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THE JUDICIAL REVIEW GAME

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The conventional wisdom in legal scholarship has been that aggressive judicial review is the creation of activist judges seeking to read their preferences into the Constitution and that this type of activism is problematic in a representative democracy.[1] This wisdom has traditionally rested upon little systematic positive or normative political theory. Public choice theory, the application of economic supply (legislator) and demand (interest group) concepts to public law, is a descriptive theory that provides interesting insights about the legislative process, and it was the rage among law professors in the 1980s. Thus informed, legal scholars questioned the conventional wisdom about judicial review.

Scholars from a wide range of perspectives have come to defend activist judicial review based upon public choice-inspired propositions that social and economic regulatory legislation is often procured by private-regarding "special interests." Such legislation is usually not justified by the larger public interest (*i.e.*, is "rent-seeking"), and aggressive judicial review can usefully monitor such rent-seeking.[2] A few scholars coun-

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[1] For two classics that seem to make this assumption, see Justice Oliver Wendell Holmes, Jr.'s dissenting opinion in Lochner v. New York, 198 U.S. 45, 65 (1905), and James Bradley Thayer's essay, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

[2] *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS (1985) (activist view of the takings clause); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980) (revival of substantive due process); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 118-32 (1991) (due process of lawmaking review to ameliorate public choice problems); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (activist review to protect poor people, gay men and lesbians, and other marginalized groups); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984) (contracts clause); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 120 (1992) (takings clause); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991) (aggressive use of first amendment to ameliorate rent-seeking tendencies); Fred S. McChesney, *A Positive Regulatory Theory of the First Amendment*, 20 CONN. L. REV. 355 (1988) (first amendment); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980) (aggressive review of economic legislation); Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341 (1988) (stricter review of statutes that lack public purposes or budgetary consistency); David S. Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985) (revival of nondelegation doctrine); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry Into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787 (1992) (supporting strict scrutiny to protect privacy rights and strict equal protection scrutiny); Cass R. Sunstein, *Na-*

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tered that public choice theory provides ambiguous support for such activism, because adjudication might itself be susceptible to rent-seeking (whatever that is exactly).[3] Now comes Professor Nicholas Zeppos, who suggests that interest groups—the rent-seekers themselves—might actually desire activist judicial review of regulatory legislation.[4]

Zeppos persuasively argues that the modern interest group state enjoys, or suffers under, a significant amount of judicial review. A fair number of important federal statutory provisions have met with invalidation or substantial reinterpretation in light of constitutional norms, and interest groups or their surrogates may participate in this process.[5] Less persuasive is the suggestion in Zeppos's paper that interest groups would choose that the Supreme Court engage in activist review. My argument in this response is that the Constitution's institutional structure creates what I call "the judicial review game." Interest groups are pretty much stuck in the game even though it does not appear to benefit them in the aggregate and even though the game is not demonstrably in the public interest.

A word of methodology is in order. Professor Zeppos's paper relies heavily upon a view of government as a battleground of rent-seeking interest groups. This is the traditional terrain of public choice theory. My response draws from a somewhat different tradition in descriptive work, "positive political theory."[6] PPT, as it is called, focuses on political institutions rather than interest groups.[7] It assumes that institutions and individuals choose actions that optimize their preferences for policy outcomes. The policy-creation game sketched here is an example of how even a simple PPT model might unsettle traditional views about judicial

ked Preferences and the Constitution, 84 COLUM. L. REV. 1689 (1984) (rational basis review with bite for economic legislation); Mark V. Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (activist dormant commerce clause review to prevent insider state groups from exporting costs to outsiders).

[3] The foundational works are Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974), and Paul Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205 (1982). See sources cited *infra* note 40, for application of these arguments to issues of statutory and constitutional interpretation.

[4] *See* Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296 (1993).

[5] Indeed, Zeppos's useful empirical study undercounts the effect of judicial activism. Some invalidations effectively nullified provisions in statutes not formally adjudicated; the most dramatic example is *Chadha*'s invalidation of the legislative veto in the immigration law, which apparently affected 200 or more other federal statutes. *See* INS v. Chadha, 462 U.S. 919 (1983). And once the Court has staked out an activist framework, it does not actually have to strike down statutes thereafter because Congress will draft more cautious statutes to avoid constitutional challenge (this has been the case in areas like lobbying reform, about which I regularly testify before Congress).

[6] *See* Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457, 457-807, 1737-834 (1992).

[7] An excellent introduction is Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 462 (1992).

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review.[8]

I. THE JUDICIAL REVIEW GAME

By seizing on public choice theory and its emphasis on interest group demand for rent-seeking statutes or constitutional interpretations, constitutional scholars have greatly overemphasized the demand side forces (interest groups want so-and-so) in the creation of public policy and have underemphasized the supply side (the incentives of those supplying public policy). More importantly, scholars have slighted the structural and institutional features of the question. Specifically, they have not sufficiently analyzed the way in which the institutional dynamics of constitutional decisionmaking structures incentives for the various players in policymaking.

This latter phenomenon is surprising, because the framers of the Constitution themselves focused (in a PPT manner) on institutional structure as the best way to regulate rent-seeking by "factions."[9] Thus, Article I, Section 7 of the Constitution requires bicameral approval and presentment to the President before a bill becomes a law, because the framers thought that a slow deliberative process would prevent enactment of laws supported only by temporary majorities and that more balanced policy would result if statutes had to be approved by representatives with diverse constituencies.[10] Article II of the Constitution requires that Congress have no hand in the implementation of statutes, since factions in Congress might be reluctant to push for tyrannical laws that another branch of government (the executive) might then apply against them.[11] The framers created Article III's independent judiciary to impose yet another filter against rent-seeking by factions, since the Court through judicial review was expected to mitigate unjust and partial lawmaking.[12]

This constitutional structure suggests that judicial review might be modeled as a positive political game, in which the demand-side risks posed by factional rent-seeking are dominated by the supply-side institutional arrangements for creating and changing public policy.[13] The judi-

[8] Because this article is in the nature of a short response, I do not offer much evidence for its descriptive accuracy, and I leave open several issues whose resolution depends upon empirical testing.

[9] *See generally* THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM (Bernard Grofman & Donald Wittman eds., 1989).

[10] *See* THE FEDERALIST No. 51 (James Madison), No. 73 (Alexander Hamilton). *See generally* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984).

[11] THE FEDERALIST No. 47 (James Madison).

[12] *Id.* No. 78 (Alexander Hamilton). The Framers understood judicial review largely in statutory interpretation terms. The Court would mitigate the effect of unjust or partial laws either by interpreting them narrowly or by refusing to give them effect because they were inconsistent with a higher positive law, the Constitution.

[13] The assumptions of the game are strong ones. Each player has preferences that are known to

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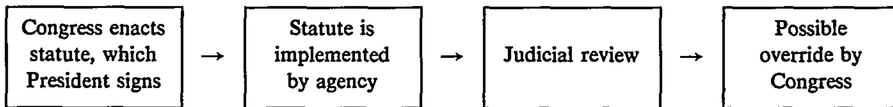
cial review game posits that policymaking starts but does not end with the enactment of a statute, for that statute then must be implemented and typically interpreted by an administering agency, whose interpretations themselves are subject to judicial review. The game comes full circle if Congress responds by overriding the agency or judicial policy. The game can be diagrammed as follows:

THE JUDICIAL REVIEW GAME



This sequential game suggests interesting ways to rethink the relationship among interest groups and the judiciary. Consider the following corollaries of the game and its implications for the practice of judicial review.

The judicial review game emphasizes rational choice among institutional actors and provides a different context for understanding interest group behavior. The primary role of interest groups in this model is to propel the game forward. Interest groups will usually be involved on all sides of a bill before Congress, and after the give and take of legislative bargaining some groups will come out losers under the statute. But the losers can continue to press their arguments with the agency charged with applying the statute over time, and new political contests occur at the agency level. The interest group losers at the agency level can seek judicial review which either interprets the statute to invalidate the agency's interpretation or invalidates the statute as unconstitutional, or something of both. The losers in judicial review have the option of trying to override the Court, either through a normal congressional override (when the Court is merely interpreting the statute or refusing to strike it down) or through a constitutional amendment (when the Court finds congressional or agency action beyond the powers vested in the national government by the Constitution).

Although the role of interest groups is important, the focus of the judicial review game is the way in which the preferences of government institutions influence public policy. The most important preferences are those of Congress, which enacts the statute, and the President, whose acquiescence is needed for statutory enactment (unless adopted by veto-

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the other players, and each player wants to impose its preferences onto statutory policy to the greatest extent possible. These are typical PPT assumptions. Important work deriving interesting legal conclusions from such models includes Linda Cohen & Mathew Spitzer, *Term Limits*, 80 GEO. L.J. 477 (1992); Brian A. Marks, A Model of Judicial Influence on Congressional Policy Making: Grove City v. Bell (Nov. 1988) (unpublished manuscript, on file with *The Georgetown Law Journal*).

For a detailed presentation of this sort of game, its assumptions, and its usefulness in modeling the original constitutional structure, see William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

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proof majorities) and who appoints and often controls agency chiefs.[14] Congress sets the original statutory policy when it enacts the statute, and the other players will generally be faithful to that policy in the short term because of the possibility of immediate congressional override. But statutory policy is subject to drift over time, especially if the original congressional preferences grow weaker as contrary preferences in the executive or judiciary grow stronger. In that event, the play between executive and judicial preferences becomes critical to the evolution of statutory policy.

A final feature of the game is that each player anticipates the response of subsequent players and calibrates its own policy intervention in order to avoid being overridden by the next actor.[15] For example, agencies will usually not interpret statutes in ways that either the Court or Congress will immediately reject. An agency will rationally choose not to adopt its ideal interpretation of a statute if that policy would be immediately voided by congressional override. Instead, it is rational for the agency to accommodate its interpretation just enough to attract override-proof support in one chamber of Congress.[16] This anticipated response feature, in particular, has important implications for thinking about judicial review.

An obvious consequence of this model is that a rational Supreme Court will usually interpret statutes and the Constitution in ways that avoid an immediate override by the political process.[17] When the Court strikes down a federal statute as unconstitutional, an override is very difficult, because it must be accomplished by a constitutional amendment requiring supermajorities in both chambers of Congress and ratification by three-quarters of the state legislatures.[18] Overrides are easier when the Court is merely interpreting a federal statute, especially when the Court's interpretation is opposed by both the President and Congress.

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[14] While the preferences of Congress in particular may be influenced by interest group pressure, the views of constituents, political parties, the media, and outside experts all exercise important influence as well.

[15] A rational institutional actor will want to avoid an override of its position, to the extent the override represents a policy further away from its preferences than the actor can achieve by strategically adopting a compromise position that avoids an override. *See* John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992).

[16] If the President is supporting the agency position and is willing to veto override legislation, the agency needs only one-third plus one support in either chamber. Also, the agency might be able to avoid override if congressional "gatekeepers," such as a committee with power to block an override, supports it.

[17] Evidence for this proposition is assembled in William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). But also consider the argument in Pablo T. Spiller & Emerson H. Tiller, Invitations to Override: Congressional Reversals of Supreme Court Decisions (1993) (unpublished manuscript, on file with the author), that sometimes the Court needs to invite an override so that its preferred policy can be implemented.

[18] U.S. CONST. art. V. Article V sets forth an alternative way for amending the Constitution that is similarly costly.

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This obvious consequence suggests a less obvious one.[19] The means by which a rational Court goes about reviewing an agency implementation of the statute may be a function of the override risk. That is, a rational Court faced with the possibility of being overridden by congressional majorities if it substitutes its interpretation of the statute for that of the agency might well simply affirm the agency, but it also might decide to reverse the agency on constitutional rather than statutory grounds.[20] In the latter event, the Court's policy would be very hard to override. Because the Court has long-term reputational reasons not to play the constitutional trump card too often,[21] the Court's choice of constitutional over statutory reasons might also be a signal of the intensity of the majority's preferences about the issue. Thus, in cases involving affirmative action, abortion, and federalism—all issues on which members of the Court seem to have strongly held, indeed passionate, preferences—those Justices seeking to block government activity tend to go beyond statutory arguments to arguments based upon very creative (*i.e.*, not much based on constitutional text or history) understandings of the Constitution.[22] Conversely, those Justices supporting state regulatory power rationally seek to shift attention to statutory arguments and away from constitutional ones.[23]

Just as the Supreme Court may tailor its review to avoid congressional overrides, so Congress might tailor its statutes to avoid Supreme

[19] The analysis in this paragraph grew out of a discussion I had several years ago with Akhil Amar.

[20] In the controversial, high-profile cases in which the Supreme Court specializes, the possibility of deciding the case on constitutional rather than statutory grounds is not at all rare. Indeed, much of the Court's statutory interpretation jurisprudence is explicitly grounded on constitutional norms. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

[21] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

[22] For examples where opponents of affirmative action go straight to constitutional arguments and ignore statutory arguments, see Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978) (opinion by Powell, J.). For federalism, consider the Court's movement from Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), to creation of a super-strong clear statement rule of interpretation in Gregory v. Ashcroft, 111 S. Ct. 2395 (1991), to its constitutional rule in New York v. United States, 112 S. Ct. 2408 (1992). The movement from judicial abnegation to a statutory interpretation rule to a new constitutional rule tracks the creation of a new majority on the Court due to Reagan-Bush appointments after *Garcia*. For the shifting fate of abortion rights, consider Rust v. Sullivan, 111 S. Ct. 1759, 1778 (1991) (Blackmun, J., dissenting).

[23] Notable examples are Justice Blackmun's majority opinion in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (see *supra* note 22 for the subsequent history, though); Justice Brennan's majority opinion in Johnson v. Transportation Agency, 480 U.S. 616 (1987) (which literally suppressed the constitutional argument against state-supported affirmative action); Justice White's vote in Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (providing the critical fifth vote to uphold federal commerce clause power to abrogate state eleventh amendment immunity but dissenting from its application in that case); and Chief Justice Rehnquist's majority opinion in Morrison v. Olson, 487 U.S. 654 (1988) (upholding independent counsel statute but giving it narrowing construction).

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Court invalidations. A rational Congress will inform itself of the relevant constitutional jurisprudence when it is considering a controversial bill and will usually draft the bill to avoid obvious constitutional difficulties. In this way, the Supreme Court can induce constitutional discussion in Congress even when the Court does not invalidate statutes. Simply by laying out parameters suggested by the Court's reading of the Constitution, the Court can influence congressional drafting practices. This reasoning is also a basis for the Court's formulation of constitutionally inspired super-strong clear statement rules.

II. INTEREST GROUPS STUCK IN THE JUDICIAL REVIEW GAME

Based on the foregoing analysis, I agree with Professor Zeppos that the independent federal judiciary is not a "deal-enforcing" arm of government. Like Zeppos, I disagree with the Landes-Posner thesis that the independent judiciary ratifies and enforces interest group deals as encoded in statutes.[24] And I agree with Zeppos that the Court vigorously enforces constitutional norms. Unlike Zeppos, I am unimpressed with the Court's direct effect on federal statutes; the Court spends a lot of *its own* time invalidating statutes and suggesting approaches that would invite invalidation, but its actual invalidations directly affect little of what *Congress has actually enacted*.[25] Yet, like Zeppos, I believe the Court's decisions have a great effect on statutes, albeit an indirect effect: anticipating judicial preferences, Congress drafts statutes to take account of constitutional norms. Thus, I see the independent judiciary as neither deal-enforcing (Landes-Posner) nor deal-breaking (Zeppos). According to the judicial review game, the judiciary is part of the deal-making process.

Is the participation of the judiciary in the creation of public policy desirable, from the perspective of interest groups generally? I am skeptical. The main effect of including the judiciary in the game is to add transaction costs to the lawmaking process—the costs of figuring out what judicial preferences are for an issue so that the group can avoid invalidation of its deal, the costs of battling opposing groups in court, and the risk that the court will actually invalidate the deal. These transaction costs are deadweight losses from a group perspective. They do not serve any goal of the interest group system of government.[26]

[24] *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1975).

[25] Virtually no federal statute in my lifetime has been completely invalidated by the Court. Its judicial activism is usually limited to striking down specific provisions of lengthy statutes, and often the provisions invalidated are not critical to the overall statutory scheme.

[26] Although individual groups (the losers at the legislative level or administrative level, or both) may benefit from the availability of judicial review in individual cases, other groups (the winners) do not benefit, and interest groups as a whole are worse off because judicial review entails overall costs which contribute little if anything to interest group government.

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Judicial review might hurt the interest group system in another way. Judicial preferences are probably less susceptible to interest group influence in the short term, both because life-tenured judges have no incentive to cozy up to groups the way bureaucrats and legislators do and because professional pressures induce judges to prefer rule of law values like coherence and nonretroactivity over policy values favored by interest groups. To the extent that judicial preferences are not those that interest groups themselves prefer, their consideration in the process by which statutes are drafted and implemented may undermine or detract from the interest group goals of the statute.[27]

In short, it seems doubtful that the existence of judicial review as an extra step in the creation of public policy is advantageous to interest groups. Yet groups or their surrogates aggressively participate in judicial review of specific agency and legislative decisions that harm their interests—even though they would probably be better off if the judicial review segment of the game didn't exist. This is Zeppos's Paradox. My solution to Zeppos's Paradox (which complements his own solution) relies on a few simple principles of rational choice theory.

For any single playing of the judicial review game, it is easy to see why a group would participate. So long as the game itself is unquestioned, a rational group that has lost in the legislative and agency process will seek judicial review if the probable benefits of review exceed the probable costs. Even if judicial review is inefficient for interest groups in the aggregate, it might be cost efficient for any given group at a particular time.[28] This point can be made more theoretically. Consider the possibility that two groups, A and B, have each gained some benefits through agency action, but have each sustained some losses as well. Each is generally better off. Will either challenge the agency? The groups are caught in a "prisoner's dilemma," in which both A and B acting independently will challenge the agency, creating a risk that both will be worse off (losing the parts of the statute that benefit each).

The prisoner's dilemma consists of two prisoners, each of whom is offered a bargain: If you betray your colleague and he is loyal to you, you will get a benefit of eight (say a good plea bargain). Each prisoner knows that if he is loyal and his colleague betrays him, he will get no benefit (the other guy gets the plea bargain). Each prisoner also knows that if he is loyal and his colleague is also loyal, they each get a benefit of five (because there is a lower probability of conviction). However, if both

[27] *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

[28] This is the point of Zeppos's initial example, Central States Pension Fund v. Lady Baltimore Foods, 960 F.2d 1339 (7th Cir.), *cert. denied*, 113 S. Ct. 179 (1992), where a group sought judicial review of a statutory amendment, based upon a principle of nonretroactivity that benefited the group in the statute that was being amended. *See* Zeppos, *supra* note 4, at 296.

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prisoners betray one another, they both get a benefit of only two (each gets a bit of a deal). The array of choices can be charted as follows:

THE PRISONER'S DILEMMA

	A Betrays	A Does Not Betray
B Betrays	2 and 2	0 and 8
B Does Not Betray	8 and 0	5 and 5

The best joint strategy would be for both prisoners to be loyal (a joint benefit of ten, as compared to eight and four for other combinations). Yet under the circumstances of the prisoner's dilemma game, each prisoner acting separately will tend to betray the other.[29] If each acts that way, the worst case scenario (a joint benefit of four) will occur. Interest groups often behave like prisoners, because on a day-to-day basis they are in constant competition with one another and not in a cooperative mode. Thus groups A and B might both challenge the agency's action, threatening to leave them both worse off.

Groups A and B in my scenario can avoid the prisoner's dilemma by entering into a long-term cooperative arrangement, in fact a frequent strategy of rational actors whose interaction will continue for several games into the future.[30] When there is the likelihood of repeat games, groups A and B might cooperate and jointly refuse to challenge the agency's decision. Even then there is a wrinkle. Anyone who might suffer from the agency's action can seek judicial review, not just A and B. Hence, A, B, or both, might rationally refrain from suing the agency, but if outlier C does so,[31] A or B, or both, might intervene to press their viewpoints. Since C might in fact have been encouraged by A or B to sue, and since such encouragement is hard to detect, the cooperative arrangement (a cartel) is in fact rather fragile.

The foregoing analysis suggests that, even though the judicial review game is usually not an efficient one for the interest group network as a whole, groups acting independently will often incur those inefficiencies. If this is the case, why don't interest groups get together and use their collective power to eliminate judicial review? One reason this doesn't happen is that the independent judiciary is staffed by people who are neither disinterested nor foolish. Acting rationally to preserve its own

[29] Acting rationally but not knowing what B will do, A faces possible benefits of two or eight if he betrays, but only zero or five, respectively, if he does not betray. Given such a choice, A will betray. B will also betray under the same reasoning.

[30] This is the point of ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984), who argues that the prisoner's dilemma can be avoided when the players know there will be a series of games rather than just the single game.

[31] Judicial review is often triggered by individuals or corporations unaffiliated with an organized group.

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opportunities for influencing public policy, the Supreme Court has constructed super-strong clear statement rules and constitutional barriers to its own elimination from the game.[32] If interest groups were to try to eliminate the judiciary from the game entirely, they would have to do so by a constitutional amendment, which would not only be costly, but a practically impossible enterprise.[33]

Indeed, it is an enterprise that the groups would not even attempt, in large part because of collective action problems.[34] No single group has a sufficient incentive, acting alone, to incur the costs of a campaign against judicial review because the group would only reap a small fraction of the benefits of such action. Yet the group will have a hard time recruiting other groups to the cause because the others will have an incentive to "free ride" on the efforts of the entrepreneurial group.[35] Unless the groups can form an effective super-cartel (where defectors can be credibly punished) to share costs in the collective effort, there is very little chance that the effort can go forward in a serious way. In short, even if I am right that the existence of judicial review does not benefit interest groups in the long run, it is very unlikely that the groups could abolish judicial review under the conditions of normal politics.

Having said this, I should immediately acknowledge that there is at least one way that groups might affect judicial review: if the Supreme Court commits a series of political blunders and outrages a substantial portion of the body politic, the Court's judicial activism can be curtailed or redirected through the appointments process. Presidents Jackson (five Justices, including Chief Justice Taney, appointed 1829-37), Lincoln (five Justices, including Chief Justice Chase, appointed 1861-65), Harrison-Cleveland (eight Justices, including Chief Justice Fuller, appointed 1885-97), Franklin Roosevelt (nine Justices, including Chief Justice Stone, appointed 1933-45), and Reagan-Bush (six Justices, including Chief Justice Rehnquist, appointed 1981-93) remade the Supreme Court through polit-

[32] *See* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Abbott Lab. v. Gardner, 387 U.S. 136 (1967). For examples where this presumption of reviewability surely undermined interest group deals, see Dunlop v. Bachowski, 421 U.S. 560 (1975), *analyzed in* Note, Dunlop v. Bachowski *and the Limits of Judicial Review Under Title IV of the LMRDA: A Proposal for Administrative Reform*, 86 YALE L.J. 885 (1977); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), *analyzed in* Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

[33] Costly, because article V makes it long and hard to procure an amendment. Impossible, because our culture would view such interest group efforts with alarm. Politicians would run for cover once the newspapers and their potential opponents opened a hue and cry against pandering to the special interests on this matter.

[34] On collective action problems, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965), as well as the explanations in FARBER & FRICKEY, *supra* note 2, ch. 1. *See also* DENNIS C. MUELLER, PUBLIC CHOICE II (1989).

[35] Each member of the beneficiary cluster has an incentive to free ride, because its failure to contribute will not disable it from accruing the benefits of successful action (the free ride part) and also because its individual effort will contribute little to the likelihood of that successful action.

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ically motivated appointments.[36] This acknowledgment is not a significant caveat to my overall thesis, because such episodes are inspired by electoral developments (i.e., the election of new Presidents) that transcend interest group alignments; because the effect of remaking the Court has typically been to rechannel judicial activism from one area to another over time, reflecting the preferences of the new Justices;[37] and because the rechanneling takes years to accomplish.

III. Is the Judicial Review Game Good for the Country?

What is bad for interest groups might be good for the country. So the question remains: Is aggressive judicial review an institution that public-regarding people should be supporting? Would the public-regarding framers have been aghast at our century's orgy of judicial review? The conventional wisdom among law professors has been that judicial review is good for the country. Many trees have been sacrificed to advocate activist judicial review and to refute contrary arguments. The theoretical structure of the judicial review game outlined in this Article suggests that this conventional wisdom might be wrong as well.

It might be wrong, but not for the reason emphasized by Professors Robin West and Larry Sager. These scholars suggest that less active review might be good, if it encourages the legislature and the people to take greater responsibility for enforcing constitutional principles.[38] This suggestion lacks an empirical basis, and the judicial review game indicates that all kinds of judicial review can encourage constitutional deliberation in the legislature. A Supreme Court that regularly invalidates federal legislation will induce Congress to consider constitutional principles on a regular basis when it drafts new statutes, lest congressional preferences be entirely nullified by the judiciary. Even if the Court's activism were limited to constitutionally based super-strong clear statement rules, Congress would be induced to substantial constitutional discussion, because

[36] Specifically, the Jackson appointments curtailed the Marshall Court's activist review of state economic legislation; the Lincoln appointments curtailed the Taney Court's activist review of antislavery legislation; the Cleveland-Harrison appointments rejected the Waite Court's passivity against state and federal labor and social legislation; the Roosevelt appointments curtailed the Fuller-White-Taft Court's activism against labor and social legislation; the Reagan appointments curtailed the Warren-Burger Court's activism in individual rights.

[37] Thus, the Jackson Justices who eased up on review of state economic legislation gave us *Dred Scott*; the Lincoln Justices who denounced *Dred Scott* gave us the *Legal Tender Cases*; the Cleveland-Harrison Justices gave us *Lochner*; the Roosevelt Justices who rejected *Lochner* gave us *Brown* and individual rights activism (see *Carolene Products*); the Reagan-Bush Justices who curtailed activism benefiting marginalized minorities have been developing arguments for judicial activism on issues of federalism, takings, and affirmative action.

[38] *See* Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993); Robin L. West, *The Aspirational Constitution*, 88 Nw. U. L. Rev. 241 (1993); *see also* Frank I. Michelman, *Law's Republic*, 97 Yale L.J. 1493 (1988) (paradox of judicial review is that Supreme Court replaces We the People as the center of republican dialogue).

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the requirement that abridgement of constitutional values be on the face of the statute, rather than implicit in it, would bring more constitutional issues to the forefront in congressional deliberations. Less activist judicial review would not inspire any greater degree of legislative deliberation about constitutional principles and might even discourage some of the deliberation that now transpires.

An important inquiry into the normative desirability of judicial review is whether it plays the role the framers expected it to play in the policymaking game outlined in Part I—namely, ameliorating the effect of "partial and unjust laws."[39] I am pessimistic on this score, because the judicial review game suggests that the judiciary may do nothing more than add another set of preferences to the process of policy creation. Simply adding another round to the game adds more transaction costs and does the country no good, unless it can be shown that constitutional adjudication somehow improves policy choices in the aggregate (such as by avoiding partial and unjust laws). Such a conclusion is not justified by the existing literature, if for no other reason than the lack of consensus about what is "impartial" or "just" policy.[40] Beyond that important (and perhaps unsolvable) difficulty, there are other reasons to doubt that judicial review is on the whole cost-justified for our political system.

Three types of arguments have been made for the proposition that adjudication by an independent judiciary contributes to better policymaking over time. One argument is that the incremental nature of the adjudicative process itself tends to produce better rules than a legislative process. Some law and economics scholars have shown great faith in the ability of a common-law mode of decisionmaking to yield efficient results, arguing that inefficient legal rules will be litigated more often and hence weeded out over time.[41] Even if true about *common-law* adjudication (and the literature now suggests not), this line of argument provides little reason to believe that the Court will come up with efficient *constitutional* rules through the process of incremental adjudications. The judicial review game suggests a reason why case-by-case litigation will not

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[39] Recall THE FEDERALIST No. 78 (Alexander Hamilton).

[40] William N. Eskridge, Jr., *Politics Without Romance: The Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 319-20 (1988); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 48-59 (1991). These two articles suggest other difficulties, explored in text.

[41] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 404-05 (2d ed. 1977) (this argument was dropped in the third edition); John C. Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. LEGAL STUD. 65 (1977); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

I am not sure that this market process would work the same for constitutional rules as it is supposed to work for common-law rules.

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necessarily yield good constitutional rules.[42] The Court's creation of a clear constitutional rule will affect legislative activities, usually discouraging constitutionally questionable ones. Even when those activities might be public-regarding, Congress will rationally abandon them, and they will not be litigated.

Thus, there is no reason to believe that what gets litigated in constitutional law are the inefficient constitutional rules. The level of litigation seems more influenced by the Court's signals of uncertainty about the constitutional rule it announces,[43] or by the intensity of interest group feelings about the rule,[44] than by the wisdom or efficiency of the Court's chosen rule. There may be some basis for this argument in the long term, if it can be demonstrated that bad constitutional rules (like *Plessy v. Ferguson*) are revealed to be bad rules over time.

A second argument for giving judges a role in policymaking is based on judicial motivations. Because judges are unaccountable to the electorate, they are free of the rent-seeking redistributive pressures of politics, and so their decisions tend to be efficiency-enhancing.[45] One difficulty with this argument is the lack of a robust, empirically supported theory of what judges seek to maximize. It is plausible to think that judges maximize efficient public policy, but no more plausible than thinking that judges maximize their prestige among litigants,[46] their leisure time,[47] or the imposition of their own preferences on public policy.[48]

The judicial review game assumes that the last theory—judges maximize the influence of their own preferences on public policy—is the dominant one. If this is so, one needs a theory of judicial preferences, which has been substantially missing in the literature. An important preference shared by most judges is a preference for coherence.[49] It may be that this preference has a modest efficiency-enhancing effect on judicial decisionmaking, if it leads judges to be responsive to a greater variety of other preferences and experiences or if coherence in the law has an independ-

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42 See the similar argument in Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992).

43 Hence, I should expect a 5-4 decision—such as either National League of Cities v. Usery, 426 U.S. 833 (1976), or the decision that overruled it, *Garcia*—to induce greater litigation.

44 *Vide* the ongoing litigation over the right to abortion, where the Court's original 7-2 decision in *Roe v. Wade* did not end efforts to persuade the Court to rethink that rule.

45 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 21-22, 495 (3d ed. 1986); *see also* Robert Cooter et al., *Liability Rules, Limited Information, and the Role of Precedent*, 10 BELL J. ECON. 366 (1979). This line of argument is analyzed, criticized, and interred in Hadfield, *supra* note 42.

46 Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129 (1983).

47 Richard A. Posner, What Do Judges Maximize? The Same Thing as Everyone Else (1993) (unpublished manuscript, on file with the author).

48 POSNER, *supra* note 45, at 505-07.

49 An interpretation coherent with rules of construction, other provisions in the same statute, and related legal texts is better than an interpretation not coherent with these sources.

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ent value. However, there is little evidence of these effects one way or the other.

A final reason why judicial review might contribute to better public policy is that the incidence and influence of group behavior might be different in the judicial arena than they are in the legislative or administrative arena.[50] Indeed, the conventional wisdom is that there is a significant difference between the politicized, interest group-driven legislative process and the neutral, law-driven adjudicative process. Again, the conventional wisdom is wrong. The judicial review game suggests that courts are part of the lawmaking process, and hence part of the political process. This being so, one would expect interest groups to act accordingly, and they apparently have: the same interest groups that effectively work the legislature and agencies for favorable statutes and implementations also work the judicial system to seek favorable constitutional, statutory, and common law interpretations.[51]

Nonetheless, the incidence of interest group behavior in the courts might be of a different quality or quantity than such behavior in Congress or the Executive. Positive political theory argues that the more symmetrical the interests arrayed on either side of an issue, the more likely the decision is to reflect public-regarding concerns rather than private rent-seeking.[52] To the extent that a wider array of group interests are represented in adjudication because the free rider problem can be more easily surmounted,[53] we might expect to find public policy pressed in more public-regarding directions. Though this possibility has been raised in the literature, it has not been tested or empirically supported.

Admittedly, my analysis raises more questions than it answers. But that is its only purpose, to raise questions about the perceived view that judicial review (activist or otherwise) serves the larger public interest. Just as the judicial review game might be a sucker's game for interest group players, so also it might be a game where the house loses as well.

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[50] This argument is developed in Eskridge, *supra* note 40, at 303-05, and disputed in Elhauge, *supra* note 40, at 70-76.

[51] *See* Galanter, *supra* note 3; Rubin, *supra* note 3.

[52] JAMES C. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 164-67 (1962).

[53] By a variety of mechanisms such as amicus briefs by encompassing groups (which tend to be more active in the adjudicative than legislative process), class actions, and public funding of successful public interest litigation.

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