking, then, should not be whether the Constitution eliminates all rent-seeking, but how effectively it provides mechanisms that align the interest of elected representatives with those of the public generally.[105] As we shall see, under this test, the mechanisms and institutions established in the United States Constitution indicate a purpose to minimize special interest bargains.

2. *The Economics of Constitutional Creation.* — Recently, public choice theorists have suggested economic reasons why constitutions are likely to be more public-regarding than other forms of law. One is that special interest groups are unlikely to agree to constitutional rules that make life easier for other special interest groups. Rules that facilitate rent-seeking generally are likely to cost each separate special interest group more in the way of wealth transfers to other groups than the group itself can expect to receive from the transfers it obtains.[106]

Individual members of a particular special interest group are hurt as much as any member of the general public by any special interest legislation not specially designed to benefit their group. For example, the airline industry, which strongly advocates anticompetitive regulation for itself,[107] is hurt as much as the general public by other protectionist regulation. Other groups that enjoy the protection of an anticompetitive regulatory environment for their own industries are harmed by the higher air fares that result from the regulation of air-

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103. See Coase, Discussion, 54 Am. Econ. Rev. (Papers & Proc.) 194–97 (1964); Demsetz, Information and Efficiency: Another Viewpoint, 12 J.L. & Econ. 1 (1969). The reduction in societal wealth caused by rent-seeking, like any other form of agency cost, is " 'non-optimal' or inefficient only in comparison to a world in which we could obtain compliance of the agent to the principal's wishes at zero cost or in comparison to a *hypothetical* world in which the agency costs were lower." Jensen & Meckling, supra note 96, at 327–28 (emphasis in original).

104. Jensen & Meckling, supra note 96, at 326–28.

105. See Fama & Jensen, Agency Problems and Residual Claims, 26 J.L. & Econ. 327, 327 (1983) ("An important factor in the survival of organizational forms is control of agency problems.").

106. See, e.g., R. McCormick & R. Tollison, supra note 24, at 127 ("[W]e would expect the consumer-taxpayer to play a larger role in constitutional processes than in normal political processes.").

107. See, e.g., Regulatory Reform in Air Transportation: Hearings on S2551, S3346, and S3536 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 2d Sess. 516 (1976) (statement of Albert V. Casey, Chairman and President, American Airlines, Inc.); id at 582 (statement of Frank Borman, President and Chief Executive Officer, Eastern Airlines, Inc.) On the application of the economics of legislation to deregulation, see Jarrell, Change at the Exchange: The Causes and Effects of Deregulation, 27 J.L. & Econ. 273 (1984); Macey & Haddock, Shirking at the SEC: The Failure of the National Market System, 1985 U. Ill. L. Rev. 315.

lines. Thus, even special interest groups that might benefit from some specific, discrete legislative wealth transfers are likely to object to general constitutional provisions that facilitate rent-seeking.

Finally, since the life of a constitutional rule is much longer than the effective life of a statute, the present value of the cost to the public of a constitutional rule that is not public-regarding will be much greater than the cost of an identical statutory rule. This greater cost will tend to mitigate the free-rider problem that plagues the public in the normal legislative arena.[108]

3. *The United States Constitution.* — If the United States Constitution was designed to facilitate rent-seeking, Judge Easterbrook's approach to statutory interpretation would lead to outcomes entirely consistent with this constitutional design. But if the Constitution was constructed to promote public, rather than private, interests by establishing a system of government that retards interest group activity, Judge Easterbrook's approach to statutory interpretation inevitably would produce results contrary to the goals of the framers. The evidence about the nature of the United States Constitution that follows strongly suggests that the Constitution was enacted to curb rather than promote narrow interest group behavior, and therefore that, unlike the traditional approach to statutes, Judge Easterbrook's approach to statutes is inconsistent with the constitutional desigu.

Bruce Ackerman has pointed out that the great insight of the framers of the United States Constitution was "to recognize that the future of American politics will not be one long, glorious reenactment of the American Revolution."[109] According to Ackerman, the principal defense given in *The Federalist Papers* for ratification of the new Constitution was that it laid the "foundations for a different kind of politics—where well organized groups try to manipulate government in pursuit of their narrow interests."[110] As described below, these foundations consist of the establishment of constitutional mechanisms and institutions that raise the costs of rent-seeking without imposing burdens on society greater than the savings derived from the diminution in such rent-seeking.

Support for the hypothesis that the Constitution is a public-regarding document, structured to favor the general polity over special interest groups can be derived from article I, which sets forth the size and

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108. See R. McCormick & R. Tollison, supra note 24:

> [W]e would expect the citizen-consumer-taxpayer to play a larger role in constitutional processes than in normal political processes . . . [because] the individual voter's stake is . . . larger when considering constitutional issues. At the relevant margins of behavior, then, we expect more voter impact on constitutions than on regular elections.

Id. at 127.

109. Ackerman, supra note 49, at 1020.

110. Id.

composition of the Senate and the House of Representatives.[111] Building on the theoretical work of James Buchanan and Gordon Tullock,[112] Robert McCormick and Robert Tollison have demonstrated empirically that for a fixed number of total legislators, interest groups fare better in the market for legislation where the legislators are distributed equally between the two houses of a bicameral legislature.[113] Therefore, if the Constitution was designed to make interest group bargains less costly, we would expect article I to require the House and Senate to be of equal size. Yet, consistent with a public-regarding view of the Constitution, article I plainly envisions a wide disparity in membership size between the House and the Senate.[114]

In addition, as Buchanan and Tullock have shown,[115] where the members of each house of a bicameral legislature represent different constituencies, and where the two houses must concur to pass a law, it is more difficult for discrete factions to ensure the passage of legislation that furthers their interests. Thus the Constitution has imposed what is, in effect, a supermajority voting rule,[116] which raises decision costs and makes favorable treatment less likely for special interest groups.[117] The same analysis applies to the executive veto, which enables the executive branch to act as a third house of the legislature, thus further raising the cost to interest groups of obtaining favorable legislation.[118]

The provision in article I, section 2, allowing for the growth of the House of Representatives as the population grows, up to the point at which there is one representative for every thirty thousand people, is also consistent with the view that the Constitution impedes factional-

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111. U.S. Const. art. 1, § 2, cl. 3 ("The Number of Representatives shall not exceed one for every thirty Thousand . . . ."); id. § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years . . . .").

112. J. Buchanan & G. Tullock, supra note 6, at 43.

113. R. McCormick & R. Tollison, supra note 24, at 45–57.

114. See supra note 111.

115. See J. Buchanan & G. Tullock, supra note 6, at 233–48.

116. Id.

117. Id. at 244.

118. Id. Structural features such as the bicameral legislature, the relative sizes of the house and senate, and the executive veto raise the costs of passing all legislation. The benefit of such a system is that it reduces the efficacy of interest group activity. The cost is that it makes it more difficult to pass public-regarding legislation. The framers were aware of this cost, and believed the benefit to be greater:

> It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments . . . . The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.

The Federalist No. 73, at 443–44 (A. Hamilton) (C. Rossiter ed. 1961).

ism.[119] Because rent-seeking is expected to increase as the population grows larger,[120] and to become more difficult as the legislature grows, a constitutional proviso that ties growth of the legislature to growth of the population is consistent with a public-regarding view of the Constitution.

The first amendment's free speech and press guarantees also support the hypothesis that the Constitution was designed to impede rather than advance rent-seeking. As Alexander Meiklejohn[121] and Robert Bork[122] have observed, the first amendment was designed to protect the integrity of the political process "so that the country may better he able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is founded in truth."[123] In addition, the commerce clause, the privileges and immunities clause, the equal protection clause, the due process clause, the contract clause, and the eminent domain clause have all been shown to be "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised raw political power to obtain what they want."[124]

In sum, the idea that the Constitution was designed to impede interest groups from obtaining economic advantage through political means is "the most promising candidate for a unitary theory of the Constitution."[125] The fact that the Constitution establishes a multitude of mechanisms to deter the efficacy of interest groups is strong evidence that the framers intended this deterrence. Even the process by which the Constitution was enacted ensured that it would be a public-regarding document. Unlike statutes, which are enacted by a representative body, the Constitution was adopted by a direct democratic process.[126] The framers recognized (and here the italics are in the original) that the Constitution "was to be submitted to *the people them-*

119. See The Federalist No. 55, at 343–44 (J. Madison) (C. Rossiter ed. 1961).

120. See R. McCormick & R. Tollison, supra note 24, at 42–45.

121. See A. Meiklejohn, Free Speech and Its Relation to Self Government 93–95 (1948).

122. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 20 (1971).

123. A. Bickel, The Morality of Consent 62 (1975) (summarizing the views of Bork and Meiklejohn); see also id. at 83 (quoting Madison's characterization of the reporter as "a sentinel over public rights").

124. Sunstein, supra note 21, at 1689.

125. Id. at 1732.

126. A topic of some debate at the constitutional convention was whether the Constitution should be ratified by the state legislatures or by the people. See 5 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 157–59, 352–56 (J. Elliot ed. 1866 & photo. reprint 1941). The mode chosen was ratification by "conventions of the people" rather than by state legislatures. Id. at 352. This mode was selected because it would "ground the new Constitution in a popular sovereignty, while at the same time making the ratification a federal rather than a national act." Mayton,

selves,"[127] and that "the disapprobation of this supreme authority would destroy it forever."[128] Thus, it is likely that the influence of interest groups on the content of the United States Constitution was less than the influence of such groups on the content of ordinary, day-to-day legislation.

The following section of this Article explores more fully how the presence of an independent judiciary makes it more difficult for interest groups to press for costly and nonproductive transfers of wealth. Despite the fact that interest group statutes are seldom struck down on constitutional grounds, the judiciary, through its traditional approach to statutory interpretation, imposes important constraints on special interests.

IV. The Subtle Virtues of the Traditional Approach to Statutory Interpretation: Legislative Subterfuge and Judicial Mistake

The classic exposition of the traditional approach to statutory interpretation is Benjamin Cardozo's *The Nature of the Judicial Process*,[129] which describes how judges in fact go about deciding cases and interpreting statutes. Judges interpret statutes by starting with the language and reaching a decision that applies that language to a particular set of facts in a way that is consistent with the publicly articulated purpose of the statute. That publicly articulated purpose will almost invariably be a public-regarding purpose. Thus, while the traditional approach encompasses a wide variety of judicial styles, all of these styles share the same goal—to discover what the enacting legislators say they intended to accomplish by passing the statute and then to render decisions designed to attain the lawmakers' stated objectives. An essential principle of statutory interpretation is that judges ought not to look beyond the legislature's stated purpose when interpreting statutes. Justice Cardozo pointed to "a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful. . . . The process of psychoanalysis [should not be carried into such] unaccustomed fields" as statutory interpretion.[130]

The traditional approach conforms to the common sense notion about what judges do, and needs no lengthy elaboration. Henry M. Hart and Albert Sachs provide the best capsule description when they admonish judges to "assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons *pursuing*

Seditious Libel and the Lost Guarantee of a Freedom of Expression, 84 Colum. L. Rev. 91, 96 n.26 (1984) (citation omitted).

127. The Federalist No. 40, at 253 (J. Madison) (C. Rossiter ed. 1961).

128. Id.

129. B. Cardozo, The Nature of the Judicial Process (1949).

130. United States v. Constantine, 296 U.S. 287, 298–99 (1935) (Cardozo, J., dissenting).

reasonable purposes reasonably."[131] As an English judge remarked over four hundred years ago in *Heydon's Case*,[132] "the office of all judges is always to make such construction as shall suppress the mischief, and advance the remedy" that "Parliament hath resolved and appointed to cure the disease of the Commonwealth."[133]

While at first it may appear that the traditional approach to statutory interpretation will simply rubber-stamp special interest legislation, in fact the traditional method poses considerable constraints on such legislation.[134] This is because where a sharp divergence between the stated public-regarding purpose of the legislature and the true special interest motivation behind a particular statute, courts will, under the traditional approach, resolve any ambiguities in the statute consistently with the stated public-regarding purpose. Judges using the traditional approach will not look beyond this publicly stated purpose to try to discover a special interest deal.

The reason special interest legislation is so often drafted with a public-regarding gloss is because this gloss raises the costs to the public and to rival groups of discovering the true effect of the legislation.[135] This, in turn, minimizes the major cost to the legislator of supporting narrow interest group legislation—the loss of support from groups that are harmed by the legislation—and thus reduces the cost to special interest groups of persuading the legislature to vote for the special interest legislation. Special interest statutes may also be passed with public-regarding facades because special interest groups often control the flow of information to lawmakers. Congress, relying on this information, may pass statutes that it believes are unambiguously in the public interest, but which in fact are riddled with incidental benefits to interest groups.

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131. H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1415 (10th ed. 1958) (emphasis added).

132. 76 Eng. Rep. 637, 638 (Ex. 1854).

133. Id. at 638.

134. Hamilton, the principal advocate in *The Federalist Papers* for the constitutional establishment of an independent judiciary, based his defense of this branch of government on its ability to control legislative excess, not through judicial review alone but through the "firmness of judicial magistracy" in its role as interpreter of statutes:

> But it is not with a view to infractions of the Constitution alone that the independence of judges may be an essential safeguard against the effects of occasional ill humors in the society. . . . [T]he firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they mediate, to qualify their attempts.

The Federalist No. 78, at 470 (A. Hamilton) (C. Rossiter ed. 1961).

135. This involves engrafting a "public value" onto a statute in order to "justify the exercise of governmental power." Sunstein, supra note 21, at 1697.

The traditional method of statutory interpretation imposes a constraint on such legislative subterfuge. Judges employing the traditional method of statutory interpretation, by giving a statute its public rather than private meaning, may reach a result that serves the public interest, but fails to honor the terms of the original deal between the legislature and the interest group. It is significant that the traditional method of interpretating statutes, unlike other approaches to statutory interpretation, and indeed unlike judicial review itself, do not require that judges determine which statutes are public-regarding and which are not. Indeed, under the traditional approach judges treat all statutes the same way. A good example of a case where the court reached a result that serves the public interest but failed to honor the original deal is *Silkwood v. Kerr-McGee Corp.*[136] The case presented the issue of whether the Atomic Energy Act of 1954,[137] which established a comprehensive system of federal regulation of the manufacture and use of radioactive materials, preempted state tort law. Karen Silkwood, a Kerr-McGee employee, was contaminated by radiation when she was exposed to plutonium that the company fabricated into rods for use in nuclear reactors. After her estate received a jury award of ten million dollars in punitive damages against Kerr-McGee for using deficient safety procedures in the plant, the company and the Nuclear Regulatory Commission appealed on the ground that the federal statutory scheme of insurance and regulation under the Atomic Energy Act of 1954 protected the company against such state law tort claims, thereby precluding an award of punitive damages.

On its face, the Act appears unambiguously to be a public interest statute. It was ostensibly designed to improve plant safety and encourage "widespread participation in the development and utilization of atomic energy for peaceful purposes."[138] But, as Judge Easterbrook notes, the statute in actuality "favors incumbents—those who generate power or make reactors—at the expense of potential entrants and con-

136. 464 U.S. 238 (1984).

137. 42 U.S.C. § 2011-2296 (1982).

138. Id. § 2013(d). With regard to the issue of safety, "Congress' decision to prohibit the States from regulating the safety aspects of nuclear development was premised on its belief that the [Nuclear Regulatory] Commission was more qualified to determine what type of safety standards should be enacted in this complex area." *Silkwood*, 464 U.S. 238, 250 (1984); see also H.R. Rep. No. 1125, 86th Cong., 1st Sess. 3 (1959) (Certain types of regulation were not to be turned over to the states because "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them.").

The ostensible concerns about participation and utilization were incorporated directly into the statute itself. See 42 U.S.C. § 2013(d) (1982); see also *Silkwood*, 464 U.S. at 257 (citing cases that interpret § 2013(d)). It is difficult to imagine how a statute that lowers the recovery permitted plaintiffs against producers of nuclear power at common law *encourages* such producers to act with greater caution or concern for safety. It is even more difficult to see how a statute that limits entry through licensing encourages "widespread participation" in the industry.

sumers."[139] The Act does this by forbidding firms from using or refining certain materials without a federal license. Such licensing statutes are a hallmark of special interest legislation,[140] protecting current participants from new entrants.

As the dissent pointed out, the ten million dollar award imposed by the jury under state law was one hundred times greater than the maximum fine the Nuclear Regulatory Commission (NRC) could impose under the circumstances.[141] Thus the punitive damage award was in direct conflict with the special interest goal of favoring incumbents by limiting the tort liability of those supplying nuclear power. Because Congress sold the Atomic Energy Act to the public as a safety regulation, the award of punitive damages did not seem to the Court to be inconsistent with the legislative scheme. The majority in the Supreme Court took Congress at its word, and therefore upheld the punitive damage award.

Congress could have been more explicit in its favoritism for the nuclear power industry when it passed the Act, but not without cost. If the Act had been clear on its face that it was desigued to enrich producers of atomic energy at the expense of the rest of the population, then only a holding that barred punitive damage awards against producers of atomic energy would be consistent with such legislative purpose. But the costs of organizing the public to wage a battle against a statute of this sort would be reduced because information costs would be less and, as a result, the costs to the special interest group of getting Congress to enact such a law in the face of public opposition would be increased.

As *Silkwood* illustrates, the cost to special interest groups of legislative subterfuge is the probability that a court will be unable to discern, or will refuse to recoguize, the underlying bargain and will therefore fail to enforce the legislative compromise. Legislative subterfuge thus leads inevitably to what interest groups might consider to be judicial mistake, and the possibility of mistake imposes costs on the efficacy of special interest bargains. Even a judiciary that wholeheartedly desires to serve the interests of Congress cannot do so when the interests of that body are intentionally vague.[142]

The chance that special interest goals, disguised by the legislature, will survive interpretation by the third branch is diminished further by the judiciary's traditional insistence on reason, analytical coherence, and principled judgment in the judicial process. This historical com-

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139. Easterbrook, supra note 17, at 45.

140. Id. ("The [Atomic Energy] Act is a licensing statute, and licensing statutes are the playgrounds of interest groups.").

141. *Silkwood*, 464 U.S. at 263 (Blackmun, J., dissenting).

142. See supra notes 39–42 and accompanying text; cf. R. Posner, supra note 7, at 271 ("[A]ll statutes have an ostensible public-interest justification, and even where the fig leaf is thin it is difficult for the courts to see through it.").

mitment to neutral principles is reinforced by the tradition that judges issue written opinions that justify and explain their decisions. The drafting exercise itself frequently will prompt a judge (or his clerks) to see the incoherence behind the articulated purpose of a statute, and to see the difficulty of justifying a particular result on the grounds that the statute serves the public interest goals identified by the legislature.[143] Consequently, judges often need not willfully substitute their opinions for those of the legislature in order to serve as an obstacle to rent-seeking. The very presence of an independent judiciary is a structural device that raises the cost to private interest groups of enacting statutes that defeat the public interest.

Even in a situation where Congress seeks to serve the public interest but instead passes a special interest statute because interest groups control the flow of information to the legislature, the process of judicial interpretation promotes the public interest by informing the legislature about the true nature of the legislation it has passed. Lobbyists are likely only to inform the legislature about the benefits of a particular legislative scheme. Judicial interpretation, however, helps fill this information gap in that the litigation process often brings the costs of legislative schemes to light. This publicity provides information to prompt those affected by the legislation to organize coalitions to protest it. These individuals may not have opposed the legislation initially because they were unaware that it was pending or because they misconstrued the effects it would have on them. In addition, litigation may provide Congress itself with new information about the costs of the scheme it enacted.

When the legislature has passed a statute that claims to be in the public interest but in fact benefits an interest group, that interest group may meet with frustration in the courts when it tries to enforce the statute. The statute is unlikely to serve the ends it claims to serve and at the same time enrich a particular group. When the court interprets the statute so as to serve the public, the court may, as it did in the *Silkwood* case, inadvertently invalidate a legislative bargain. But when this happens it is all to the common good.

The benefits of traditional statutory review extends far beyond particular plaintiffs. Society as a whole benefits, because the lower the probability of enforcement of special interest statutes with public pur-

143. See A. Bickel, The Supreme Court and the Idea of Progress (1970):

> The restraints of reason tend to ensure also the independence of the judge, to liberate him from the demands and fears—dogmatic, arbitrary, irrational, self- or group-centered—that so often enchain other public officials. They make it possible for the judge, on some occasions, at any rate, to oppose against the will and faith of others, not merely his own will or deeply-felt faith, but a method of reaching judgments that may command the allegiance, on a second thought, even of those who find the result disagreeable.

Id. at 82.

pose facades, the lower their value to the special interest groups. The further a statute strays from its articulated purpose, the lower the value will be because of the greater chance that the courts will fail to carry out any hidden interest group orientation that may exist. The interest group pressing for enactment of a special interest statute can always go back to Congress after an unfavorable judicial ruling to have the statute clarified. But the costs of this second bite at the legislative apple will be considerable. In addition to the normal cost of getting legislation passed, the publicity that surrounds any congressional overruling of a court decision will make it easier for opposing groups to mobilize.[144] Consequently, when special interest groups find it disadvantageous to press for explicit statutes in the first place, they are even more likely to find it disadvantageous in the future.

In addition to decreasing the overall quantity of special interest legislation, traditional statutory interpretation encourages Congress to be more explicit about the true special interest purposes of the special interest statutes it does pass. As described above, there are two types of special interest statutes: open-explicit statutes which represent the naked, undisguised transfer of wealth to some group, and hidden-implicit statutes which disguise their special interest orientation by shrouding it in public interest terms. Hidden-implicit statutes are less costly to enact initially, but the underlying deals are ultimately less likely to be enforced in the courts. Open-explicit deals have a higher probability of being enforced but are more costly politically. An interest group will select the type of statute that maximizes its own net benefit.

Inevitably, there will be an equilibrium between open-explicit and hidden-implicit statutes. Any technique of statutory interpretation that decreases the probability of a judicial nullification of hidden-implicit statutes will result in more of this type of statute relative to the number of open-explicit statutes. Under Easterbrook's contractarian approach, therefore, because judges actively seek to discover the disguised terms in hidden-implicit statutes, we would expect to observe a lower proportion of open-explicit statutes relative to the total number of interest group statutes. By contrast, under the traditional approach to statutory interpretation espoused here, legislative subterfuge is less likely to be successful, and as a result, at the margin we will observe a higher percentage of open-explicit statutes relative to hidden-implicit statutes. Therefore, the traditional approach to statutory interpretation results not only in less special interest legislation, but in special interest legislation that is more candid as to its true nature and purpose. Increased candor will improve the operation of the judicial process by encourag-

144. See infra notes 145–54 and accompanying text (discussing the value of publicity for making statutes more "public-regarding").

ing simpler statutes and by affording litigants the benefits of greater predictability.

V. Institutional Constraints

The preceding discussion advocates the use of traditional methods of statutory interpretation as the best means of addressing the problem of special interest group legislation. This section describes more fully how this method imposes a constraint on special interest legislation and suggests ways of enhancing the tendency of the traditional method of adjudication to further the public interest.

A. *The Federal Courts and the Value of Publicity*

One of the primary reasons for the public's failure to rise up in indignation at the special interest nature of certain pieces of legislation is simply the cost of discovering what Congress is doing.[145] As this cost goes down, the public will be able to place more pressure on the legislature to serve the public good. Thus, even when a federal court upholds a bargain between an interest group and the legislature, the publicity attending the court's decision in an important case serves the valuable function of informing the public about the kinds of things Congress is doing. The publicity value of Supreme Court decisions is particularly high. Important Court decisions are the beginnings of conversations between the Court and the people and their representatives.[146] The publicity surrounding a major decision provides information that would not otherwise be available to the polity.

One tactic for getting publicity that was frequently used by Justice Felix Frankfurter might best be described as "judicial blackmail."[147] Frankfurter, when faced with special interest group statutes, chose "a narrow, harsh interpretation of those laws on the ground that such a reading would break the log jam of interests and force the legislative hand."[148] As Dean Calabresi has pointed out,[149] nowhere is Frankfurter's use of this device more apparent than in his interpretations of the Jones Act,[150] a legislative scheme remarkably similar to the Atomic Energy Act reviewed in the *Silkwood* case.[151]

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145. Cf. M. Olson, The Logic of Collective Action 126–27 (1971) (discussing interests of voters and groups in primarily their own welfare); R. McCormick & R. Tollison, supra note 24, at 16–17 (explaining how the activities of voters seeking to affect political decisions depend on the nature of the information available and the costs of organizing into political coalitions entailed).

146. See Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957).

147. G. Calabresi, supra note 55, at 34.

148. Id.

149. Id. at 33–34.

150. Ch. 250, 41 Stat. 988 (1920) (codified in scattered sections of 46 U.S.C.).

151. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); see supra notes 136–43 and accompanying text.

Just as the Atomic Energy Act sought to rewrite the common law of damages by setting an upper bound on the recovery of those injured by producers of nuclear energy, the Jones Act set an upper limit on the common law recovery available to persons injured at sea. Like the Court in *Silkwood*, the Court evaluating the Jones Act was skeptical of the value of the Act where it curtailed the common law rights of sailors to recover for maritime injuries. Unlike the majority in *Silkwood*, Frankfurter would have upheld the terms of the special interest group bargain, but he would have done so in such a way as to bring public excoriation upon the lawmakers responsible for the wealth transfer.[152]

The Frankfurter approach has particular appeal where the terms of the special interest group bargain are explicit. By enforcing a statute but refusing to seek out a public interest purpose where none exists, judges using traditional methods of interpretation such as those used by Frankfurter impose costs on legislative bargains that lobbyists must reckon with when entering the legislative arena.

The publicity generated by court decisions provides not only the public but also legislators with information. Because interest groups often control the flow of information to Congress, statutes that benefit particular interest groups may be passed by legislators who believe they are acting in the public interest.[153] Over time, statutory interpretation tends to educate Congress about the actual effects of the statutes they pass and serves the public interest by improving the deliberative nature of the legislative process.[154]

B. *The Logical Impossibility of Consistent Decisions*

As we have seen, special interest group bargains are less valuable to the contracting parties if the parties are uncertain as to whether the bargains will ultimately be enforced by the courts.[155] Nonetheless, as Judge Easterbrook elegantly has demonstrated, the Supreme Court, through no fault of its own, "continues to hand down inconsistent decisions, to dishonor precedents, and to change the weight attached to particular . . . statutory provisions or the values derived from them."[156] Pointing out these inconsistencies has long been a way of criticizing the Court, since, after all, "[e]veryone thinks that the Court should be consistent."[157] But elementary public choice theory illustrates that

152. G. Calabresi, supra note 55, at 34. See also United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942), in which the Court's construction of the statute in question provoked a rapid legislative revision. See W. Murphy, Elements of Judicial Strategy 129–31 (1964).

153. See supra notes 39–42 and accompanying text.

154. See Sunstein, supra note 1, at 52–53 (describing the nature of legislators' "deliberative responsibility").

155. See supra notes 141–44.

156. Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 812 (1982).

157. Id. at 811.

achievement of even basic consistency is in fact impossible for the Court. Judge Easterbrook's point is that the "[p]lurality opinions, concurring opinions, shifting coalitions, frequent overrulings (not many acknowledged as such), inconsistent lines of precedent—in other words the manifold institutional failings of appellate courts in general and the Supreme Court in particular—are . . . primarily consequences of the fact that a court is an electoral body."[158]

Following Arrow's Impossibilty Theorem, Easterbrook demonstrates that under certain conditions beyond the power of the justices to control, it is not only likely, but inevitable that Supreme Court opinions will be inconsistent.[159] But Arrow's Theorem also implies that, where there is unanimity among the justices, consistency *is possible*.[160] Arrow's Theorem further suggests that consistency is possible in simple cases where there are only two possible outcomes.[161] Regarding specific issues, consistency can be achieved even in complex cases where multiple outcomes are possible, if there is unanimity among the justices as to either preference or the ranking of preferences.[162]

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158. R. Posner, supra note 7, at 242 (discussing Posner's reading of Easterbrook).

159. See Easterbrook, supra note 156, at 823–31. Arrow's Theorem, for which Arrow won the Nobel Prize, sets out five conditions (which are paraphrased below), and proves that no voting system can satisfy all five simultaneously:

1. Unanimity Rules: If all voters prefer alternative *A* to alternative *B*, then alternative *A* will be selected.
2. No Veto by Any Individual: No one's preferences control the actions of the other voters.
3. Range of Alternatives: There must be at least three admissible alternatives, and every voter must be free to select among these alternatives as he chooses.
4. Independence of Irrelevant Variables: The choice between two alternative variables must depend solely on a comparison of those two variables.
5. Transitivity: If the collective decision selects *A* over *B* and *B* over *C*, it must also select *A* over *C*. This is the requirement of logical consistency.

See id. at 823 (setting out Arrow's five conditions in slightly different form).

In short, Arrow's Theorem shows that no voting system can satisfy all of these conditions simultaneously. Thus, where conditions one through four are met, transitivity and thus logical consistency is not possible. Easterbrook's argument is that the Court's decisions are inconsistent because conditions one through four hold for the Court, thus making condition five impossible. See id. at 824–31.

For a relatively accessible proof of Arrow's Theorem, see D. Mueller, Public Choice 186–88 (1980). Mueller's book also contains an untechnical survey of the literature of public choice.

160. See Easterbrook, supra note 156, at 814–23.

161. Consistency is out of the reach of the Supreme Court only where there are at least three possible decisions open to the Court. See supra note 159; see also Easterbrook, supra note 156, at 825–29 (discussing the "Range Condition" of Arrow's Theorem).

162. See Easterbrook, supra note 156, at 825–29. This conclusion can also be derived from Condorcet. See M. Condorcet, Essai sur l'application de l'analyse à la Probabilité des Décisions Rendues à la Pluralite des Voix (New York photo reprint 1972) (Paris 1785). Easterbrook's article on voting procedure in the Supreme Court contains an excellent example of the application of Condorcet's voting paradox to

For a variety of reasons, a hidden-implicit statute enacted to aid a special interest group but masked as a public interest statute is likely to be subject to a wider variety of interpretations than either a purely public interest statute or an open-explicit statute. First, it is always possible to read the statute in a way that is consistent with its ostensible public purpose. Second, it will be possible to read the statute as a private interest bargain, and to refuse to enforce it. Finally, following the Easterbrook legislation-as-contract approach, it is possible to read the statute as a private interest bargain and to agree to enforce it as such.[163] Where statutes are subject to three or more possible interpretations, Arrow's Theorem suggests that consistency is not possible. Of course some public interest statutes also will be subject to more than two interpretations. The discussion here is necessarily limited to tendencies and not absolutes. Special interest statutes are likely to be more ambiguous and complex and therefore subject to a wider variety of conditions and interpretations. According to Arrow's theorem, this complexity makes inconsistency more likely.[164]

The above discussion is limited to the hidden-implicit type of special interest statute. Open-explicit statutes are likely to be enforced logically and consistently by courts, because these statutes, like public interest statutes, by definition make no effort to hide their true purposes.[165] Thus, like public-regarding statutes, these statutes are not likely to be subject to more than two interpretations. But, as demonstrated above, these open-explicit statutes can only be passed at a relatively high political cost to legislators.[166]

Consequently, the inconsistency of Supreme Court decisions ought not be viewed as an unmitigated evil. While inconsistency is detrimental when it leads to the misapplication of public interest statutes,

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Supreme Court voting behavior on establishment clause issues. See Easterbrook, supra note 156, at 815–17; cf. A. MacKay, Arrow's Theorem, The Paradox of Social Choice (1980) (discussing Arrow's five conditions and their relevance to the design of institutions that make decisions collectively).

163. See Easterbrook, supra note 17, at 54–58.

164. A complex statute is one in which judges have a wide range of plausible choices about how the statute should be interpreted. Arrow's range condition presumes complexity because it presumes that decisionmakers have more than two choices. As the number of choices increases, the range of choices is likely to increase and thus the likelihood of consistency (condition 5) being attained is diminished. Cf. Easterbrook, supra note 156, at 825–26 ("Multi-peakedness becomes more and more likely as the number of dimensions of choice increases.").

165. While both the discussion and the underlying theory are complex, most of the insights of the theory can be usefully summarized by the simple aphorism that "it is easy to reach agreement on easy cases." Id. at 805. When the legislature makes no attempt to hide the true purpose of the legislation it passes statutes will be easier to construe than when there is an attempt at subterfuge. As Judge Posner has observed: "To the extent that legislators use Aesopian langnage to deceive potential opponents of the interest groups behind legislation, they may fool the courts as well and thereby limit the political power of those interest groups." Posner, supra note 5, at 273.

166. See supra notes 47–48, 129–44 and accompanying text.

it is beneficial when it results in nullification or misapplication of special interest group bargains.

C. *Judicial Willfulness*

The above discussion has assumed that courts invariably attempt to interpret statutes so as to achieve the publicly articulated goals of the legislature. It is also true that judges will at times ignore or deliberately misread statutes in order to thwart the will of the legislature. As Justice Frankfurter chose to embarrass Congress by a highly literal interpretation of the Jones Act, Justice Black reacted to the same statute by misreading it.[167]

There are sanctions that Congress can impose on a willful judiciary. While the salaries of sitting judges technically cannot be reduced,[168] Congress has the power to withhold raises, which, during inflationary periods, amounts to salary reduction.[169] When this sanction is imposed, however, it punishes both those judges who are faithful servants and those who are not. Hence it is an ineffective tool for disciplining judges or groups of judges, especially since such measures may cause dissension even among the ranks of the most faithful. Congress also has the authority to curtail the jurisdiction of the courts,[170] thereby making the work that judges do less interesting and less important. But if Congress seriously curtailed the jurisdiction of the federal courts, it would have no reliable institution to enforce its enactments. True, legislative bargains could be enforced by state courts, but Congress has even less ability to control state judges than federal judges. Congress would face similar problems if it tried more subtle sanctions, such as refusing to appropriate funds for judges' support personnel. Again, these sanctions apply to faithful judicial agents as well as unfaithful ones.

A further reason why legislative sanctions on the judiciary are likely to be futile lies in the fact that much judicial willfulness is subconscious.[171] Justice Cardozo observed that the forces that shape the decisions of judges "are seldom fully in consciousness . . . . Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make the man, whether he be litigant or

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167. See G. Calabresi, supra note 55, at 34.

168. See U.S. Const. art. III., § 1.

169. R. Posner, supra note 7, at 29–47, especially at 37 (discussing judges' salaries and showing chart of federal judicial salaries in constant (1983) dollars from 1800 to 1983).

170. See U.S. Const. art. III, § 1. Congress is not even compelled to *create* any lower federal courts. See supra note 86.

171. See B. Cardozo, supra note 129, at 167–77 (describing the subconscious forces that lead judges to the decisions they make).

judge."[172] Regardless of the sanctions that Congress might impose on the judiciary, it is surely powerless to curb subconscious willfulness.

The point here is not to praise or defend judicial willfulness, but merely to point out its inevitability, and to observe that this willfulness, while deplorable in particular cases, serves to lower the present value of rent-seeking to interest groups.

VI. Some Suggestions For Making Law More Public-Regarding

For much of the nation's history, the prevailing school of statutory interpretation counseled that it was wise to restrict legislative enactments as narrowly as possible.[173] After a relatively brief hiatus during the New Deal, the dominant attitude about legislative enactments is now shifting back to this earlier incarnation.[174] This recent trend reflects a more realistic conception of the negative outcomes that the legislative process frequently generates and is consistent with the approach to statutes that existed when the framers enacted the Constitution, as well as with the approach advocated in this Article.

Accordingly, the suggestions that follow about statutory interpretation frequently counsel returning to the older approaches to statutes that fell into disuse during the past fifty years. If used properly, these

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172. Id. at 167.

173. In the first edition of Justice Sutherland's famous treatise on statutory construction he opined that:

> The natural tendency and growth of the law is towards system and towards certainty, towards modes of operation at once practical and just, by the process of its intelligent judicial administration; but this process is impaired by overwork and legislative interference.

J. Sutherland, Statutes and Statutory Construction iii (1st ed. 1891). This approach to statutory interpretation was the dominant approach at the time of the framing of the Constitution, and met with approval in *The Federalist Papers* as a means of controlling factions. See The Federalist No. 78, at 470 (A. Hamilton) (C. Rossiter ed. 1961). Common law courts in England never had the power of judicial review that developed early on in the United States. But, as societal attitudes about statutes became more benign, judicial attitudes about statutory construction also changed. Thus, in 1943, when Horack wrote the preface to the new edition of Sutherland's treatise on statutory interpretation, he observed that: "The third edition reflects the growing acceptance of statutes as a creative element in the law rather than, as Sutherland suggested in the first edition, as 'legislative interference.' " 1 J. Sutherland, Statutes and Statutory Construction vi (3d ed. 1943).

174. See R. Posner, supra note 7, at 271 (describing "shift in scholarly thinking about legislation from a rather naive faith in the public-interest character of most legislation to a more realistic understanding of the importance of interest groups in the legislative process"); see also Sunstein, supra note 1, at 29–30 (current "dissatisfaction" with American scheme of government traceable to problems produced by interest groups); supra text accompanying notes 1–6; cf. G. Calabresi, supra note 55, at 31–43 (arguing that judges be given the power to alter statutes not in conformity with the predominant legal topography); Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 544 (1983) (statutes' domains should be restricted unless Congress plainly gives courts right to expand its scope).

suggestions will improve the performance of the legislature by increasing its incentives to act in the public interest. The common feature of the suggestions is that they do not require judges to pick and choose among particular statutes on the basis of whether the judges think the statute benefits the public rather than a special interest group. These suggestions, like the traditional approach, counsel judges to take a consistently neutral approach to all statutes. The result of this approach will be to raise the costs of enacting hidden-implicit legislation without intruding on the legislature's authority to make law.

A. *The Use of Legislative History*

A core premise of the traditional method of statutory interpretation is that the legislature should be taken at its word when it enacts a statute. Judge Easterbrook's approach to statutory interpretation seems to call upon judges to ignore legislative histories, and to invoke instead principles of economics in order to apply statutes according to the terms of the bargain struck with or between interest groups. But this approach blurs an important distinction that must be made between two types of special interest statutes: those that are unabashedly special interest in nature, and those that masquerade as public interest statutes.[175]

While courts have an obligation to enforce otherwise constitutional statutes, they have no obligation to encourage rent-seeking. The traditional method of statutory construction calls upon judges to refer to the legislative history—including floor debates and committee hearings and reports—for clarification of complex statutes.[176] The federal courts "have made increasing use of legislative history materials."[177] Today the courts use such materials in virtually every case where statutory interpretation is required. This practice, when used in conjunction with the traditional method of statutory interpretation, will act as a brake on the efficacy of special interest legislation so long as such materials are used with sensitivity to the issue of public-regardingness as described below.

By contrast, the use of nonpublic or off-the-record statements of legislative intent is inconsistent with the analysis presented here. The constraints of the political marketplace, which impose costs on legislators who fail to act in the public interest, do not affect legislators who make nonpublic or off-the-record statements about a statute. Such statements, although they might reveal the special interest nature of a

175. See supra notes 47–48 and accompanying text.

176. See Posner, supra note 5, at 272. For a more penetrating look into the use of these documents, particularly the use of legislative history, see Dickerson, Statutory Interpretation: A Peek into the Mind and Will of a Legislature, 50 Ind. L.J. 206 (1975); Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930).

177. Johnstone, An Evaluation of the Rules of Statutory Interpretation, 3 U. Kan. L. Rev. 1, 4 (1954).

legislative enactment, should not be relied upon by courts. Reliance would lead only to windfalls for special interest groups.

The same analysis applies to postenactment remarks by legislators: these cannot "be treated simply as impartial interpretations of the law" by anyone who "takes seriously the interest-group theory of politics."[178] Under the Easterbrook legislation-as-contract approach, such statements would be of value because they can provide insights into the special interest nature of statutes,[179] but under the traditional approach these statements should be accorded no weight.

Isolated statements such as public remarks by individual legislators read into the *Congressional Record* should also be ignored by judges. Such individual remarks often will reflect an appeal to a particular congressman's own constituency rather than an honest attempt to clarify a statute.

By way of illustration, suppose a statute can be interpreted in two ways. One interpretation will result in reading the statute as affecting a public purpose. The other interpretation will benefit a special interest group. While Congress may have passed the law with an intent to benefit the public, a particular congressman, whose district is controlled by the interest group that will benefit from a skewed interpretation may have a strong incentive to make isolated statements claiming the statute was designed solely to benefit his local interest group. The congressman suffers no cost in making such statements while enjoying the significant benefit of support from the relevant interest group.

For a similar reason, the commonly held view that prior interpretations of statutes by administrative agencies should be afforded great deference should be reconsidered. This is an implication of "capture theory," a primitive version of the economic theory of regulation which predicts "that over time regulatory agencies come to be dominated by the industries regulated."[180] While this theory has little value where a single agency regulates separate industries with conflicting interests[181] and ignores the influence of consumer groups on regulatory agencies,[182] the fact remains that administrative agencies, like legislatures, are subject to substantial interest group influence. When courts rubber stamp their interpretations of legislation, they ignore political reality and abdicate their role as a check on the legislature. Just as legislators can avoid political ramifications of their actions by passing hidden-implicit statutes, so too can they avoid such ramifications by giving broad authority to administrative agencies that they expect to be captured by

178. Posner, supra note 5, at 275.

179. California state courts have begun to permit legislators to give courtroom testimony about their past legislative intent. See Comment, Statutory Interpretation in California: Individual Testimony as an Extrinsic Aid, 15 U.S.F.L. Rev. 241 (1981).

180. Posner, supra note 2, at 341 (footnote omitted).

181. Id. at 342.

182. Id.

interest groups. Agency officials, who lack lifetime appointments, are subject to political pressures from which judges are immune. As a result, blind deference to agencies should be abandoned and courts should subject agency action to rationality review and means-ends analysis.

B. *Using the Canons of Statutory Construction*

The canons of statutory construction,[183] while they elicit little modern commentary, are frequently invoked by judges.[184] There are so many canons that most questions of statutory interpretation fall within the domain of more than one canon.[185] As Professor Llewellyn once observed, for every canon a judge might bring to bear in interpreting a statute one way, there is another canon that suggests the opposite outcome.[186] As a result, the canons of statutory construction enhance, rather than limit, the power of judges to engage in willful statutory interpretation. A judge who invokes a canon of construction to defend a particular reading of a statute masks his willfulness under a cloak of legitimacy, because he appears to be using a neutral, rather than a result-oriented, source to support his result.

Nonetheless, the canons can be ranked and ordered by judges on the basis of which best fulfill the two conditions of public-regardingness and legitimacy set forth above.[187] Perhaps the best example of a valuable canon is the venerable (but still popular) "plain meaning rule" which commands judges to begin their inquiry into the meaning of a statute with the actual words of the statute, and only to stray from this approach if absolutely necessary. Closer adherence to this method of statutory interpretation would diminish judges' present need to instantly refer to legislative history in order to decide cases. It would also force legislators to spell out the nature of their intentions much more clearly on the face of the statutes they pass. In addition, the canon that statutes in derogation of the common law should be narrowly construed,[188] limits the scope of inefficient statutes by protecting the do-

183. See 4 J. Sutherland, Statutes and Statutory Construction 1–3 (C. Sands 4th ed. 1975) (listing and describing the canons of construction).

184. R. Posner, supra note 7, at 276.

185. See K. Llewellyn, The Common Law Tradition: Deciding Appeals 521–35 (1960); Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 215–16 (1983) ("[I]n the present state of the law, the various approaches to statutory construction are drawn out as needed, much as a golfer selects the proper club when he gauges the distance to the pin or the contours of the course.").

186. K. Llewellyn, supra note 185, at 521; see also R. Posner, supra note 7, at 202 (Canons of construction are "fig leaves covering decisions reached on other grounds, often grounds of public policy.").

187. See supra p. 225.

188. See Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35 (1983). Interestingly, Judge Easterbrook seems to endorse the

main of efficient common law rules from encroachment by ill-conceived, special interest statutes.[189] Were this canon invoked with regularity, Congress would be forced to be much more explicit about the nature of the statutes it adopts. This is especially true if this canon were applied along with the rule that statutes should be interpreted according to their "plain meaning" even if that interpretation is contrary to Congress' actual purpose.[190] By forcing the legislature to spell out more clearly the terms of its bargains with special interest groups, these canons strengthen the separation of powers and limit special interest legislation. These methods of interpretation are a legitimate exercise of judicial power, because they do not obstruct the ability of the legislature to make law, and they do not allow judges to pick and choose between statutes they like and statutes they do not like.

In contrast, some other canons enhance the efficacy of hidden special interest bargains by increasing the probability that the bargains will be enforced in the courts. Prominent among these is the rule that remedial statutes are to be broadly construed.[191] Often, "remedial" statutes do not actually remedy anything, but are used as a guise for the transfer of wealth to some favored group. The Interstate Commerce Act[192] and the Glass-Steagall Act[193] are remedial statutes that have come to be seen as promoting the narrow interests of particular industry groups.[194] When judges are called upon to apply such remedial

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use of this canon, at least when special interest statutes are being construed. The basis for his endorsement is that special interest groups are entitled only to the exact terms of the deal they reached with the legislature and no more. A judge should seek out the bargain and enforce it, but only as a "faithful agent" of the legislature, not with "enthusiasm." Easterbrook, supra note 17, at 15.

189. There is a growing literature on the efficiency of the common law. See Cooter & Kornhauser, Can Litigation Improve the Law Without the Help of Judges?, 9 J. Legal Stud. 139 (1980); Goodman, An Economic Theory of the Evolution of Common Law, 7 J. Legal Stud. 393 (1978); Landes & Posner, Adjudication as a Private Good, 8 J. Legal Stud. 235, 238–40 (1979); Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977); Rubin, Why is the Common Law Efficient?, 6 J. Legal Stud. 51 (1977); Terrebonne, A Strictly Evolutionary Model of Common Law, 10 J. Legal Stud. 397 (1981).

190. A "milder version" of this canon "holds that in interpreting a statute one should begin, though perhaps not end, with the words of the statute." R. Posner, supra note 7, at 277; see also International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 558 (1979) (" 'The starting point in every case involving construction of a statute is the language itself.' " (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring))); Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128, 138 (1956) (Frankfurter, J., dissenting) ("Of course, one begins with the words of a statute to ascertain its meaning, but one does not end with them.").

191. See SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 353 (1943).

192. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).

193. The Glass-Steagall Act is the popular name for the Banking Act of 1933, ch. 89, 48 Stat. 162 (codified in scattered sections of 12 U.S.C.).

194. See Macey, supra note 67, at 15–21 (Glass-Steagall Act); Posner, supra note 5, at 271 (Interstate Commerce Act).

statutes they often will find that the statutory language makes little sense in light of their stated public interest objectives. Such statutes must be narrowly construed. Otherwise, they will be devoid of meaning and impossible to apply coherently.[195]

While none of the canons of construction intrudes absolutely on the authority of the legislature to make law, some canons serve the public interest better than others because they provide better incentives for Congress to pass public-regarding legislation. Thus, sensitivity to the economics of legislation leads to normative conclusions in favor of canons of construction that encourage legislative honesty and raise the costs of passing special interest legislation. The use of these canons enables judges to fulfill their function within the constitutional scheme as a check on legislative abuse without requiring that they attempt to determine on a case by case basis which statutes are public-regarding and which are not. Other canons, such as the broad construction of remedial statutes, that make legislative subterfuge less costly, do not satisfy the requirement that article III courts should serve as a check on rent-seeking in the legislature.[196]

CONCLUSION

Examining the independent judiciary from an interest group perspective sheds new light on what Alexander Bickel described as the

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195. It is important to observe that the ordering of the canons of construction does not require judges to pick and choose among statutes on the basis of whether the statute is public-regarding or not. Rather, the rank ordering is based simply on the *general recognition that at least some unspecifiable number of statutes* are special interest in nature. The basis for the ordering of the canons suggested here is that the preferred canons are realistic about the dual nature of legislation and exert pressure on Congress to enact public-regarding statutes, by raising the cost of enacting special interest statutes.

It has been argued that the canon regarding remedial statutes would be a "sound working rule" if every statute were public-regarding. See R. Posner, supra note 7, at 278; see also Easterbrook, supra note 17, at 15 ("If statutes generally are designed to . . . replace the calamities produced by unguided private conduct with the ordered rationality of the public sector, then it makes sense to use the remedial approach to the construction of statutes . . . ."). But, as argued above, see supra note 165 and accompanying text, judges do not need much help to interpret public-regarding statutes, because in such statutes the nature of the legislature's objective is plain. These statutes do not have to be construed more broadly or more narrowly than Congress intended in order to give them a fixed meaning.

196. This argument can perhaps best be seen in light of the argument made by Judge Easterbrook that judges, when construing interest group legislation, should give interest groups precisely what they bargained for, no more and no less. Easterbrook, supra note 17, at 15. Viewed from the ex ante perspective that Judge Easterbrook himself advocates, the approach to the canons of construction taken here does precisely that. When a bargain between a legislature and a special interest group is struck, there will be, ex ante, some probability (greater than zero) that the bargain ultimately will be abrogated in the courts. Once the new rules of the game are made clear, nothing will change except that the present value of rent-seeking in the legislature will go down, and on the margin fewer such bargains will be made.

counter-majoritarian difficulty of judicial review. The analysis here suggests that, as an institution, the independent judiciary places subtle pressures on Congress to act in ways that benefit the public. In addition, the third branch imposes costs on the interest groups that seek to transfer wealth to themselves from the rest of society. Most important, the judiciary can accomplish these ends in ways that enhance, rather than diminish, the constitutional separation of powers and the lawmaking authority of elected officials.

The conclusions in this Article are a testament to Edmund Burke's views on the enduring value of society's traditional institutions.[197] As an institution, the federal judiciary is subject to two fundamental criticisms. First, those who benefit from legislative outcomes are likely to complain that any judicial interference with statutory enactments conflicts with the principle of majority rule. Those who lack access to the legislative process can respond that the Constitution is committed not only to the principle of majority rule but also to the principle, envisioned by the separation of powers, that the lawmaking process must be checked. The absence of obvious checking by courts leads to the second criticism—that judges should control legislative excess. The imperative that judges steer a course between these two constitutional principles inexorably mitigates against absolutes. Individual rights are threatened rather than enhanced by judges who seek to impose their ideas of the common good upon the rest of us. Thus, where statutes are naked wealth transfers to special interest groups—what has been described here as "open-explicit" bargains—the choice is between two unappealing alternatives. The first is to enforce the statute so as to maintain the terms of a bargain that is clearly not in the public interest. The second, which is to invalidate the rule for some reason or other, has a surface appeal, because it seems to serve the public interest. In reality, however, this alternative is not likely to be invoked by judges or tolerated by Congress where it is invoked. But the conclusion that judges cannot, on constitutional grounds, substitute their own notions of the public good for the will of the legislature does not mean that they must shrink from their responsibility to constrain legislative excess. Such constraints are vital, but they must be imposed without upsetting the balance created by the separation of powers.

The value of the independent judiciary does not lie in its unbridled capacity to seek out and do good. As the framers envisioned, the value of the judiciary is institutional rather than episodic in nature. The judiciary is most valuable to society when judges take the "traditional" approach to the interpretation of statutes.

This Article makes no claim that the Constitution is the most effi-

197. See Burke, Reflections on the Revolution in France, *in* 3 The Works of the Right Honourable Edmund Burke 19 (1792); see also P. Magnus, Edmund Burke (1939) (describing the nature of Burke's philosophy); J. Morley, Burke (1887) (same). Burke's ideas are brilliantly summarized in A. Bickel, supra note 123, at 23–30.

cient mechanism possible for restraining rent-seeking. Nonetheless, the Constitution permits judges, using traditional methods of statutory interpretation, to play a role in regulating the activities of special interest groups. The suggestions set forth here may appear to be disturbingly modest weapons with which to confront the seemingly awesome problem posed by special interest groups. But the alternative is to abandon representative democracy in favor of either the anarchy of direct participation or the tyranny of judicial despotism.