

Against (And For) Madison: An Essay in Praise of Factions

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In James Madison's seminal *Federalist #10*, he famously warned against faction, which he regarded as the greatest scourge of democratic government.¹ Two centuries later, the terminology is different but its normative resonance remains the same. Rather than employ the now-quaint word "faction," modern commentators are more likely to speak of special interests, vested interests, lobbies, pressure groups, and (in certain cases and with particular scorn) single-issue groups. In the spirit of Madison, however, these commentators almost always use these newer terms as pejoratives, hurling them as political epithets so as to discredit them in the public eye.² The thundering jeremiad against special interests (as I shall usually call them here) is among the oldest, most common, and most successful techniques in the long history of democratic political rhetoric. Its practitioners remain in full throat today.

But there is an apparent paradox here: The American polity protects special interests as assiduously as it denounces them. The same politician-philosopher who excoriated special interests fathered a constitution that effectively fortifies such groups against their opponents' legal efforts to destroy or disable them. The coexistence of these opposing tendencies of American democracy—the relentless criticism of special interests and the law's remarkable solicitude for them—constitutes one of our system's most striking features. The strength of each tendency—and the fundamental, abiding tension between them—betrays something more than mere ambivalence or confusion, and something less than the pathology of collective schizophrenia. By compartmentalizing our attitudes toward special interests, we have managed to avoid confronting our analytical inconsistencies.

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1. THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

2. One recent commentator refers to factions as "political parasites." Glenn Harlan Reynolds, *Is Democracy Like Sex?*, 48 VAND. L. REV. 1635, 1643-44 (1995).

An analogy may help to underscore the point. Suppose that the nation's most distinguished physicians identified a disease so insidious that it posed a continuing threat to the health and lives of all Americans, a threat vigorously denounced at every opportunity by virtually everyone. Suppose further that the physicians thought that they knew how to cure or control this disease—albeit with some possible side effects. In these circumstances, would it not seem exceedingly odd if the nation's leaders not only failed to suppress this disease but actually bound themselves as a matter of constitutional law not to do so in the future?

This Essay seeks to resolve this apparent paradox. In Part I, after disposing of some definitional issues, I describe both the robust constitutional protection that special interests enjoy and the equally vigorous vilification to which the American public has always subjected them. Part II discusses the principal theoretical and empirical claims advanced by the critics of special interests. Part III, the core of the Essay, is a strong but qualified defense of special interests. I conclude in Part IV with a discussion of various reforms that bear on the nature and role of special interests in the political process.

I argue that although special interests pose certain risks for the health of American society,³ they have actually caused few serious structural problems in recent years.⁴ Moreover, they have caused even fewer ills that policy changes are likely to remedy. The provision of strong protection for a strongly reviled system of special interest politics thus appears to be less a paradox than an example, familiar in our system, of a sound political and constitutional commitment to take some risks and to bear some costs in return for larger social benefits. As I shall explain, the pluralist gamble has paid off handsomely. Nevertheless, some changes might improve the system and are worth considering. Overall, however, there is simply no realistic, attractive alternative to special interest groups in a liberal democracy. This reality would

3. Although I do not develop the comparative politics point in this Essay, I strongly suspect that special interest groups pose a greater threat to democratic values in other societies whose political and economic institutions, practices, and values are less diverse, competitive, fluid, and participatory than ours. See, e.g., Peter H. Schuck & Robert E. Litan, *Regulatory Reform in the Third World: The Case of Peru*, 4 YALE J. ON REG. 51 (1986) (discussing obstacles to regulatory reform posed by bureaucratic and private interests). My suspicion is supported by the relative inability of other western democracies to cure the "Eurosclerosis" that has long gripped them, raising their tax levels to support expanding public payrolls while drastically limiting their capacity to generate new private employment for their workers. See Editorial, *Europe's Year of Reckoning*, WALL ST. J., Dec. 27, 1996, at A6 (lamenting Europe's "well-documented Eurosclerosis, characterized by slow economic growth and rising unemployment"); George Melloan, *Global View: Europe's Gloomier View of the Welfare State*, WALL ST. J., Feb. 14, 1994, at A19 (discussing "renewed Eurosclerosis" and its effects on European attitudes about welfare state).

4. By referring to *structural* ills, I mean to acknowledge the obvious fact that special interests do affect the resolution of particular policy issues, and sometimes do so in ways that I and others regard as undesirable.

In Praise of Factions

remain even if constitutional rights of association and advocacy did not mandate protection for the pluralist system.

I shall make four central claims of my own in the course of this Essay. Two of them are normative. The first is that the central element of Madison's understanding of factions—his objective conception of the public interest—is no longer either plausible or attractive, if it ever was. The second claim is that in the contemporary American polity even the most convincing element of the Madisonian critique—the view that special interests are animated by narrow and selfish motives—does not justify Madison's strong indictment. My third claim is empirical. I argue that the principal weakness of Madison's normative argument, which leading public choice theorists also advance today,⁵ is the premise that special interests tend to destroy individual liberty, social welfare, and political health.⁶ The dynamic conditions of modern American politics, I maintain, refute this notion. My final claim is prescriptive. Having reaffirmed Madison's most creative and important idea—that only a diverse, competitive, and vibrant civil society can remedy the dangers posed by special interests—I go on to argue that the government's role in nourishing and diversifying the pluralist system ought to be decidedly limited. The government's principal goal, rather, should be to ensure that citizens are educated well enough to discern their own and the community's interests and to make informed, independent choices about the merits of possible public actions.

I. CONSTITUTIONAL PROTECTION AND IDEOLOGICAL DEMONIZATION

A. *Defining Special Interest*

Madison defined a faction as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”⁷ The most striking element of this definition is the proposition that a majority of the citizenry might constitute a faction, with all of a faction's attendant political vices. Madison asserts the objectivity of the public interest (“the permanent and aggregate interests of the community”)—a conception that stands above and apart from any special interest or from any combination of such interests—

5. See *infra* Part II.

6. This was only one of the erroneous premises on which the Constitution was founded. Robert Dahl advanced the point well more than forty years ago: “It is only an index to the pitiful limitations of human knowledge to note that, realistic and gifted as [the Framers] were, many of their key assumptions proved to be false, and the constitution they created has survived not because of their predictions but in spite of them.” ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 141 (1956).

7. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

including those of a majority.⁸ Such a transcendent conception, of course, was hardly Madison's invention. In one form or another, it had constituted a convention of most political philosophy stretching back through the writings of Rousseau,⁹ Aquinas,¹⁰ Aristotle,¹¹ and Plato.¹² In advancing his conception of the public interest, however, Madison did not adopt the Rousseauian view that this public interest could be discerned simply through the deliberative processes of a small, decentralized, homogeneous, noncommercial republic. Rather, he sought to find a middle ground between the objective conception of the idealists and the more proceduralist conception of the pluralists. He did so through a vision of representation in which, as Cass Sunstein has put it, "legislators were neither to respond blindly to constituent pressures nor to undertake their deliberations in a vacuum."¹³ In this view, representation would elevate government above private interests but also keep it accountable to those interests.

Indeed, one of the most significant innovations of liberal political theory, especially of the American variety, is its challenge to the Madisonian conception of the public interest.¹⁴ Much of modern liberalism has repudiated this conception in favor of one defined in terms of process values and political participation through group activity.¹⁵ This procedural notion of the public interest is the dominant one today, essentially accepted even by progressives and social democrats on the left and by market and libertarian conservatives on the right. Commentators of all ideological stripes, of course, criticize the ways in which this model actually operates. They argue, for example, that the

8. According to Cass Sunstein, Madison believed that elected representatives, standing above local interests and factions, would deliberate on and produce the common good in the national legislature. See Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 41-42 (1985) (discussing THE FEDERALIST NO. 10 (James Madison)).

9. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 24-29 (Willmoore Kendall trans., Henry Regnery Co. 1954) (1762) (discussing "general will").

10. See Ernest L. Fortin, *St. Thomas Aquinas*, in HISTORY OF POLITICAL PHILOSOPHY 248, 248-58 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987) (discussing Aquinas's notion of objective order of divine providence).

11. See ARISTOTLE, THE POLITICS 99 (Carnes Lord trans., Univ. of Chicago Press 1984) (defining "virtue" objectively).

12. See PLATO, THE REPUBLIC 189 (G.M.A. Grube trans., Hackett Publishing Co. 1992) (discussing "the form of the good").

13. Sunstein, *supra* note 8, at 47.

14. This innovation, of course, has itself been reviled from many philosophical quarters, most famously in the work of Leo Strauss. See LEO STRAUSS, NATURAL RIGHT AND HISTORY 1-8 (1953) [hereinafter STRAUSS, NATURAL RIGHT]; LEO STRAUSS, *Relativism*, in THE REBIRTH OF CLASSICAL POLITICAL RATIONALISM 13, 13-26 (1989) [hereinafter STRAUSS, *Relativism*].

15. This assertion is one axis of the vigorous debate between the natural-rights liberalism of Leo Strauss, who defended an objective, transcendent conception of the public interest, and the pluralist liberalism of Robert Dahl, Edward Banfield, and others, who advanced a bargaining model of the public interest. Compare STRAUSS, NATURAL RIGHT, *supra* note 14, and STRAUSS, *Relativism*, *supra* note 14, with EDWARD C. BANFIELD, POLITICAL INFLUENCE 7 (1961) (studying government as "patterns of influence"), and ROBERT A. DAHL, WHO GOVERNS? (1961) (arguing that political consensus is achieved through continual process of communication between political professionals and population at large).

In Praise of Factions

process-oriented model systematically favors certain interests and values over others, and that it often produces deplorable policies.¹⁶ Many of these critics, moreover, go beyond simply denouncing particular process failures and outcomes; many invoke a vision of the public interest that purports to transcend such particulars. But these invocations are probably best understood as gambits in a larger rhetorical strategy that is conducted well within the premises of the pluralist system.

To understand the role of special interest groups in the American polity today, then, we must define faction in a way that does not depend—as Madison’s definition manifestly does—on a transcendent conception of the public interest that no longer elicits strong defense or justification, even from those who most vehemently condemn pluralism’s processes and policies. All definitions of “special” interests can be criticized for being under-inclusive, over-inclusive, arbitrary, or subjective. To characterize any interest as “general,” to assert that its goals correspond with those of the community at large, is not simply a presumptuous claim but also inevitably a form of approbation. To characterize an interest as “special,” in contrast, is to ascribe to it a partial, parochial, or narrowly self-interested quality; in common parlance this label is almost always deprecatory. If a definition of special interest is to facilitate any useful analytical work, it must be broad enough to include all of those groups that contend for public policy influence and elicit significant opposition. Any such definition will be broad indeed.

Political scientist Paul Peterson has employed a definition of special interest that is probably as serviceable as any. An interest is special, according to Peterson, “if it consists of or is represented by a fairly small number of intense supporters who cannot expect that their cause will receive strong support from the general public except under unusual circumstances.”¹⁷ Peterson distinguishes special interests from the major political interests, like those of senior citizens or of the proponents of a strong national defense, whose goals are so widely shared that they have seized the attention of the political parties and helped to shape their policy agendas.

For my purposes, however, even Peterson’s broad definition of special interests cuts too finely. In the pages that follow, I mean special interests to

16. Typically, critics on the left claim that the pluralist process disadvantages the poor and other diffuse groups that find it difficult to organize for political action. *See, e.g.*, THEODORE LOWI, *THE END OF LIBERALISM* 198-236 (2d ed. 1979). Those on the right often claim that the process disadvantages entrepreneurs and traditional groups in favor of an anti-market alliance of government officials, elite intellectuals, and the mass media, which together comprise a “new class.” *See, e.g.*, IRVING KRISTOL, *TWO CHEERS FOR CAPITALISM* 23-28 (1978); *cf.* JOSEPH WHITE & AARON WILDAVSKY, *THE DEFICIT AND THE PUBLIC INTEREST* 545-51 (1989) (identifying government officials, intellectuals, and mass media as interest groups affecting political process).

17. Paul E. Peterson, *The Rise and Fall of Special Interest Politics*, in *THE POLITICS OF INTERESTS: INTEREST GROUPS TRANSFORMED* 326, 327 (Mark P. Petracca ed., 1992) [hereinafter *POLITICS OF INTERESTS*].

include any group that pursues contested political or policy goals, and that is widely regarded by the public as being one contending interest among others. This definition is capacious enough to encompass the political parties themselves.¹⁸ Madison, like the other Framers, viewed parties as factions—as evils to be avoided, if possible, or tamed, if necessary.¹⁹ Two centuries of experience with parties have clarified the nature of their relationship to special interest groups. Today's parties seek to attract such groups into a winning electoral coalition by promising to realize the groups' special-interest goals while simultaneously promising to transcend those goals with a broader vision of the public interest that can appeal to voters unaffiliated with those constituent groups. The fact that a party is, in part, an opportunistic alliance of special interest groups by no means excludes it from my definition of special interest: Each party competes vigorously for public support for its own ideological and programmatic agenda, neither party effectively controls the policy process, and both are widely viewed as, well, partisan (rather than comprehensive) in their appeals.

Broad as this definition is, it is still not broad enough. As I shall note below, the government itself—including politicians, bureaucrats, and even judges—is increasingly seen and denounced by many members of the public as a special interest—indeed, as a special interest of a particularly dangerous kind. This critique, moreover, is by no means confined to anarchists, conspiracy theorists, and revolutionaries; it has become a rhetorical staple of Republican (and some Democratic) politicians, generating important institutional reforms such as term limits, “sunset” laws, and judicial recalls.²⁰ If much serious, respectable, mainstream political discourse regards government itself as a special interest, our working definition should certainly include it.

One may plausibly object that a definition that excludes virtually nothing is meaningless. In the context of a discussion of public perceptions about special interest groups, however, such an objection misses the point. In truth,

18. Indeed, as the share of voters self-identifying with a political party continues to decline, even the parties might come within the loose size constraints of Peterson's definition.

19. See THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961); George Washington, Farewell Address (Sept. 17, 1796), in 1 DOCUMENTS OF AMERICAN HISTORY 172 (Henry Steele Commager & Milton Cantor eds., 10th ed. 1988); see also Steven G. Calabresi, *Political Parties As Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1482-83 (1994) (noting that “[t]he Framers of the U.S. Constitution deliberately set up our constitutional regime so that it would be inimical to the spirit of “faction” or of “party”—two terms that they tended to equate”). But see Lloyd N. Cutler, *Now Is the Time For All Good Men*, 30 WM. & MARY L. REV. 387, 398 (1989) (arguing that Madison's definition of faction “would not appear to cover a broadly based national political party that cuts across narrow interest groups”).

20. The fact that such reforms are important does not mean that they are not sometimes misguided, as I believe term limits are. But see GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY (1992). Fortunately, Congress now seems unlikely to approve a term limits amendment. See Adam Clymer, *House Rejects Term Limits, Bringing Drive to a Dead Halt*, N.Y. TIMES, Feb. 13, 1997, at A1.

In Praise of Factions

the critique of special interests in American politics is so pervasive that it encompasses the institutions of government themselves. Many citizens are convinced that governmental institutions are not merely ineffective in controlling special interest groups but that these institutions actually facilitate those groups' depredations against the public interest.²¹ This conviction, that government is part of the problem, has always been both widespread and influential. For that reason, it must be included in our definition and analysis of special interest groups.

Still, most critiques of special interests are concerned primarily with groups that are politically active in pursuing certain economic or ideological issues, such as trade and professional associations, labor unions, commodity groups, religious coalitions, and civil rights groups. While these issues often have far-reaching social implications, they nevertheless occupy only a portion of the full spectrum of issues with which political parties and government are typically preoccupied. Accordingly, the discussion of special interest groups that follows will be primarily concerned with groups pursuing these relatively narrow economic or ideological agendas, although my analysis will usually apply as well to the far broader array of interests that also fall within my definition.

B. *The Constitutional Protection of Special Interests*

From a political perspective, as Madison recognized, the most important properties of a special interest are its policy goals and the strategic resources that it can effectively mobilize in pursuit of those goals. It is striking, then, that the Constitution protects special interests without regard to their goals or resources.²² More specifically, it protects people's rights to form special interests, to solicit and expel members, to govern their internal affairs, to define their agendas, to maintain their privacy, to organize their activities, and to deploy their resources for all lawful purposes.²³

21. For example, a recent CBS News/*New York Times* poll found that 65% of registered voters believe that "most members of Congress are more interested in helping . . . special interest groups" than the people. *CBS News/New York Times Poll*, released Oct. 22, 1996, available in WL, Poll Database. In another poll, 85% of registered voters said that "many of [their] elected officials are controlled by contributions from special interests." *Fox News/Opinion Dynamics Poll*, released Dec. 16, 1996, available in WL, Poll Database.

22. Even groups with subversive or illegal purposes enjoy such protection, at least up to the point at which they act to effectuate those purposes. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

23. Recently, however, the Supreme Court's remarkably broad constructions of the federal Racketeer Influenced and Corrupt Organizations (RICO) statute have come perilously close to criminalizing behavior that would be valid for entities not statutorily defined as "criminal organizations." See, e.g., *NOW v. Scheidler*, 510 U.S. 249, 256-61 (1994) (holding that RICO does not require proof that alleged racketeering enterprise or acts were motivated by economic purpose and that RICO can be applied to network of anti-abortion groups).

The courts have been especially solicitous of factions that engage in political and legal advocacy.²⁴ Political parties are accorded very broad protections from government regulation: Under even the narrowest conception of the First Amendment, their representational and advocacy functions lie at the very core of democratic freedoms.²⁵ The principle that their status as largely private organizations whose autonomy from government influence and funding²⁶ must be respected contrasts with the conception of parties in most civil law polities, which view them as creatures of public law subject to various regulations and subsidies.

In a series of decisions involving the National Association for the Advancement of Colored People (NAACP), a leading civil rights organization, the Supreme Court recognized a large zone of organizational activity that could not be infringed even to serve otherwise legitimate governmental interests, such as regulating the conduct of litigation²⁷ and of economic boycotts.²⁸ More recently, the Court protected the right of nonprofit advocacy groups to make campaign expenditures in support of political candidates that would be illegal

24. On the other hand, courts do not always accept the policy outcomes generated by constitutionally protected advocacy. As Professor Sunstein argues, courts use certain public law doctrines to require that legislation reflect certain public values and not simply reflect factional political and legal advocacy. A prominent example is the rationality requirement under the Equal Protection Clause. *See* Sunstein, *supra* note 8, at 49-64.

25. *See, e.g.,* Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309, 2316 (1996) ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.").

26. It should be noted, however, that federal and state law confer a number of electoral advantages on the two major parties, including public funding for their presidential campaigns, preferred positions on ballots, and special access to regulated media, for which other parties may qualify, but with greater difficulty. The federal equal-time provision for access to media outlets by legally qualified presidential candidates is one specific provision. *See* 47 U.S.C. §§ 312(a)(7), 315 (1994); *see also* Fulani v. FCC, 49 F.3d 904 (2d Cir. 1995) (rejecting complaint by third-party candidate of unequal time); *In re* Complaint of Ross Perot v. ABC, CBS, NBC, & Fox Broad. Co., 11 F.C.C.R. 13109 (1996) (same). Several federal laws grant partial public financing to major presidential candidates. *See* Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 (1994); Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042 (1994); *see also* LaRouche v. FEC, 996 F.2d 1263 (D.C. Cir. 1993) (rejecting third-party candidate's challenge to FEC denial of federal matching funds).

There are numerous state laws granting advantages to the major political parties. *See, e.g.,* ARIZ. REV. STAT. ANN. § 16-571 (West 1996) (allowing representatives of two major political parties, but not independent candidates, to obtain immediately list of people who voted in election); COLO. REV. STAT. ANN. §§ 1-6-102, 1-6-109 (West Supp. 1996) (mandating that each major political party supply half election judges); FLA. STAT. ANN. §§ 99.092, 99.103(1) (West 1996) (excluding political parties with less than 5% of total registered voters from receiving partial rebate of candidate's quite substantial filing fees); IND. CODE ANN. § 9-18-15-10, 9-18-15-13, 9-29-5-32 (Michie 1997) (mandating preferential distribution to major political parties of \$30 "political contribution" fee from each personalized license plate issued by state); N.H. REV. STAT. ANN. § 658:25 (1996) (allowing only members of two major political parties to be designated ballot clerks). For discussions of these and other provisions, see Richard Winger, *Election Law Obstacles to Minor Party Success* (1996) (unpublished manuscript, on file with author). Recent cases of note involving these issues include *Twin Cities Area New Party v. McKenna*, 73 F.3d 196 (8th Cir.), *cert. granted*, 116 S. Ct. 1846 (1996); *Libertarian Party v. Smith*, No. 87342, 1996 WL 693606 (Fla. Dec. 5, 1996); and *Indiana Republican State Comm. v. Slaymaker*, 614 N.E.2d 981 (Ind. Ct. App. 1993).

27. *See* NAACP v. Button, 371 U.S. 415, 428-29 (1963).

28. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 908-09 (1982).

In Praise of Factions

if made by business corporations.²⁹ In these decisions, the Court affirmed that the First Amendment protects not only speech but also the rights to associate with others for common purposes, to seek to influence governmental decisions, and to be free of governmental intrusion on organizational autonomy.

Economic factions also receive broad constitutional protection. In the nineteenth century, the courts recognized the emerging industrial corporations as legal entities possessing most attributes of constitutional personhood, and extended to them broad immunities (later withdrawn) from government regulation.³⁰ Although corporations, as just noted, are subject to some restrictions on campaign expenditures,³¹ they generally enjoy full First Amendment protection for their associations in multi-corporate organizations, and for their political lobbying and public advocacy.³² Their political activity is also protected against antitrust liability.³³ The same is true of labor unions, which are also permitted to engage in some concerted activities that might otherwise be illegal.³⁴

Religious organizations, which are probably more numerous and diverse in the United States than anywhere else in the world,³⁵ receive special constitutional protection under the Free Exercise and Establishment clauses of the First Amendment, although they are required to comply with “neutral” regulations adopted for health, safety, and other public welfare reasons.³⁶ The circum-

29. See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263-65 (1986); see also *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 661-65 (1990) (upholding *Massachusetts Citizens for Life, Inc.* but finding that chamber of commerce is not exempt organization).

30. See, e.g., *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (applying Takings Clause to protect corporation); *Minneapolis & St. Louis R.R. v. Beckwith*, 129 U.S. 26, 28 (1889) (treating railroad as person under Due Process Clause of Fourteenth Amendment); *County of Santa Clara v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886) (assuming without discussion that railroad is person under Equal Protection Clause); *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 455-58 (1874) (treating insurance company as citizen under Constitution for purposes of diversity jurisdiction). For *Lochner*-era substantive due process decisions that presume that a corporation is a person, see *Coppage v. Kansas*, 236 U.S. 1 (1915), and *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). For discussion of these developments, see Howard Jay Graham, *An Innocent Abroad: The Constitutional Corporate “Person,”* 2 *UCLA L. REV.* 155 (1955); and Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 *GEO. L.J.* 1593, 1640-51 (1988).

31. See, e.g., Federal Election Campaign Act, 2 U.S.C. § 441b (1994).

32. See, e.g., *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 775-95 (1978).

33. The *Noerr-Pennington* doctrine holds that federal antitrust laws do not regulate the political conduct of private individuals or entities even when they are seeking anticompetitive action from the government. See *UMW v. Pennington*, 381 U.S. 657, 670 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961). For a recent discussion and application of the *Noerr-Pennington* doctrine, see *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-80 (1991).

34. *Pennington*, 381 U.S. 657, is the classic statement of the labor exemption from anti-trust liability. For a recent application, see *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116 (1996).

35. See Gustave Niebuhr, *Death in a Cult: The Landscape*, *N.Y. TIMES*, Mar. 30, 1997 (reporting that United States has over 2000 distinct religions and that Los Angeles, unlike any country in world, has members of every existing Buddhist sect).

36. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872, 879 (1990). These decisions, especially the latter, led to the enactment of the Religious Freedom Restoration Act, 42

stances under which the government may distribute public funds to religious entities (as distinguished from imposing burdens on them) has long been a hotly contested issue in the United States.³⁷ Secular cultural organizations—those that promote particular languages, traditions, or ways of life—likewise are constitutionally protected in their efforts to exemplify and advance their group values.³⁸

C. *The Vilification of Special Interests*

Given the broad immunities from governmental interference that the Constitution confers on special interests, it may seem surprising that Madison and many other Framers viewed them as inimical to democracy, as groups against which constitutionalists must be especially vigilant. The Framers, ever-mindful of the political conspiracies and intrigues that had (they thought) led to tyranny in ancient Greece and Rome, vilified factions in the strongest terms. This assault on factions, particularly on economic elites, quickly became a central motif of the American political tradition. Although these attacks were almost always engendered by the critics' opposition to particular substantive policies or social conditions, they often took a more general rhetorical form: an indictment of special interests for insidiously deforming and undermining the larger public interest.

During the constitutional period, for example, militant farmers launched Shay's Rebellion against the elites that dominated state and national politics. The Jacksonian Democracy was fueled by a sustained attack on special interests, vividly exemplified by the already moribund Federalists and their Bank of the United States.³⁹ The Free Soilers, Whigs, Republicans, and abolitionists sought (and sometimes gained) power by demonizing the "Slave Power" and "King Cotton." During the 1880s and 1890s, the Populist movement denounced the railroads, bankers, middlemen, grain elevators, and

U.S.C. § 2000bb-2000bb4 (1994), which is now under constitutional challenge in *City of Boerne v. Flores*, 73 F.3d 1352 (5th Cir.), *cert. granted*, 117 S. Ct. 293 (1996).

37. See, e.g., Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 HARV. L. REV. 989 (1991). Today, much controversy surrounds proposals for government-funded vouchers with which parents can pay tuition for religious schools. The Supreme Court is reviewing the status of *Aguilar v. Felton*, 473 U.S. 402 (1985), which barred New York City public schools from sending teachers to provide on-site instruction in parochial schools. See *Agostini v. Felton*, 117 S. Ct. 759 (1997), *granting cert. to Felton v. Secretary, U.S. Dep't of Education*, 101 F.3d 1394 (2d Cir. 1996). This challenge may well succeed. See Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 165 n.301 (1996).

38. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Such groups are actively litigating the constitutionality of states' official English policies. See, e.g., *Arizonans for Official English v. Arizona*, No. 95-974, 1997 WL 84990 (U.S. Mar. 3, 1997).

39. See generally ARTHUR SCHLESINGER, JR., *THE AGE OF JACKSON* (1945).

In Praise of Factions

the emerging industrial corporations,⁴⁰ while the Mugwumps broke with the Republican Party over what they viewed as its alliance with corrupt privilege and special-interest politics. A decade later, the Mugwump critique of factions was taken up by the Progressives, who in turn sowed the seeds for the New Deal reform agenda. When industrial interests bitterly opposed that agenda, President Franklin Roosevelt won wide popular support by excoriating them as “economic royalists,” even as he legitimated and entrenched them in many of the regulatory institutions that he helped to construct.⁴¹

In the post-World War II era, this anti-special-interest rhetoric became more or less universal. Not surprisingly, the Democratic Party and many groups on the ideological left of the political spectrum have stressed the nefarious role of “big business” and other special interests in resisting fundamental social change and wealth redistribution and promoting aggressive foreign policies.⁴² So widespread and popular has the anti-special interest position become, however, that even middle-of-the-road and right-wing Republicans have joined the chorus of denunciation, from President Eisenhower’s warning about the growing domination of the “military-industrial complex,” to Patrick Buchanan’s accusations that special interests pull the strings on Main Street, Wall Street, and in Washington, D.C. President Reagan, like Prime Minister Margaret Thatcher of Britain, succeeded in positioning himself as the consummate outsider, as a populist elected to do battle with both the federal establishment and the private groups dedicated to preserving the status quo. President Clinton has attempted to do the same.

For a long time, the academy resisted this critique of special interests. As early as the first decade of this century, the pluralist political science of Arthur Bentley explored and celebrated America’s unique system of group politics.⁴³ Bentley’s theory, which was elaborated and empirically supported in the 1950s and 1960s by David Truman,⁴⁴ Robert Dahl,⁴⁵ Edward Banfield,⁴⁶ and other pluralist scholars, was based on a number of propositions about the political significance of interest groups. In this view (setting aside some differences in detail among these scholars), individuals who share common values and interests coalesce easily into groups; such group formation reflects

40. See generally LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA* (1976).

41. See ARTHUR SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* 489-507 (1959).

42. At the same time, the Democratic Party, particularly at the national level, has increasingly cultivated big business. See E.J. DIONNE, *THEY ONLY LOOK DEAD* 140 (1996); Alison Mitchell, *The Fund Machine: Building a Bulging War Chest*, N.Y. TIMES, Dec. 27, 1996, at A1.

43. See, e.g., ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* (Peter H. Odegard ed., Belknap Press 1967) (1908).

44. See DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951).

45. See DAHL, *supra* note 15.

46. See MARTIN MEYERSON & EDWARD C. BANFIELD, *POLITICS, PLANNING AND THE PUBLIC INTEREST* (1955).

individuals' natural social and political propensities. Politics is a complex process in which these groups bargain with one another, engaging in a combination of argument, resource exchange, threat, protest, and other forms of persuasion. Some groups are more powerful than others in that they possess a richer arsenal of resources. Even so, however, the political bargaining process is exceedingly fluid. New groups face low barriers to entry into this bargaining process, and even small ones participate to some degree. The issues around which bargaining occurs are infinitely varied and the mix of resources possessed by particular groups have different salience and value for different issues. The alliances that form around these issues are remarkably transient, dynamic, and opportunistic.

The pluralist scholars did not intend their portraits of group formation and political bargaining to be merely descriptive accounts. Most of them also viewed these bargaining processes as normatively desirable, claiming that they encouraged forms of participation that succeeded in integrating even marginal groups into the social and political mainstream. This normative celebration of pluralism followed, almost tautologically, from the pluralists' descriptive accounts and from their conception of the public interest as a *process* of group bargaining, accommodation, and conflict resolution. So long as this process was consensual, broadly participatory, and consistent with canons of procedural fairness, it served effectively to legitimate whatever bargains emerged from it. The pluralist logic was that if the process is fair, then its outcomes should be regarded as democratically acceptable, if not necessarily just.⁴⁷

This broad pluralist consensus began to break down in the mid- and late-1960s. The civil rights, welfare rights, anti-war, and environmental movements placed enormous stress on the notion that the pluralist system was operating in a smooth, stable, inclusive, and equitable fashion. The rise of protest politics and the well-publicized spectacles of violence in the streets, on college campuses, and at the Democratic National Convention seemed to belie such smug claims.⁴⁸ Theodore Lowi, Grant McConnell, Peter Bachrach, and other

47. The emergence of a pluralist political science that justified policy outcomes by reference to the fairness of the processes that produced them was hardly an isolated academic development. It paralleled the rise of a more general intellectual paradigm that tended to suppress or marginalize ideological conflict, a paradigm exemplified by the functionalist sociology of Talcott Parsons, *see* TALCOTT PARSONS, *STRUCTURE AND PROCESS IN MODERN SOCIETIES* (1960), and Daniel Bell, *see* DANIEL BELL, *THE END OF IDEOLOGY* (1960), the behavioral psychology of B.F. Skinner, *see* B.F. SKINNER, *SCIENCE AND HUMAN BEHAVIOR* (1953), and the analytical philosophy that increasingly dominated normative political theory.

48. In retrospect, at least, the pluralist system might be viewed as having accommodated protest politics rather comfortably within its dynamic, expansive processes and hence within its self-defining legitimation capacities. Even groups such as war protesters, welfare rights advocates, and environmentalists, whose political resources might have seemed limited to an ability to impede normal governmental processes, asserted compelling moral claims and mobilized media attention. Indeed, these groups were able to extract concessions—in some cases, remarkable victories—from interests that were much more powerful in conventional terms. For accounts of their political struggles, *see*, for example, TAYLOR

In Praise of Factions

political scientists attacked the pluralist model at its foundations.⁴⁹ They vigorously denounced the system of “interest-group liberalism” (Lowi’s opprobrious term for it⁵⁰) on both descriptive and normative grounds.⁵¹ While these political scientists undermined the pluralist consensus from the ideological left, remarkably similar criticisms of the system were forthcoming from academic conservatives. Mancur Olson, Richard Posner, George Stigler, and other political economists advanced theoretical and empirical accounts of organizational behavior and public decisionmaking that emphasized the distortions that interest-group incentives and behavior created in the polity and economy.⁵²

This odd intellectual alliance of left and right was soon joined by the egalitarian, often populist critical legal studies movement, which argued that legal doctrine, especially judicial decisionmaking, was deformed by some of the same organizational and political incentives and dynamics identified by the political scientists and political economists.⁵³ In the 1970s, these “public choice” critiques of the role of interest groups in American society began to dislodge pluralism as the ruling paradigm in the academy, while discrediting its procedural, functionalist, and often reductionist conception of the public interest. Such critics, however, generally failed to offer a convincing alternative conception.

These intellectual currents were, in part, propelled by the rise of “public interest groups.”⁵⁴ These groups, typically organized on a nonprofit basis, are

BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63* (1988); MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973* (1993); MICHAEL LIPSKY, *PROTEST IN CITY POLITICS: RENT STRIKES, HOUSING AND THE POWER OF THE POOR* (1970); and FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS* (1977).

49. See, e.g., PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* (1967); LOWI, *supra* note 16; GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966).

50. See LOWI, *supra* note 16, at 50-61.

51. See generally Mary Summers, *Putting Populism Back In: Rethinking Agricultural Politics and Policy*, 70 *AGRIC. HIST.* 395, 400-09 (1996) (reviewing and critiquing these and other anti-pluralist scholars for their neglect of influence of countervailing populist interest groups).

52. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); Richard A. Posner, *Theories of Economic Regulation*, 5 *BELL J. ECON. & MGMT. SCI.* 335 (1974); George J. Stigler, *The Theory of Economic Regulation*, in *CHICAGO STUDIES IN POLITICAL ECONOMY* 209, 209-33 (George J. Stigler ed., 1988). An important exception is Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 *Q.J. ECON.* 371 (1983), which modeled politicians and bureaucrats as mere agents of interest groups rather than as independent sellers of services, and which predicts that policies that increase efficiency are likely to prevail in pressure-group competition.

53. The critical legal studies scholars also tended to emphasize certain distinctive themes, including the indeterminacy of legal rules and the public mystification effected by liberal ideology. See generally *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1982).

54. Because this term has long been conventional in political discourse, I shall not continue to use inverted commas. I do so initially only to call attention to the fact that, although these groups naturally seek to secure the political benefit of such an approbative term, the correspondence between their activities and policy goals, on the one hand, and the public interest, on the other, is largely if not entirely in the eye of the beholder. See generally Peter H. Schuck, *Public Interest Groups and the Policy Process*, 37 *PUB. ADMIN. REV.* 132 (1977).

dedicated to representing in various public and private fora a remarkable array of diverse interests: those of consumers, welfare recipients, the environment, political dissidents, ethnic minorities, women, children, future generations, the elderly, small businesses, worshippers, and countless others. These interests are relatively dispersed and their goals are often non-economic or ideological in nature. For this reason, the increasingly influential critics of pluralism in the academy (and the still-nascent critical legal studies movement) firmly predicted that such interests either would be unable to mobilize and sustain themselves as organizational entities or, once established, would be politically impotent.⁵⁵ These predictions were driven by theoretically elegant rational choice models of individual and group behavior, models which posited that such groups were especially vulnerable to the free-rider and other collective action problems.⁵⁶

In the event, public interest groups proliferated and prospered.⁵⁷ This was the first major predictive error of the new public choice theorists; I shall mention a second error later on.⁵⁸ Many public interest groups, moreover, proved to be remarkably effective political actors, helping to initiate, shape, and reform a broad range of public policies. There are many reasons for their successes; some of them are discussed below.⁵⁹ In almost every case, however, an important element of their political effectiveness is their ability to project themselves credibly and persuasively as opponents of the narrowly self-interested "special interests" whose positions jeopardize the public interest.

Ralph Nader was (and remains) the embodiment of the public interest advocacy movement and its chief rhetorician. His work, which first came to public attention in 1965,⁶⁰ and that of his colleagues in the consumer, environmental, and civil rights movements, soon expanded to cover vast areas of the domestic policy universe. More importantly, he created a constellation of public interest groups, financed by a combination of his lectures and publications, student fees, foundation grants, and public support. Many of these groups developed alliances and political strategies that continue to wield influence today, more than three decades later. These public interest groups soon augmented and indeed transformed a political bargaining process that their

55. The classic account of this argument is OLSON, *supra* note 52. See also JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* (1973). For a review and critique of this literature, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997); and Peter H. Schuck, *The Politics of Regulation*, 90 *YALE L.J.* 702 (1981) (book review).

56. See *infra* text accompanying notes 76-78.

57. On the proliferation in this period of public interest groups and of interest groups generally, see Mark P. Petracca, *The Rediscovery of Interest Group Politics*, in *POLITICS OF INTERESTS*, *supra* note 17, at 3, 13-18; and Jack L. Walker & Frank R. Baumgartner, *Survey Research and Membership in Voluntary Associations*, 32 *AM. J. POL. SCI.* 908 (1988).

58. See *infra* text accompanying notes 137-140.

59. See *infra* text accompanying note 65.

60. See RALPH NADER, *UNSAFE AT ANY SPEED* (1965).

participation rendered far more complex and balanced than the interest-group liberalism that Lowi and others had described and denounced. These groups also engaged in many forms of non-legislative politics, including court litigation, participation in administrative proceedings, and efforts to influence professional groups and academic curricula.

The results of this public interest group activity were nothing short of astonishing. A cataract of new regulatory laws poured out of Congress during the late 1960s and 1970s, unprecedented in American politics. The highly technical character of many of these laws spawned the formation of yet more interest groups hoping to exploit, combat, or at least reach a *modus vivendi* with the new regulatory regimes. Some of these new groups, including a number of industry associations and broader coalitions, were expressly designed to defeat or at least to neutralize the regulatory onslaught that the Nader-type groups had helped to instigate. These organizations exploited the very same levers of influence—litigation, agency proceedings, the Freedom of Information Act, congressional hearings, professional and academic activity, grassroots lobbying, mass media—that Nader and his public interest group allies had successfully deployed against business interests.

Private and public interest groups of both the left and the right shared at least one common theme. This was the perception that *government* itself had become a powerful, independent special interest group in its own right. In this view, the problem was not simply that the government had been bent to the will of private interests. The government's *own* institutional interests—as a bureaucracy committed to a steady expansion of its authority and resources, as an ensemble of career politicians obsessed with self-promotion and re-election, and as an “imperial judiciary” seeking to embed its policy views in the law—were as self-serving and inimical to the public interest as were the profit-seeking, influence-wielding private actors surrounding it. This view came to be held by many on the left who advocated more pervasive and effective control of the market, by many on the right who hoped to liberate the market from interference by governmental or government-sponsored private forces, and by many without strong ideological or partisan leanings who nevertheless perceived the government as an alien, hostile, or needlessly intrusive power.⁶¹

The attack on “Big Government” as a sprawling, dangerous, uncontrollable special interest was hardly a new one. Madison's definition of faction appears to have referred to private actors and thus did not, strictly speaking, include government. Nevertheless, the *Federalist Papers* (not to mention the vast corpus of anti-Federalist writings) evidence a profound understanding and

61. See, e.g., PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY (1995); INTENSIVE CARE: HOW CONGRESS SHAPES HEALTH POLICY (Thomas E. Mann & Norman J. Ornstein eds., 1995).

apprehension of government's oppressive, imperialistic propensities.⁶² Although the size of government from the Founding until World War I was small by modern standards, it was nevertheless always large and powerful enough to arouse fear and loathing among those who, for reasons of ideology or interest, opposed its exactions.⁶³ This government-as-special-interest critique became far more plausible and powerful during the New Deal, of course, but the Great Depression, World War II, and the Cold War blunted the political effectiveness of this position while increasing governmental authority. In the 1970s, however, both Republican and Democratic political rhetoric exploited this theme. Both parties made populist, anti-government (especially anti-Washington) appeals a centerpiece of their post-Watergate strategies to capture Congress and the presidency. In ways that archetypal Washington insiders Lyndon Johnson and Richard Nixon could never have made credible, Jimmy Carter, Ronald Reagan, and Bill Clinton were elected as outsider-reformers determined to clean up the Augean stables fouled by special interests, both private and governmental. They succeeded in making "inside the Beltway" a new, all-purpose political epithet.

During these years, as American politics and the federal government itself became more sharply divided along ideological and partisan lines, a new critique of factions gained prominence. The media, goaded by political reformers from all parts of the political spectrum, excoriated "single-issue" groups as particularly pathological excrescences from the body politic.⁶⁴ Some of the critiques, of course, were almost comically hypocritical and self-serving. The American Civil Liberties Union and abortion rights groups denounced the National Rifle Association and the Christian Coalition, which returned the favor by demonizing their detractors. Neither side acknowledged that it, like its opponents, was comprised of narrowly defined interest and ideological groups, nor did most other critics recognize that single-issue groups had produced some of the most important advances in social justice in American history, such as female suffrage and abolition of slavery. Nor did either side grant the possibility that groups with more focused agendas might reflect and represent their members' views more faithfully than those with relatively opaque or diversified appeals. Still less did they concede the pluralist claim,

62. See, e.g., THE FEDERALIST NO. 46, at 298 (James Madison) (Clinton Rossiter ed., 1961) (noting that federalist systems protect against "ambitious encroachments of the federal government on the authority of the State governments"), NO. 48, at 308 (James Madison) ("[P]ower is of an encroaching nature and . . . ought to be effectually restrained from passing the limits assigned to it."). But the authors of the *Federalist Papers* were also wary of the dangers caused by governmental weakness, dangers that their experience under the Articles of Confederation had made all too manifest. See, e.g., THE FEDERALIST NO. 21, *supra*, at 138 (Alexander Hamilton) ("The next most palpable defect of the existing Confederation is the total want of a SANCTION to its laws. The United States as now composed have no power to exact obedience, or punish disobedience to their resolutions . . .").

63. See *supra* text accompanying notes 39-41.

64. See, e.g., Tom Mathews et al., *Single-Issue Politics*, NEWSWEEK, Nov. 6, 1978, at 48.

In Praise of Factions

now muted, that this profusion of groups served to enrich and legitimate a more inclusive, participatory system of interest group bargaining.

The proliferation of special interest groups had the paradoxical but entirely predictable effect of spawning new and more effective groups in response.⁶⁵ But other factors were also at work in multiplying the number and diversity of such groups. The traditionally broad-based, relatively non-programmatic political parties and other multi-issue organizations such as labor unions declined in importance. Large “peak” trade associations had to share influence with smaller, nimbler, more specialized industry, sub-industry, and market niche groups. The media’s institutional need for dramatic confrontations, and hence for organizational representatives of opposing positions, intensified. New communications technologies made it easier and less costly to target narrow public preferences. A more ideological political culture encouraged more combatants to enter the fray.

Ironically, many of those who had long demanded a more issue-oriented, participatory politics to replace the bland, exclusionary consensus—the “insider’s game” of interest-group liberalism (as they saw it)—seemed to be even less satisfied with the new ideologically-driven, partisan politics that emerged to take its place. Propelled by the new animus against “single-issue groups,” the centuries-old crusade against the special interests continued into the 1990s. It gained additional momentum in the populist presidential campaigns of Ross Perot and Pat Buchanan, in the post-mortems to the Clinton national health plan in 1994 (whose defeat was widely attributed by the left to the machinations of the health care and insurance lobbies), and in the steadily mounting public agitation over the revelation of the campaign-finance abuses before and after the 1996 elections.

I have demonstrated that political rhetoric and political struggle over more than two centuries have centered on a fundamental critique of special interest groups, and never more vehemently than today. Social scientists and legal academics, whose influence over social attitudes has almost certainly grown in recent decades, have provided theoretical models and empirical studies to support that critique. I now turn to a consideration of the particular objections that the critics lodge against special interests.

65. See *supra* text accompanying note 60. On the increase in the number of special interest groups in recent decades, see *supra* note 57. A vivid example of this organizational growth was the evolution of environmental policy in the Reagan administration, whose assaults on existing policies and on pro-regulation environmental groups only succeeded in stimulating additional public support for those policies and groups. An analogous, equally predictable development was that more extensive regulation tended to generate greater political and legal resistance by the regulated industry. See generally JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA* (1988).

II. THE CLAIMS UNDERLYING THE CRITIQUE OF SPECIAL INTERESTS

Three supposed vices of special interest groups are of particular concern—first, that their partiality violates a particular substantive conception of the public interest; second, that the unequal distribution of resources among groups renders political outcomes unfair and hence illegitimate; and third, that quite apart from this unfairness, special interest groups produce undesirable public policies.

A. *The Partiality Objection*

As noted earlier, Western political thought has developed many theories that posit a general or public interest.⁶⁶ One version is identified with a discursive ethos of participation and deliberation, as in most versions of civic republicanism. Another version of the public interest, the Madisonian model, is defined primarily in contrast to what it is *not*—private and transitory interests or passions. In each of these (and other) formulations, the public interest remains abstract and indeterminate, at least until a particular policy or arrangement is said to embody it, and its supporter provides an adequate explanation of the reasons for that approbation.

Special interest groups are said to undermine these conceptions of the public interest because they are partial—in three related senses. First, they are animated by selfish motives and transitory passions rather than (as Madison put it) by “the permanent and aggregate interests of the community.”⁶⁷ A special interest group is self-referential; it seeks to advance its own values or interests, not those of the larger society. Second, such groups think narrowly; they take an incomplete and fragmented view of the good rather than a comprehensive and integrated one, and they have little incentive to look any further.

But special interest groups are partial in a third, more structural sense: They tend to be undemocratic in their self-governance. Although they may not be subject to the rigid “iron law of oligarchy” that Robert Michels posited,⁶⁸ it is nevertheless true that relatively few politically active groups are robustly democratic. Some—business corporations, for example—purposefully subordinate participatory values to economic ends.⁶⁹ Others, such as labor

66. See *supra* text accompanying notes 7-13.

67. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

68. See ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 377-92 (Eden & Cedar Paul trans., Free Press 1949).

69. Few corporations have successfully introduced substantial worker control without a loss of efficiency. See Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination and Economic Democracy*, 99 YALE L.J. 1749, 1784 (1990) (arguing that efficiency generally improves only in firms with highly homogeneous work forces); see also Adam Bryant, *No Longer Flying in Formation: Labor Rifts Return to Employee-Owned United Airlines*, N.Y. TIMES, Jan. 17, 1997, at D1 (discussing difficulties of employee ownership at United Airlines).

In Praise of Factions

unions, officially advocate participatory values but seldom achieve them.⁷⁰ Many other groups, from political parties to community organizations, have found it difficult to reconcile robust democratic self-governance with their immediate purposes, such as winning elections or influencing government.⁷¹ In still others—the huge American Association for Retired Persons (AARP), for example—members join for essentially instrumental rather than expressive or participatory reasons.⁷² In virtually all groups, leaders exercise decisive control over the organization's crucial information, resources, and incentives, making genuine accountability to members unattainable, even if they desire it. Under these conditions, a special interest is likely to be partial from an *internal* as well as external perspective; it will reflect the views and interests of those who effectively control its decisionmaking apparatus rather than those of all its members.

B. *The Unfairness Objection*

Politically active groups, whether “special” or “public interest,” are unequal, and there is simply no way—certainly none consistent with democratic norms—to make them equal.⁷³ This inequality exists because the resources that can be used to acquire and wield political influence are themselves unequally distributed among different groups. Large corporate interests, for example, tend to have more financial assets than public interest groups and can convert these financial assets into crucial political ones: publicity, access, campaign support, information, lobbyists, and so forth. The values that business groups pursue also tend to be more concentrated and less dispersed than many public values such as the interest in a healthy environment or in protecting future generations. This greater focus may make business interests somewhat easier to organize; it also tends to reduce free-riding and other opportunistic behaviors that impede organizational effectiveness.⁷⁴

Critics of special interests emphasize the dynamic dimension of these organizational and resource inequalities. Political life, the argument runs, does

70. See generally Herman Benson, *Union Democracy and the Landrum-Griffin Act*, 11 N.Y.U. REV. L. & SOC. CHANGE 153 (1982-1983). For a compelling critique by a union lawyer, see THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK* (1991). Violations of union democracy have sometimes been the subject of Justice Department prosecutions. The recent Teamsters election exemplifies the fragility of hard-won democratic reforms in unions. See Steven Greenhouse, *Teamster Counterrevolution: Why It Nearly Won Election*, N.Y. TIMES, Dec. 22, 1996, at A1.

71. See NELSON W. POLSBY, *CONSEQUENCES OF PARTY REFORM* 53-88 (1983).

72. Membership in the AARP is open to anyone over the age of 50 and annual dues are only eight dollars (for which members may receive a variety of benefits, including discounts on drugs).

73. Madison explicitly recognized and addressed this problem. See THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

74. This advantage, however, can be exaggerated. Even business interests confront organizational and coalitional difficulties. The classic study demonstrating this is RAYMOND A. BAUER ET AL., *AMERICAN BUSINESS AND PUBLIC POLICY* (1963).

not merely *reflect* these inequalities; it also *reinforces* and *magnifies* them, exemplifying what might be called the law of multiplying advantages. Groups bargaining from a starting point of unequal endowments of influence will inevitably produce political outcomes that will mimic and perhaps even increase that inequality. The powerful will tend to become more powerful, and the rich richer.⁷⁵

C. *The Inefficiency Objection*

According to public choice theorists, politicians and bureaucrats are entrepreneurs who seek to maximize their wealth or power. Legislators use their votes and bureaucrats use their administrative authority to gain support from special interest groups that can provide them with the campaign funds, policy information, public exposure, reputation, and other resources they need to remain in power and to exercise it effectively. The groups, for their part, “invest” in politicians and bureaucrats in order to induce them to adopt policies that will advance the groups’ special interests.⁷⁶ Some models of these exchanges, such as those developed by the “McNollgast” trio,⁷⁷ tend to be somewhat more complex, politically sophisticated, and institutionally rich than those of most public choice economists, but their general story line is much the same.

The possibilities for bad—in economists’ terms, inefficient—policy outcomes become clear when one adds to this public choice story the leading theories of organization and transaction cost economics. These theories stress the differential collective action problems that organizations face in securing the resources they need to maintain themselves and pursue their goals.⁷⁸ In these accounts, rent-seeking special interests can solve their collective action problems more easily than public interest groups can and thus are better positioned to influence politicians and bureaucrats.⁷⁹ Indeed, *ceteris paribus*, the narrower and more internally homogeneous the group’s interests are, the

75. See, e.g., David Cay Johnston, *High Earners Paying No U.S. Income Tax Rise to Nearly 2400 in 1993*, N.Y. TIMES, Apr. 18, 1997, at A21.

76. For a general review and critique of this literature, see FARBER & FRICKEY, *supra* note 55.

77. “McNollgast” refers to the collaborative work of Mathew McCubbins, Roger Noll, and Barry Weingast. See, e.g., Mathew McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Mathew McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Mathew D. McCubbins et al., *Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures*, 6 J.L. ECON. & ORG. 307 (1990).

78. See, e.g., OLSON, *supra* note 52; OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES, ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION* (1975). The seminal article in this field is Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

79. They are also in a better position to shape favorable judicial doctrine by investing strategically in litigation. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 100-03 (1974).

In Praise of Factions

more easily and cheaply it can organize itself and the more effectively it can deploy its political resources to secure its policy objectives. Political influence, then, is a function not only of a group's numbers (indeed, the theory suggests that larger size can magnify its free-rider problems) but also of its internal cohesiveness. This cohesiveness, in turn, is affected by how varied the goals of the group's members are and how effectively the group can control the costs and benefits of membership in order to minimize defections.

If politicians and bureaucrats tend to reward those special interests that support them politically, as these theories claim, then one would expect to find that public policy is replete with anti-competitive regulatory and legal regimes that disadvantage consumers and other diffuse, hard-to-organize, interests.⁸⁰ Public choice theorists note the existence of many rules and practices that promote wasteful subsidies, restrict entry and exit, artificially increase prices and reduce quality, and discourage innovation.⁸¹ They claim that information, always a precious resource in policymaking and reform, is distorted by those who can afford to produce, control, and disseminate it in their own interests.⁸²

Worse, the critics say, the same disproportionate special interest influences that produce perverse public policies also cause the political system to resist any changes that might reform these undesirable arrangements. The corruption or "hijacking" of government by private interests—a perennial target of reformers in the Mugwump-Progressive-Nader-Perot tradition⁸³—becomes endemic. The campaign finance laws promote and legitimate this corruption by encouraging special interests to make their support for particular politicians explicit, thereby facilitating exchanges of favors for contributions.⁸⁴ Here again, the law of multiplying advantages applies: Already well-endowed groups are strategically positioned to use their access to politicians to entrench and increase those endowments.

80. *But see* Becker, *supra* note 52 (predicting strong tendency toward more efficient policies, rather than less).

81. Examples include agricultural subsidies, segmented financial-services markets, a bloated tort system, rent controls, and many aspects of environmental policy.

82. Commonly cited examples of such distortion are the misleading information campaigns mounted by both the supporters and the opponents of tort reform. *See* STEPHEN J. CARROLL WITH NICHOLAS PACE, *ASSESSING THE EFFECTS OF TORT REFORMS* 3 (1987); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 *DENV. U. L. REV.* 77 (1993); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 *MD. L. REV.* 1093 (1996).

83. One cannot easily resist the temptation to point out the hypocrisy of such claims when made by critics such as Ross Perot, whose fortune in part reflects his talent for cultivating and then exploiting this same business-government connection.

84. For an exploration of this and related ethical problems, see Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in An Age of Mistrust*, 95 *MICH. L. REV.* 1, 84-107 (1996). In an interesting twist, my colleague Ian Ayres and Jeremy Bulow suggest that one remedy for this problem would be to prohibit the disclosure of contributions to candidates. *See* Ian Ayres & Jeremy Bulow, *The Donation Booth* (Feb. 27, 1997) (unpublished manuscript, on file with author).

These three indictments of special interest groups—for their narrowness of motive and vision, their unfair advantages in the political process, and their promotion of inefficient and inequitable public policies—together comprise an important element of the American political tradition. These indictments are also propagated by much mainstream academic commentary. If true, they are damning indeed. But to what extent are they true? In the next section, I contend that while there is some truth to these criticisms (this is why my defense is a qualified one), they are vastly exaggerated.

III. A QUALIFIED DEFENSE OF FACTIONS

Special interest groups are essential to a vibrant, participatory, technically sophisticated, flexible, and democratically accountable polity. This has never been truer than it is today. My point is not simply that a system like ours that protects special interests is better than the alternative, but also that in a democracy like ours, there really *is* no alternative.

A qualified defense of special interest groups must acknowledge the force of certain of the above criticisms: that these groups always strive to influence public policies to their own advantage, that the policies that would advantage them are often contrary to the social good (at least as I define it), and that they often succeed in getting their way. Their effectiveness in shaping public policy, often in perverse ways, is a brute fact.⁸⁵ A qualified defense of the pluralistic system must also acknowledge the danger that politics dominated by powerful special interests will fail adequately to represent voters' diffuse interests in precious collective goods—in the environment, in the welfare of future generations, in the use of public spaces, in a just law, and indeed in the quality of government itself.

Still, it is easy to exaggerate the magnitude of this danger under current conditions. First, diffuse interests of the kind just mentioned do receive considerable recognition in public policy, although not as much as some of us might wish. The constituency for environmental quality is manifestly strong

85. The Internal Revenue Code is studded with examples. See Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987) (arguing that tax legislation is a "contract" between legislators and private interests seeking beneficial tax provisions). See generally JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987); MICHAEL J. GRAETZ, *THE DECLINE (AND FALL?) OF THE INCOME TAX* (1997); Ronald F. Wilson, *Federal Tax Policy: The Political Influence of American Small Business*, 37 S. TEX. L. REV. 15 (1996). The list of special interest influence is hardly limited to tax law, however. The fingerprints of trial lawyers, for example, can readily be found on "tort reform" measures, affirmative action policies reflect the handiwork of civil rights groups and anti-discrimination bureaucracies, and the budget is a compilation of outlays demanded by beneficiary groups. Indeed, one tax law scholar notes that "the Code is much more coherent from a policy perspective than most people believe and less riddled with special interest provisions than many other areas of the law." Letter from Professor Edward Zelinsky, Cardozo Law School, to author (Mar. 10, 1997) (on file with author).

In Praise of Factions

and durable. As noted above, it prospered during the 1980s despite, and perhaps because of, the determined opposition of the Reagan administration, and achieved some significant gains during the Bush and Clinton years.⁸⁶ Voters are manifestly committed to the interests of their posterity, as evidenced by the substantial and growing resources devoted to education and child health.⁸⁷

A telling current example of the power of diffuse interests is the strong, bipartisan sentiment in Congress to regulate the managed care industry, which vigorously opposes such regulation and is far better organized in public choice theory terms than are health care consumers.⁸⁸ The reality is that many politicians search assiduously for new issues on which they can assail the special interests on behalf of some widely-shared common interest, even at some cost in special interest support. The most successful politicians are those who can fashion that public support when it is still inchoate, winning credit for having had the courage and vision to mobilize that support rather than simply climbing on the bandwagon later.

The representation of such diffuse interests reflects, in part, the growing power of ideas and values (for example, government ethics, economic efficiency, family integrity, non-discrimination, environmental protection) in a more highly educated polity.⁸⁹ It also reflects the political reality that the

86. Important examples are the Food Quality Protection Act, Pub. L. No. 104-170, 110 Stat. 1489 (1996) (codified at 7 U.S.C. § 136), and the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified in scattered sections of 42 U.S.C.).

87. Between 1970 and 1991, public spending on education—per student from kindergarten to twelfth grade—increased from \$3431 to \$5958 (in 1993-1994 dollars). See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 153 tbls.231-32 (1996) [hereinafter STATISTICAL ABSTRACT].

The number of low-income children actually served under Medicaid has grown rapidly since the mid-1980s, largely due to statutory changes expanding coverage well beyond the traditionally categorically eligible AFDC families. The largest growth in Medicaid spending occurred between 1988 and 1992, when the program grew at over 22% each year, primarily because of expanded coverage of children; nominal dollar expenditures per beneficiary also grew rapidly during this period, increasing by almost 50%. See John Holahan & David Liska, *Reassessing the Outlook for Medicaid Spending Growth*, NEW FEDERALISM: ISSUES & OPTIONS FOR STATES (Urban Institute, Series A, No. A-6, Washington, D.C.), Mar. 1997, at 1, 1-2. Although future growth rates in the program may be lower than this, see *id.* at 4-6, several bipartisan bills are pending in Congress that would further expand the coverage of low-income children. See Robert Pear, *Senate Bills to Extend Medicaid to Children*, N.Y. TIMES, Apr. 24, 1997, at B8 (describing proposals).

The welfare-reform legislation enacted in 1996, although bitterly and in some respects rightly denounced for its possible effects on low-income children, can best be understood as an effort, perhaps misguided, to improve the long-term prospects of these children by altering their parents' incentives and behavior. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.).

88. See Robert Pear, *Congress Weighs More Regulation on Managed Care*, N.Y. TIMES, Mar. 10, 1997, at A1 (reporting that Congress, anticipating public frustration, is likely to dictate some industry practices, as it did during its 1996 session).

89. Indeed, neo-conservative critics argue that those who propagate the notion of a politics of ideas, rather than of interests, themselves constitute an increasingly powerful special interest—a "new class." See *supra* note 16.

self-interest of well-organized provider groups (for example, pollution-control manufacturers, teachers unions, health care providers) often coincides with these diffuse collective interests.⁹⁰ Especially when one considers the far greater complexity of social and political problems today, the United States is probably a better governed, less corrupt, more tolerant, and more just society than at any time in its history.⁹¹

Second, although well-organized, well-funded groups start with important political advantages, those advantages by themselves are seldom decisive. Political resources take many different forms. They include not only money but also the number and intensity of supporters, quality of leadership, strategic thinking, institutional embeddedness, allies among policymaking elites, name recognition, skill in using the media, political skill, a sense of timing, reputation, rhetorical effectiveness, legal authority or leverage, the appeal of attractive ideas and anti-special interest arguments, and just plain luck.⁹²

The recent and rapid decline of the political fortunes of the tobacco industry is a dramatic case in point. This industry has long been among the wealthiest, best-connected, effectively organized, legally impregnable, aggressively managed, tactically sophisticated, and politically powerful corporate groups in the United States, indeed in the world. Yet its adversaries—who are poorly endowed in terms of financing, legal precedents, and the support of leading politicians—have nevertheless succeeded in turning public opinion decisively against the industry, transforming its political and economic prospects.⁹³ This does not mean, of course, that the war against the tobacco industry is over or that the industry will not continue to win some important battles. But the tobacco example indicates the variety of political resources that skillful advocates can press into service and the remarkable openness and fluidity of American politics.

In the United States these resources are distributed widely enough that the vital interests of even poor people—to take what is surely the hardest case for the argument that I am making about the broad distribution of political influence—have gained and sustained a considerable measure of protection

90. See, e.g., R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 37* (1983); Bruce A. Ackerman et al., *Toward a Theory of Statutory Evolution*, 1 J.L. ECON. & ORG. 313, 320 (1985).

91. For a comparison of social conditions in 1965 and 1995 documenting significant improvements in these and other areas, see Peter H. Schuck, *Alien Ruminations*, 105 YALE L.J. 663, 2007-12 (1996) (book review). For a more rueful comparison of the 1950s and the 1990s, one that argues that the decline of authority caused by Americans' obsession with increased personal choice has produced social disintegration, see ALAN EHRENHALT, *THE LOST CITY: DISCOVERING THE FORGOTTEN VIRTUES OF COMMUNITY IN THE CHICAGO OF THE 1950S* (1995).

92. See ETHNIC IRONIES: *LATINO POLITICS IN THE 1992 ELECTIONS*, at xi-xiii (Rodolfo O. de la Garza & Louis DiSipio eds., 1996) (arguing that luck is important condition for political influence and that it magnified Latino influence in 1992 elections).

93. See Kevin Sack, *For the Nation's Politicians, Big Tobacco No Longer Bites*, N.Y. TIMES, Apr. 22, 1997, at A1.

In Praise of Factions

despite their relatively low level of political participation and their small share of the population. This is demonstrated by the large growth in overall income and in-kind transfers to the poor (the “safety net”) during the last three decades, a growth that was maintained even during the Reagan-Bush years and will remain at high levels even after the implementation of federal welfare reforms enacted in 1996.⁹⁴ At the same time, as Paul Peterson has shown, the share of federal spending for programs favored by special interests (as he defines them) declined significantly during the 1980s under the pressure of a more centralized politics of budgetary constraint, tax reform, and programmatic retrenchment: “Although other components of the national budget were holding their own or expanding, these [special interest] programs were being cut by 70%—from 5.3% to 3.7% of GNP—a reduction back down to the levels that had existed in 1962.”⁹⁵ An important reason for this reduction in special interest influence over the budget has been Congress’s imposition of budgetary and tax procedures that require proponents of additional budget or tax expenditures to maintain revenue neutrality by proposing offsetting reductions in other areas.⁹⁶ As I discuss below, this establishes a competitive, zero-sum game among special interests that both exposes opportunities for policy

94. The enactment and vast expansion of the food stamp program has virtually eliminated hunger from American life. See R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 183-232 (1994). Although the real value of AFDC benefits eroded during the 1980s, Medicare and Medicaid expenditures grew rapidly, helping many low-income people. See Schuck, *supra* note 91, at 2011. Since 1965, the poor have seen an increase in their standard of living. See Daniel T. Slesnick, *Gaining Ground: Poverty in the Postwar United States*, 101 J. POL. ECON. 1, 16 tbl.3 (1993). For data on the growth of social welfare spending, see STATISTICAL ABSTRACT, *supra* note 87, at 368-69.

The 1996 welfare reform legislation, which will reduce federal AFDC expenditures, will have relatively little effect on the larger entitlement programs. Indeed, some of these programs, such as Medicaid, Medicare, and Social Security (and possibly food stamps), are expected to grow substantially in the future for demographic reasons. Although President Clinton has proposed capping Medicaid payments, the governors are strongly opposed to such limits. See Robert Pear, *Governors Oppose Clinton Proposal for Medicaid Cap*, N.Y. TIMES, Jan. 31, 1997, at A1. Moreover, additional state expenditures on safety net programs may fill some of the gap created by the new legislation. See Jennifer Preston, *Trenton Approves Bill Overhauling Welfare System*, N.Y. TIMES, Feb. 21, 1997, at A1 (reporting that New Jersey legislature approved legislation proposed by Gov. Whitman continuing cash benefits and Medicaid for legal immigrants and providing other coverage no longer required or funded by federal government). Hence total safety net expenditures are likely to remain at or near the historically high levels achieved before the 1996 changes were enacted.

Recent research comparing a variety of poverty rate measures across nations indicates that the United States (along with Canada and Luxembourg) has the lowest absolute poverty rate, as measured by equivalent purchasing power, in the world. When measured by relative poverty rates, as determined by incomes below a given percentage of average income, the United States is one of the highest among industrialized nations. See McKinley L. Blackburn, *Comparing Poverty: The United States and Other Industrial Nations* (Feb. 7, 1997) (unpublished manuscript, on file with author).

95. Peterson, *supra* note 17, at 337.

96. See Edward A. Zelinsky, *Text, Purpose, Capacity, and Albertson’s*, 2 FLA. TAX REV. 717, 729 (1996) (arguing that under constraint of revenue neutrality requirements congressmen otherwise indifferent to granting special interest tax benefits are forced to attack such benefits to pay for desired programs).

improvements and minimizes the inefficiency costs that they can exact through their lobbying activities.⁹⁷

Again, I certainly do not mean to deny that the funds that special interests invest in political influence do not have an effect on gaining preferred access to decisionmakers. The point, rather, is that many other resources, which special interests may lack, also play their parts in influencing policy outcomes. Even in the area of campaign finance, where the correlation between expenditures and outcome is ostensibly strong, the causal relationship is weaker and far more complicated than the standard account suggests.⁹⁸ Political scientist Graham Wilson's finding that economic groups in the United States are less powerful than those in western Europe whereas noneconomic interests in the United States are more powerful,⁹⁹ helps us to view the question of special interest influence in a more comparative perspective.

Third, when a group fails to gain approval for a policy change that it advocates, it is hard to know precisely why its effort failed in the absence of a detailed political analysis of the issue. Proponents of rejected reforms tend to blame their defeats on "politics as usual" or "powerful interests," but the truth is usually more complicated. A group may have lost because its support was weak; because its support was strong but too diffuse or unmobilized; because its key sponsors had other, higher priorities; because its ideas were unmeritorious; because its adoption was impeded by its opponents' strategic manipulation of voting rules; because an unexpected political contingency or social event intervened; because its coalition fragmented; because of the inertial force of the status quo; or for any number of other reasons. Too many diffuse, poorly-funded interests have managed to win political struggles and too many concentrated, well-funded ones have been defeated to justify attributing outcomes to any single dimension of politics such as financial advantage. Such a simplistic approach, for example, does not begin to explain either the many victories of consumer, environmental, women's, poverty, economic deregulation, and other reform agendas (again, even in the Reagan-Bush years). Nor can it adequately explain the many recent instances in which traditionally powerful groups such as the chemical industry, the banking industry, the American Medical Association, organized labor, broadcasters, pharmaceutical manufacturers, interstate truckers, defense contractors, and agribusiness failed to get their way. In each of these cases (and in numerous others), reformers successfully mobilized populist, anti-special interest sentiment as well as other

97. See discussion *infra* Part IV.

98. See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1067 (1996) ("It seems clear that many candidates win despite spending less than their opponents, and that the correlation between spending and success is not as strong as other indicators, such as the correlation between incumbency and success.").

99. See Graham K. Wilson, *American Interest Groups in Comparative Perspective*, in POLITICS OF INTERESTS, *supra* note 17, at 80, 95.

In Praise of Factions

political resources to defeat better funded, more highly organized forces. As noted earlier, this sentiment is itself a valuable political asset in American politics.¹⁰⁰

There are reasons for thinking that the political system today is more resistant to the consistent domination of particular special interests than ever before. A number of recent developments exert strong countervailing pressures. An increasingly global economy has sharply eroded the economic and political power of domestic industries and labor unions traditionally protected by legal and political arrangements. More effective capital markets have imposed harsher penalties on inefficiency. A more competitive political system at all levels of government and in all regions of the country has made the system more responsive and accountable to voters' preferences. The extraordinary proliferation of public interest advocacy groups has provided decisionmakers with a broader diversity of values, information, political pressures, oversight, and coalitional possibilities, as has the more active participation of religious groups in politics. The maturation of a huge nonprofit sector has sustained competition with for-profit providers in many areas of the economy such as health care, long-term care, education, child care, news and entertainment, housing and community development, and many other social services.¹⁰¹ More critical, professional, and effective mass media, the growing use by citizens of new communication technologies to facilitate political education and action, and the greater limits on groups' ability to make political deals behind closed doors, have increased the public's ability to monitor, expose, and discipline the group bargaining process. A more highly educated citizenry now demands from both the polity and the economy more choices, openness, and competition, as well as higher standards of integrity and superior performance.

I certainly do not mean to suggest that each of these developments is an unalloyed social gain. They have all profoundly reshaped our society in ways that have left some victims in their remorseless wakes, even as they have improved the lives of most Americans. Indeed, they all entail some real social dangers. These changes will inevitably spawn new centers of influence—for example, powerful media conglomerates—whose growing hegemony must be combatted. The changes are also threatening certain values—for example, the idealized doctor-patient relationship and the supply of health care by disinterested providers—whose weakening many of us regret. Higher ethical standards are likely to produce more ethical failures. Politicians who are more closely monitored may display less political courage. My point, rather, is that

100. See *supra* Part I.C.

101. Since 1982, the number of employees in the nonprofit sector has grown by a third, compared with 25% growth in government and private-sector employment. See Judith Miller, *Gift Enables Harvard to Establish Center for Study of Nonprofit Sector*, N.Y. TIMES, Apr. 12, 1997, at A12. In 1994, some 16.4 million people worked or volunteered for some 1.4 million nonprofit groups. See *id.*

these developments have made it far more difficult than in the past for a small constellation of special interests to exercise enduring hegemony in contemporary society.

Nevertheless, the traditional American conviction that such special-interest hegemony poses an imminent, mortal threat to our polity and economy is so conventional and deeply entrenched that I shall not belabor it further here. Instead, I shall proceed to discuss the democratic virtues of special interest groups, which are little appreciated by most commentators. These virtues can be grouped into four general categories: participation, social intelligence, liberty, and the public interest.

A. *Participation*

Modern polities bear little resemblance to the Greek *polis*. Direct democracy through a mass assembly of all citizens is no longer either feasible or even desirable.¹⁰² Despite technological advances that have dramatically reduced the costs of communicating with one another, we still live in a world in which the cost to individual voters of acquiring information relevant to political choice or action remains very high relative to the marginal benefits to them of that information.¹⁰³ Special interest groups perform an exceedingly important intermediating function in such a world. They can exploit economies of scale in information by monitoring political developments of interest to their members, conducting research, educating their members, and the like. In addition, they represent their members in the political process by communicating their views to policymakers, forming political alliances, and bargaining on their members' behalf. Finally, factions facilitate participation by providing fora and occasions for purposeful, discursive interaction among members in common undertakings. Values are clarified, social faculties are developed, and political education is advanced through these interactions.¹⁰⁴

The immensity and anonymity of the polity as a whole encourage free-riding and passivity. The relatively small size of special interest groups enable them to avoid these obstacles to political participation. Although these groups are seldom robustly democratic in their internal governance,¹⁰⁵ many are

102. On the other hand, some interesting experiments are seeking to use modern technology to facilitate public deliberation about policies and candidates. *See, e.g.*, JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION* (1991).

103. The classic demonstration of this is ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238-59 (1957).

104. Interacting within special interest groups, individuals learn communication and organizational skills that can be readily transferred to political activities outside those groups. *See* Sidney Verba et al., *The Big Tilt: Participatory Inequality in America*, *AM. PROSPECT*, May-June 1997, at 74, 79. Although Verba et al. stress that low-income citizens participate at lower rates than more affluent ones, *see id.*, they do not show that the resulting policies adversely affect the interest of the former compared with the policies that might otherwise be adopted.

105. *See supra* text accompanying notes 68-71.

In Praise of Factions

nonetheless small enough for members to perceive the personal and social consequences of the group's actions and to take some responsibility for them. Precisely because these groups' concerns are more partial and narrowly defined than those of the polity as a whole, they are more likely to engage the interests and energies of voters with severely limited attention spans, time, and political knowledge—voters whose most vital concerns are relatively narrow. For the vast majority of citizens—those for whom political action is neither a profession nor a consuming passion—meaningful participation must occur at levels that can effectively engage those limited, specialized capacities and interests. These levels are located between the generally remote, impersonal realm of issue-oriented politics and public values, on the one hand, and the more affective, parochial domains of family and friendship, on the other. Special interest groups, particularly those organized locally, usually operate at these intermediate levels.

The size and focus of special interest groups create a deep tension for the polity as a whole. On the one hand, the greater capacity of these groups to elicit citizen involvement is an important democratic virtue. On the other hand, as the earlier discussion of the inefficiency objection suggested,¹⁰⁶ this same capacity confers on such groups advantages in the political bargaining process that may adversely affect the polity. The size of the group may be small enough to make it politically effective in obtaining policies that benefit its members, but large enough that securing these benefits imposes very high costs on the rest of the society.¹⁰⁷ The agribusiness and defense-procurement lobbies exemplify this problem. The solution, however, is not to diminish the activities of special interest groups but to foster a politics in which their attempted depredations are exposed and challenged (as they increasingly are) by other groups pursuing contrary interests and by groups articulating broader ideals of public welfare (in the examples just given, the ideals of social efficiency, environmental protection, and civilian control of the military).

Recent work by political scientist Robert Putnam argues that citizen participation in public life is waning in the United States, and that the stock of "social capital"—the accumulated habits of trust, cooperation, and common purpose in society—is declining. In an article with the evocative, only partly figurative title *Bowling Alone*,¹⁰⁸ Putnam maintains that this depletion of social capital has impaired the vigor of our democratic life. Although some of

106. See *supra* text accompanying notes 76-84.

107. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 41-44 (1982). For a critique of Olson's book by the author of this Essay, see Peter H. Schuck, *The Politics of Economic Growth*, 2 *YALE L. & POL'Y REV.* 359 (1984) (book review).

108. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 *J. OF DEMOCRACY* 65 (1995). Putnam has developed and applied the conception of social capital more extensively in ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993).

Putnam's factual claims and inferences are controversial,¹⁰⁹ a more pertinent issue here is whether participation in special interest groups—as distinct from the kinds of local voluntary organizations involving face-to-face encounters and the building of trust that Putnam rightly emphasizes—counts in the stock of social capital. I believe that it should and that the much-remarked profusion of single-issue and other special interest groups, many religiously based and not all locally based, should be welcomed as a sign of greater civic engagement and participation, rather than lamented as a portent of political decay.¹¹⁰ By raising such questions about Putnam's analysis, however, I do not at all disagree that social capital, understood as civic participation in its many organizational forms, is immensely valuable or that its increase is desirable. The important questions are how and by which institutions the desired increase in social capital can best be achieved, questions that I address directly in Part IV.

Criticism of special interest politics is easy and often warranted; the narrowness, injustice, and inefficiency that this politics sometimes produces are not pretty sights. What is far more difficult, however, is to provide a satisfactory answer to the “compared to what?” question. Some possible alternatives to contemporary pluralism would endanger the democratic project,¹¹¹ while other more promising ones seem to elude our grasp. For example, a system that could exploit the political virtues of special interest groups while also promoting effective party organizations with more general, integrative purposes and capacities would be most desirable. Unfortunately, no one has figured out how to generate such a system under contemporary social

109. See, e.g., Nicholas Lemann, *Kicking in Groups: The Alleged Decline of America's Communal Culture*, ATLANTIC MONTHLY, Apr. 1996, at 22, 25 (arguing that perhaps “the dire statistics in *Bowling Alone* reflect merely a mutation rather than a disappearance of civic virtue, because civic virtue has found new expressions in response to economic and social changes” and citing increase in soccer leagues, number of restaurants, and small businesses as examples); Katha Pollitt, *For Whom the Ball Rolls*, NATION, Apr. 15, 1996, at 9, 9 (arguing that Putnam's “whole theory is seriously out of touch with the complexities of contemporary life”).

According to Pollitt, the trend discussed by Putnam is not to be mourned:

It would be amazing if league bowling survived the passing of the way of life that brought it into being, nor am I so sure we need mourn it. People still bowl, after all. In fact they bowl more than ever, . . . [a]nd despite Putnam's title, they don't bowl alone. They bowl with friends, on dates, with their kids, with other families. The bowling story could be told as one of happy progress: from a drink-sodden night of spouse avoidance with the same old faces from work to temperate and spontaneous fun with one's intimate friends and relations.

Id.; see also Andrew Greeley, *The Other Civic America: Religion and Social Capital*, AM. PROSPECT, May-June 1997, at 68, 73 (showing increase in volunteering since 1981, especially among younger people and much of it through religious organizations).

110. For discussions of religiously based political activity, see STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 67-82 (1993); and JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 89-95 (1991).

111. One worrisome possibility, for example, is a mass politics mobilized spasmodically by centralized institutions and actors through their skillful, cynical manipulation of the mass media. Some critics have suggested that our political system is moving rapidly in this direction. See, e.g., KEVIN PHILLIPS, *ARROGANT CAPITAL* at xi-xviii (1994).

In Praise of Factions

conditions. Most, though not all, of the measures proposed to regulate or fine-tune special interest influence over the political process—including, notably, many proposals seeking to reform campaign finance—would be unconstitutional, unwise, or ineffective.¹¹² Given that realistic constraint, participation in special interest groups, despite its flaws, may still be among the best vehicles for sustained citizen involvement in politics.

Special interest groups' growing use of direct marketing techniques to educate and mobilize more citizens through lower-cost information technologies is an important force driving and shaping civic participation today. Many of the risks of these techniques and technologies are clear enough (child pornography and invasion of privacy, for example), but we should not pretend that we can yet understand, much less appraise, all of their effects and implications. Even granting their defects in eliciting democratic participation, the most likely alternative is not a return to the intense civic engagement of the New England town meeting or the Lincoln-Douglas debates.¹¹³ The more realistic prospect is a growing passivity, boredom, and lack of involvement of much of the electorate—a development of which the low voter turnout in the 1996 elections may be a grim harbinger.¹¹⁴ This disengagement may well constitute a far greater threat to democratic values than the hucksterism of the political marketplace that (technological differences aside) has characterized American politics since the Jacksonian era ushered in mass electoral appeals.

B. *Social Intelligence*

Sound public policy depends, above all, on a swift, constant flow of accurate, policy-relevant information between citizens and government decisionmakers. Here, information is more than a resource for public participa-

112. New disclosure requirements, discussed briefly *infra* at note 154 and accompanying text, could almost certainly improve the system without violating constitutional principles. As I have mentioned, however, mandatory *non*-disclosure, if enforceable, might also be an improvement. See *supra* note 84.

113. Historian David Donald reports that the Lincoln-Douglas debate held at Ottawa, a town of 9000 people, 80 miles from Chicago, attracted 10,000 spectators who journeyed there by foot, horseback, carriage, boat, and rail. As there were no seats, these spectators stood during the three-hour debate. See DAVID H. DONALD, *LINCOLN* 215-16 (1995).

114. Voter turnout in 1996 was 48.8% of the voting-age population. See David A. Bositis, *The Farrakhan Factor: Behind the Big Increase in Black Men Voting*, WASH. POST, Dec. 8, 1996, at C1 (reporting turnout decline from 55.2% in 1992 to the lowest rate since 1924). The proportion of Americans who contribute money to campaigns, on the other hand, has almost doubled during the past 20 years. See Verba et al., *supra* note 104, at 75.

It should be noted that some studies of non-voting in the United States reveal somewhat less dismaying explanations for this phenomenon (for example, the relatively large number of elections held at inconvenient times, the—correct—belief that one's vote will not affect the outcome, and a degree of acquiescence or satisfaction that lowers the voter's stakes in the outcome). These studies also reveal that the political preferences of voters and non-voters are quite similar, and that non-voters tend to be more ignorant about public issues than voters. The classic study is RAYMOND F. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* (1980). See also E.J. Dionne, Jr., *If Nonvoters Had Voted: Same Winner, But Bigger*, N.Y. TIMES, Nov. 21, 1988, at B16.

tion; it is also an essential ingredient of socially rational policymaking. Special interest groups are among the most important sources of the information that decisionmakers so desperately need. This fact, rather than being a cause for regret, underscores the vitality of the private sector in American life. If, for example, the government wants to know about the nature of housing needs and the cost of expanding or altering the housing stock, it cannot simply consult with public housing authorities, public interest groups concerned with affordable housing, or even the policy research staff at HUD. It must also turn to the private housing market, which utterly dwarfs the public housing sector in information, expertise, analysis, and resources, and possesses powerful incentives to get the information right, at least for its own profit-seeking purposes. The same is true of transportation, health care, education, and virtually every other area of public policy.

Before officials use private information for policy purposes, of course, they should review it for bias due to its possibly interested source. Where feasible, they should also test the reliability of this information against other data. Frequently, however, officials must choose on the basis of a dearth of reliable information rather than having the benefit of competing versions of it; moreover, the best available information may come from an interested source. Officials can sometimes sponsor new policy research and resourcefully seek better, more disinterested information, but these options are not always open to them. Indeed, it is seldom clear what the term "disinterested" means in the highly competitive, adversarial, politicized process in which most important policymaking occurs. Certainly, the fact that research was conducted or sponsored by the government, academics, or public interest groups hardly assures public acceptance of the findings as competent and unbiased.¹¹⁵ In the end, it is the relative openness of the policymaking process, rather than the exclusion of special interest information or any other alternative, that provides the most effective, publicly acceptable safeguard against bias.

In a democracy, the ability of public policy to reflect voters' preferences is an essential element of social intelligence as well as of democratic responsiveness. But it is not enough for policymakers to know which outcomes voters want. Far more important, they must also discern the *intensity* of voters' preferences—that is, not what voters want in the abstract but how strongly they want it and what they are willing to sacrifice in order to obtain it. This vital political intelligence is hard to obtain. While a competitive marketplace can readily register the intensity of consumers' preferences, only a political

115. An example is the current dispute over the reliability and objectivity of government-sponsored research on the so-called Gulf War Syndrome. See Eric Schmitt, *No Proof, But New Clues on Gulf War Illness*, N.Y. TIMES, Jan. 12, 1997, § 4 (Week in Review), at 2 (reporting presidential advisory committee's finding that "Pentagon's initial inquiry into [reports of chemical exposure in Gulf War] was so inept that much more research was needed").

In Praise of Factions

bargaining process in which alternative outcomes are “priced” through exchanges among the participants can measure how intensely voters feel about policy outcomes.

Special interest groups provide an important index of voters’ willingness to “pay” for their policy goals. Being a member of a group usually entails some cost; members’ actions on behalf of the group such as writing letters, grass roots work, reading-group materials, and lobbying are even more costly to them. For this reason, voters’ group memberships are a proxy—a crude one, to be sure—for the intensity of their policy preferences. So long as “exit” from a group is possible, preference intensity can be viewed as a function of the groups’ resources, the costs of membership, their ability to mobilize support, their political effectiveness, and so on.¹¹⁶ Where members’ exit from the group is not feasible¹¹⁷ or where group membership is virtually costless,¹¹⁸ the fact of group membership is a less significant marker of their feelings about its goals, and the same inferences about intensity cannot be drawn. Skillful politicians learn to gauge these factors as they gain knowledge about the various groups that are actively concerned with particular policy issues. As we have seen, this process of assessment creates a significant, but not necessarily disabling, political disadvantage for those preferences around which groups cannot easily organize—either because they are diffusely or weakly held, or because the individuals who share those preferences lack political resources.¹¹⁹

Special interest groups engender social learning, often in dramatic ways. For example, the insistence of anti-war groups that the Vietnam War was a tragic error led to President Johnson’s decision not to seek reelection and to a rapid reversal of policy direction. (Ending the war itself, unfortunately, took much longer). Many different groups—insurers, health care providers, policy analysts, and others—worked to persuade the public that the Clinton national health plan was misguided, as in some respects it was. Other groups—environmentalists are a notable example—succeeded in marshalling public opposition to central elements of the Republican Party’s Contract With

116. For the classic discussion of the economic significance of organizational exit, see ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

117. Examples include “closed shop” unions, corporate contributions to charities or political campaigns, and compulsory contributions to agricultural cooperatives’ advertising. On the latter, see *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1374 (9th Cir. 1995), *cert. granted* 116 S. Ct. 1875 (1996), and *cert. denied* 116 S. Ct. 1876 (1996).

118. See *supra* note 72. The political influence of the AARP, it appears, derives not simply from its number of members but also from its skill in representing and mobilizing them on particular policy issues, such as the swift repeal in 1989 of the mandated catastrophic-care coverage under Medicare, see Medicare Catastrophic Coverage Repeal Act of 1989, Pub. L. No. 101-234, 103 Stat. 1979 (codified in scattered sections of 42 U.S.C.) (repealing Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683), and the periodic easing of the limits under Social Security on retirees’ earned income, see, e.g., Senior Citizens’ Right to Work Act, 42 U.S.C.A. § 403 (West 1996).

119. See *supra* Part II.B.

America, which initially dominated legislative activity in the 104th Congress. Groups advocating the interests of Social Security beneficiaries have educated the public about long-term threats to the program's financial integrity. Disability-rights organizations have helped to transform public attitudes toward the physically and mentally handicapped.

In countless other cases, special interest groups have brought politicians and the general public around to different views about policy issues. Whether one regards these as examples of valuable public education or of irresponsible distortion may depend largely on one's views about the merits of these controversies. What is certain, however, is that only special interest groups have both the incentives and the resources to perform the requisite tasks of analysis, mobilization, communication, and implementation. In a democracy, such groups are perhaps the main transmission belt for the kind of social learning that is essential to a fluid, responsive policy process, one not unduly dominated by the parochial interests or myopic, anachronistic perceptions of policymakers.

C. *Liberty*

More than 160 years ago, Alexis de Toqueville noted the importance in the United States of the institutions of civil society,¹²⁰ which today are also called "mediating institutions."¹²¹ Such institutions—the family, churches, and other voluntary organizations—stand as bulwarks separating the isolated individual from the powerful state and helping to integrate those individuals into the larger society. These institutions not only represent certain of the individual's interests in state councils, as described above; they also resist the state's encroachments on those interests, some of which—civil liberties, civil rights, and private property, for example—are essential to the preservation and expansion of the individual's liberty and autonomy.

Special interest groups are important mediating institutions—less central than family, to be sure, but significant nonetheless. They are a source of political intelligence, education, and mobilization, helping members to identify threats to their vital interests, to formulate effective policy responses, and to defend those interests in cooperation with others. Labor unions and community organizations have traditionally played this role, as have the media and a rich variety of lobbying and ideological organizations. By routinizing organized

120. See ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 513-17 (George Lawrence trans., J.P. Mayer ed., Perennial Library 1988) (1840). Toqueville, who hoped to influence the development of Louis Philippe's bourgeois regime in France, extended his analysis beyond the United States to all liberal polities.

121. See PETER BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* (1977). Indeed, the term is now quite ubiquitous. See, e.g., Calabresi, *supra* note 19.

In Praise of Factions

opposition to the proposals and blandishments of politicians and the state, these groups legitimate such opposition and protect the liberties of their members. And by mustering support for proposals that their members favor, they advance the members' conceptions of liberty.

Special interests, of course, can also threaten individuals' liberty if their power over individuals is unchecked. The use of public authority to limit private power is essential to the preservation of liberty to the extent that competition, social and religious values, disclosure and publicity, and other constraining forces are inadequate safeguards. Fortunately, many recent social developments—political, technological, economic, legal, and ideological—make it less likely that special interests can achieve and maintain the level of arbitrary power over individuals' lives that they sometimes exercised in the past. Such changes, for example, have broken the nearly monopolistic hold that network television had for decades on Americans' access to home entertainment and national news. Company towns are largely a thing of the past, marginalized by a more mobile labor force, legal protections, investigative journalism, corporate reputational concerns, and other factors.¹²² These same forces have also limited, although certainly not eliminated, race, religion, and gender discrimination in the workplace and most other areas of American life. Legal controls have reduced the ability of government and powerful private groups to punish dissidents for their political views. Again, the important point is not that special interests never oppress individuals but that large social forces are increasingly constraining their power to do so.

D. *The Public Interest*

Invoking the notion of the “public interest” in support of a policy proposal is a commonplace of political rhetoric. Absent an articulated, more general theory of the public interest, utterance of this phrase usually means little more than that the speaker strongly favors the proposal. Although many political theories, as noted earlier, advance substantive conceptions of the public interest, liberal theories usually define the public interest in terms of fair *process*—a process of representation and bargaining,¹²³ of dialogue,¹²⁴ or of unbiased choice.¹²⁵ Such theories sometimes yield substantive principles of justice—for example, Rawls' difference principle,¹²⁶ market freedom,¹²⁷

122. For one example, see Peter H. Schuck & Harrison Wellford, *Democracy and the Good Life in a Company Town: The Case of St. Mary's*, HARPER'S, May 1972, at 56.

123. See *supra* notes 15-16 and accompanying text.

124. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., MIT Press 1996).

125. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

126. See *id.* at 75-83.

127. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 297-334 (1974).

or distributive equality¹²⁸—but these principles tend to be highly abstract, and they remain contested even within the community of liberal theorists. Their specific policy implications are even more controversial.

In a procedural conception of the public interest, special interest groups play an essential role. As a practical and perhaps even as a theoretical matter, such groups are necessary to any fair and effective process of representation, bargaining, and political dialogue. I believe that these processes have produced a polity that is more just, diverse, well-governed, economically efficient, inclusive, and dynamic than it was in the past, although it remains plagued by serious problems, especially the persistence of a large, hopeless urban underclass.¹²⁹ Even if one views public policy trends more critically than I do (as many readers doubtless will), it would be hard to show that this procedural conception of the public interest, with the role that it assigns to special interest groups, has utterly failed or is responsible for the problems that remain.

IV. REMEDIES

James Madison, in *Federalist #10*, saw only “two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.”¹³⁰ I have maintained here that these “mischiefs” largely turn out either to be exaggerated or to constitute democratic virtues. But even in Madison’s own terms, the remedies are decidedly limited: The causes of faction, he concluded, cannot be eliminated in a free society; he focused therefore on controlling its adverse effects. His famous remedy was an extended, commercial republic in which the number of competing interests would be sufficiently large and diverse that they would have to counter one another, thereby preventing the formation of a permanent majority with the power to oppress minorities.

Madison’s solution has proved brilliantly prescient. It resembles the remedial mantra of the Supreme Court in First Amendment cases—that the cure for error and falsehood is not government restriction of speech, but *more* speech—which has also served us well. In the same way, Madison seemed to believe that the dangers of special interests could best be minimized if the political process encompassed more of them. I emphatically agree, even as I recognize—as Madison did not—that the multiplication and diversification of interests carries an important cost: They produce an increasingly complex,

128. See, e.g., RONALD DWORKIN, LAW’S EMPIRE 297-98 (1986); Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

129. See Schuck, *Alien Ruminations*, *supra* note 91.

130. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

In Praise of Factions

opaque political process, which ordinary citizens cannot readily understand.¹³¹ The public's bewilderment and confusion may partly explain its growing alienation from government. What can be said with confidence is that the growing incomprehensibility of contemporary politics and policymaking to ordinary Americans would be even more so if special interest groups did not play the intermediation role that I described earlier.¹³²

Another risk of multiplying and diversifying interests is that of political stalemate or even breakdown. In such a case, the pluralistic system can simply become overloaded, generating more political energy—more demands, conflicts, and uncertainties—than the institutions of a limited, democratic government can effectively handle. As the number and variety of conflicts for which political solutions are required increases, so too do the risk and adverse social consequences of such a stalemate. This kind of marasmus may be occurring today in France, Germany, and some other advanced welfare states in which the public sectors have grown so large and the conflicts so intractable that even the leaders of these nations seem to recognize that their governance capacities are stretched to the breaking point, making it almost impossible for necessary reform decisions to be made.¹³³

To be sure, American commentators frequently warn of possible political paralysis in the United States that would impede necessary reforms.¹³⁴ This is certainly a danger worth worrying about, but the important fact is that it has not yet occurred. Indeed, it is striking how many complex, controversial issues Congress has managed to address and resolve (usually for better, sometimes for worse) in the last two decades even as special interest groups—much to the consternation of most commentators—proliferated and became more politically engaged.¹³⁵ The period since the early-1970s has been one of truly remark-

131. Interestingly, Madison viewed a complicated, divided government full of checks and balances as a way to curb the influence of factions. See Sunstein, *supra* note 8, at 43-45 (discussing THE FEDERALIST NO. 51 (James Madison)).

132. See *supra* Part III.A.

133. See, e.g., William Drozdiak, *German Jobless at Post-WWII High: Recession's Sweep Provokes Calls for Strikes, Concern for Single Currency*, WASH. POST, Jan. 10, 1997, at A28; Thomas Kamm, *French Labor Unrest, Austerity Budget Renew Doubts About Monetary Union*, WALL ST. J., Aug. 29, 1996, at A4; Thomas Kamm & Cacilie Rohwedder, *Continental Divide: Many Europeans Fear Cuts in Social Benefits In One-Currency Plan*, WALL ST. J., July 30, 1996, at A1; Anne Swardson & Charles Trueheart, *French Leaders Face Autumn of Discontent: Opposition Groups Plan to Protest Benefit Cuts*, WASH. POST, Sept. 1, 1996, at A37.

134. Retiring politicians who have seen the problem first-hand often issue such warnings. See, e.g., David S. Broder, *Three Disillusioned Democrats*, WASH. POST, Nov. 10, 1995, at C7 (quoting Sen. Nunn); Helen Dewar, *Bradley Won't Run for Reelection to Senate in 1996*, WASH. POST, Aug. 17, 1995, at A1.

135. Some examples at the federal level include the substantial, if not total, economic deregulation of basic industries such as telecommunications, financial services, energy, trucking, railroads, buses, and airlines; renovation of the welfare and social security programs entrenched since the New Deal; reform of the federal budgeting and intergovernmental relations systems; a dramatic reduction in the military's share of the national economy and budget; a vast expansion of the national park and wilderness systems; and a fundamental overhaul of the major tax, immigration, housing, agricultural,

able policy innovation at all levels of government. The new politics of public policy¹³⁶ is unquestionably more complex and hence more difficult than the old, and the growth of special interest groups surely has much to do with this change. The evidence demonstrates, however, that the process remains manifestly viable and effective nonetheless.

In this period, and especially since the Reagan-era recession that ended in 1982, the U.S. economy has been utterly transformed. As it happens, this transformation directly tests—and seems sharply to refute—what is surely the most important and arresting prediction that Mancur Olson and most other public choice theorists have made concerning the putatively pathological tendencies of special interest groups in politics: that such groups would succeed in using their narrow organizational advantages to deform the political process in ways that extract narrow economic benefits for them by imposing massive inefficiencies on the rest of society.¹³⁷ *In fact, during precisely the period when special interest groups were rapidly proliferating, many of the most important sectors of the U.S. economy—transportation, automobiles, steel, banking, energy, telecommunications, and (arguably) health care—were growing markedly more efficient.*¹³⁸ *Moreover, these efficiency gains, which*

transportation, campaign finance, environmental, intellectual property, and civil rights laws. Reforms at the state level are equally impressive. *See generally* CARL VAN HORN, *THE STATE OF THE STATES* (3d ed. 1996); LARRY SABATO, *GOODBYE TO GOOD-TIME CHARLIE: THE AMERICAN GOVERNOR TRANSFORMED, 1950-1975* (2d ed. 1983).

136. This phrase is the title of a book that reviews some of the major developments in policymaking during this period. *See* *THE NEW POLITICS OF PUBLIC POLICY* (Marc K. Landy & Martin A. Levin eds., 1995).

137. *See* OLSON, *supra* note 107, at 44-46 (1982). Olson's theory has been popularized more recently in JONATHAN RAUCH, *DEMOSCLEROSIS* 23-31 (1994). Earlier in this Essay, I discussed another erroneous prediction of this version of public choice theory: that free-rider problems would prevent the formation, and certainly the political effectiveness, of public interest groups representing diffuse public values. *See* text accompanying notes 52-58.

138. *See* Clifford Winston, *Economic Deregulation: Days of Reckoning for Micro Economists*, 31 J. ECON. LITERATURE 1263, 1274-75 (1993) [hereinafter Winston, *Economic Deregulation*] (observing that in nine industries studied—railroads, trucking, air transport, banking, natural gas, petroleum, telecommunications, cable television, and securities brokerage—which account for about 10% of GDP, deregulation produced price reductions, increased output, and service quality improvements); Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation* (Sept. 1996) (unpublished manuscript, on file with author) (projecting additional efficiency gains over time in these industries as well as electric utilities, as longer term effects of deregulation occur). A number of studies have demonstrated large efficiency gains in the steel industry. *See, e.g.,* DONALD F. BARNETT & ROBERT W. CRANDALL, *UP FROM THE ASHES: THE RISE OF THE STEEL MINIMILL IN THE UNITED STATES* (1986); Robert W. Crandall, *From Competitiveness to Competition: The Threat of Minimills to Large National Steel Companies*, 22 RESOURCES POL'Y, 107, 116 fig.7 (1996) (observing enormous reduction in price of industry's bellweather product, cold rolled sheet steel). Other studies have shown the same with respect to the telecommunications industry. *See, e.g.,* Robert W. Crandall & Jonathan Galst, *Productivity Growth: The Telephone Industry Since 1984*, in *THE SERVICE PRODUCTIVITY AND QUALITY CHALLENGE* 391, 402 tbl.5 (Patrick Harker ed., 1995) (observing that productivity growth has accelerated due to competition and technological change since breakup of AT&T). The same is true for the automobile industry. *See, e.g.,* PAUL INGRASSIA & JOSEPH B. WHITE, *COMEBACK: THE FALL AND RISE OF THE AMERICAN AUTOMOBILE INDUSTRY* (1994) (discussing resurgence of American auto industry in early-1990s); James Bennet, *Auto Makers Begin to Rethink Prices*, N.Y. TIMES, Jan. 23, 1995, at D1 (reporting that "auto makers have achieved enormous productivity gains and other cost decreases in

In Praise of Factions

*are an important cause of the persistently low inflation rates experienced in recent years, occurred even as the economy generated new jobs at a rate that is the envy of the rest of the industrialized world.*¹³⁹

Needless to say, the precise causes of this economic transformation are complex,¹⁴⁰ and it is not my purpose here to explore, much less to explain, them. My point is a narrower but nevertheless exceedingly important one: In contrast to the predictions of public choice theorists, the expansion in the number and political activity of special interest groups has not clotted the economy with inefficiency. The evidence strongly suggests that, if anything, the contrary is true. Special interest group expansion has been paralleled by a

recent years”); James Sterngold, *Facing the Next Recession Without Fear: Newly Leaned Corporations Expect to Do Fine When the Tough Times Come*, N.Y. TIMES, May 9, 1995, at D1 (observing that big three auto makers since 1980s have “sharply reduced costs and shortened the time it takes to get vehicles from the drawing board to the showroom floor”).

Judgments about efficiency trends are harder to make in the health care context because the outputs of the system, which constitutes about 14% of GDP, are notoriously difficult to define and measure. Nevertheless, many analysts of the health care industry believe that the industry has become significantly more efficient in recent years. In particular, downsizing, cost controls, and managed care have begun to have substantial effects on excess capacity in the hospital sector, which accounts for roughly 40% of the system’s costs. Telephone Interview with Professor Joseph Newhouse, Director, Division of Health Policy Research and Education, Harvard University (Feb. 25, 1997); see also Robert Pear, *In Separate Studies, Costs of Hospitals Are Debated*, N.Y. TIMES, Mar. 13, 1997, at D2 (discussing new data from federal commission “show[ing] remarkable reductions in the growth of hospital operating costs in the last three years”). Recent analyses also suggest that the system is delivering at least some kinds of care more efficiently; costs have increased somewhat but the improvements in quality of care and resulting survival rates and life expectancy have improved even more. See DAVID CUTLER ET AL., ARE MEDICAL PRICES DECLINING? (National Bureau of Econ. Research Working Paper No. 5750, 1996) (arguing that, according to revised cost of living index, real price of treating heart attacks between 1984 and 1991 may have declined, taking quality into account).

139. Despite these aggregate gains in national wealth and efficiency (or perhaps because of them), inequality in the United States has increased according to some measures. This dismaying rise in inequality appears to reflect a number of complex, interrelated developments: increasing economic returns to education; immigration; the surge of relatively inexperienced young and female workers into the labor force; erosion of the real value of the minimum wage and of AFDC benefits; the extraordinary increase in single, female-headed households; the drop in black male labor-force participation in urban areas; and other structural changes in the economy. On balance, some of these factors seem socially desirable and likely to reduce inequality in the long run even if they increase it in the short run. Higher returns to education, for example, create strong incentives for youths and lower-skilled workers to acquire more education and training and thus improve their economic prospects. And as women who entered the work force in the 1970s and 1980s acquire the additional experience and skills that seniority brings, they will (as they already have) continue to close the gender gap in wages and income. Recent evidence suggests that the income gap may already be narrowing again. See Robert Hershey, Jr., *Clinton Aides Say that Income Gap Narrows*, N.Y. TIMES, Feb. 11, 1997, at D3 (discussing annual report of Council of Economic Advisors). For present purposes, however, the relevant point is that the rise in inequality is overwhelmingly the result of deep changes in large, indeed global, economic and social structures rather than the activities of domestic special interest groups.

140. The explanations certainly include deregulation, which was strongly opposed by the major special interest groups (large firms, unions, and trade associations) in these industries. See generally Winston, *Economic Deregulation*, *supra* note 138. Increased foreign competition, which powerful special interests also seek to restrict, is the main reason for growing efficiency in the automobile and steel industries, which were not deregulated. Foreign competition, however, can explain only part of efficiency gains in the economy as a whole; imports still account for a relatively small share of the U.S. economy. See COUNCIL OF ECON. ADVISORS, ANNUAL REPORT, ECONOMIC REPORT OF THE PRESIDENT 300-01 tbl.B1 (1997) (reporting that imports accounted for 12% of U.S. economy in 1995).

striking improvement in economic efficiency. Whether this group expansion was one *cause* of the increased efficiency in the economy is an intriguing question that I do not pursue here; I venture only that such a causal relationship, which would be very difficult to prove, is at least plausible.

What does seem clear is that special interest groups cannot subvert the public interest as readily as they could in the past. A relentless growth is occurring both in the mobility of economic resources (capital, labor, information, etc.) and in the options available to firms, interest groups, and individuals concerning the regulatory regimes under which they operate. These developments are steadily reducing the economic and political leeways for governmental and private sector inefficiencies that special interests can spawn and on which they sometimes feed. Special interests have not ceased their traditional efforts to pursue narrow group agendas at public expense. Rather, they are encountering greater political resistance to those agendas and have less freedom to implement them in the face of remorseless market forces.¹⁴¹

I have already noted that the proliferation of interest groups since 1965 has accompanied the expansion of the administrative state during this period; indeed, the two developments have been mutually reinforcing.¹⁴² The fact that government action helped to stimulate interest group formation, however, does not necessarily mean that government should affirmatively seek to reduce the risks of partiality, unfairness, and inefficiency created by this proliferation. Indeed, the contrary is true. Although the desire to “level the playing field” of organizational competition will always be a seductive metaphor and a tempting goal, it should be resisted except in unusual circumstances. Even those governmental efforts to improve the functioning of the pluralist process that seem benign and neutral—whatever benignity and neutrality might mean in so intensely competitive a context—are likely to have unpredictable, often undesirable effects.¹⁴³

Government should not be in the business of creating or subsidizing interest groups. By placing its heavy thumb on the scales of organizational competition, it almost inevitably compromises both the integrity and the effectiveness of that competition. Government patronage would tend to stifle the emergence of genuine, grassroots interest groups, delegitimize those groups that government

141. For an interesting exploration of this theme, see Peter Huber, *Cyber Power*, FORBES, Dec. 2, 1996, at 142. As Huber points out, the relentless squeeze on inefficiency is a global phenomenon in which the industrial nations' inflation rates, tax rates, and regulatory structures seem to be converging under the pressure of these market forces. See *id.* at 147.

142. See *supra* note 57 and text accompanying note 65. This expansion in turn was fueled—but only in part—by the growing economic and social diversity in the United States. See generally Peter H. Schuck, *Some Reflections on the Federalism Debate*, in YALE L. & POL'Y REV.-YALE J. ON REG., SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 1 (1996).

143. For an interesting analysis of the effect of law on group and individual behavior, see Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996).

In Praise of Factions

seeks to sponsor, and entrench the status quo in a dynamic society in which flexible responsiveness to change is essential.

Government creation and subsidization of interest groups carries other risks as well. In areas of policy in which government-sponsored and privately sponsored organizations both operate and serve similar populations, the government enterprises are often both inferior and more costly.¹⁴⁴ Where dynamic, complex market forces operate, government's ability to select "winners"—as some proponents of industrial policy envision—is severely limited.¹⁴⁵ Even the well-established policy of encouraging nonprofit activity by granting nonprofit organizations tax-exempt status on a more or less categorical basis raises persistent questions and complaints about the fairness and efficiency of such preferential treatment, given the extent to which nonprofit groups compete with for-profit ones for capital and customers.¹⁴⁶

Other policy options for encouraging the formation of groups without creating such distortions are limited. The most that government can hope to accomplish in this realm is to foster a dynamic of group competition that, as Madison envisioned, minimizes the damage that special interests' propensity toward partiality, unfairness, and inefficiency can do. Even this seemingly modest goal is difficult to achieve. Several examples will suffice to indicate the directions that reforms might take. First, the government can reduce the dangers of special-interest influence over federal budgetary and tax policy by strengthening existing rules, adopted during the last two decades in order to restrain growing federal budget deficits, that require proponents of subsidies or expenditures to propose offsetting reductions in other areas.¹⁴⁷ This

144. For example, most commentators believe that private parochial schools do a better job of educating low-income children than do public schools, although disputes persist over whether the populations served are truly similar. *See, e.g.,* JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICAN SCHOOLS* 181, 259-60 (1990). Another example is child welfare services such as adoption and foster care. Prison management may be another example, although the evidence is still incomplete. Private mail service is superior to the U.S. Postal Service, even taking into account the latter's legal duty to serve unprofitable localities. *See* James I. Campbell, Jr., *Politics and the Future of Postal Services*, in *PERSPECTIVES ON POSTAL SERVICE ISSUES* 194, 195-97 (Roger Sherman ed., 1980); Robert J. Barro, *Let's Play Monopoly*, *WALL ST. J.*, Aug. 27, 1991, at A12.

On the other hand, very recent research on the accuracy of inflation forecasting has concluded that the Federal Reserve's forecasts are superior to those of commercial forecasters; the best explanation is that the Federal Reserve commits far more resources to the effort. *See Federal Reserve Forecasts Would Be Valuable to Commercial Forecasters*, *NBER DIG.*, Jan. 1997, at 1, 1 (citing CHRISTINA ROMER & DAVID ROMER, *FEDERAL RESERVE PRIVATE INFORMATION AND THE BEHAVIOR OF INTEREST RATES* (National Bureau of Econ. Research Working Paper No. 5692, 1996)).

145. On the other hand, there have been occasional successes, such as the Chrysler and Lockheed bailouts and, more recently, Sematech. *See* Elizabeth Corcoran, *Chip Research Consortium to Drop U.S. Subsidy: Decision to Rely on Corporate Funding Reflects Industry's Comeback*, *WASH. POST*, Oct. 5, 1994, at F2.

146. *See* the discussion and references in John G. Simon, *The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 67, 91-93 (Walter W. Powell ed., 1987).

147. *See supra* text accompanying notes 96-97. In the tax area, Professor Zelinsky argues that this reduction in special interest influence is caused not only by the revenue neutrality requirement, but also

approach places special interests in a zero-sum game where any costs that they add must come at the expense of other special interests.¹⁴⁸ This presents a sharp contrast to the logrolling game against which many public choice theorists have warned so wisely and strenuously (but which, as I have explained, has not always had the consequences that they predicted).¹⁴⁹

A second remedy relates to the first. As these new zero-sum rules increasingly constrain special interests in the tax and budgetary domains, the pressures generated by these groups do not disappear; they are simply channeled into regulations, private sector mandates, special trust funds, borrowing authorities, and other off-budget areas of governmental activity where these constraints do not now apply. By extending the zero-sum rule device to these off-budget areas, the government can further reduce the potential scope of special-interest abuses while still exploiting the social intelligence virtues of those groups for policymaking purposes.

Third, the government should review and rationalize its widespread programs to subsidize the activities of private business interests in the name of such attractive goals as regional development, export promotion, price stabilization, and government procurement. Many of these programs, which take multiple forms, are unfair to beneficiary firms' competitors, costly to taxpayers, and fail to achieve their objectives. Fortunately, this "corporate welfare" is under increasingly intense bipartisan challenge. At a time when traditional welfare for the indigent has been severely curtailed and politicians wish to be perceived by the public as even-handed rather than cruel, such policies may finally be vulnerable.¹⁵⁰

Fourth, the government can protect the integrity and autonomy of interest groups by assuring, as the courts have generally done, that their values and activities are not unduly hampered by public or private interference.¹⁵¹ The use of governmental power to harass interest groups is a perennial threat, one magnified by the difficulty of distinguishing between legitimate policy-related

by the structure of tax institutions more generally, including the greater diversity of congressional tax committees' membership compared to that of the special subject matter committees. See Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993) (arguing that tax institutions, like Treasury and congressional tax committees, are less readily captured by special interests due to diverse nature of interests affected by tax system).

148. Cf. William D. Eggers, *The Incredible Shrinking State*, REASON, May 1997, at 35, 37 (arguing that New Zealand reformers, by proposing changes affecting many different special interests simultaneously, legitimated reform by spreading costs of change and winning special interest support).

149. See *supra* text accompanying notes 52 and 137-139.

150. See David E. Rosenbaum, *Republicans in Transition: Corporate Welfare's New Enemies*, N.Y. TIMES, Feb. 2, 1997, at D1. The growing power of John R. Kasich, the Chairman of the House Budget Committee and a fierce, apparently committed crusader against corporate welfare, may augur well for this challenge. See Joe Klein, *Balancing Act*, NEW YORKER, Feb. 17, 1997, at 34, 34-35.

151. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (protecting civil rights group from private interference); NAACP v. Button, 371 U.S. 415 (1963) (protecting civil rights group from public interference).

In Praise of Factions

investigations and witchhunts of the kind that characterized the McCarthy era.¹⁵²

The risk of such harassment is particularly great for those groups that depend on government support, such as the local grantees of the federally funded National Endowment for the Humanities (NEH), Legal Services Corporation (LSC), and the Corporation for Public Broadcasting (CPB). Once these groups receive public funds, they are properly subjected to close public scrutiny and demands for accountability. Politics being what they are, this scrutiny and accountability may result in abrupt funding cutoffs, policy changes, personnel controls, and other pressures that jeopardize organizational autonomy. Sometimes those pressures will be legitimate, sometimes misguided, and occasionally illegal, but in a vigorous democratic polity they are inescapable. Nevertheless, the dangers that these pressures pose to group independence (and perhaps effectiveness) constitute a compelling reason for such groups to seek private support instead of public subsidies whenever possible.¹⁵³

Fifth, government can seek to increase the accountability of interest groups both to their members and to the public by requiring the groups to disclose pertinent information about their transactions. Even where disclosure is already required, as with respect to federal-election campaign contributions, much improvement is still possible. Specifically, Congress could require contributors and candidates to file information on the Internet as soon as the contributions are made, in a form that is more comprehensible to journalists and the general public.¹⁵⁴ Similar measures already exist at the state and local level, where many charities soliciting funds from the public must disclose information about their operations, including the amount they spend on fund-raising. The disclosure approach is often a better way to protect public values than imposing substantive restrictions on the groups' activities.

152. Senator Alan Simpson's crusade against the AARP, for example, may have been undertaken for a combination of partisan and policy-reform purposes. See Laurie McGinley, *Sen. Alan Simpson Challenges AARP's Tax-Exempt Status*, WALL ST. J., June 14, 1995, at B3. For Simpson's defense of his challenge to the AARP, see ALAN K. SIMPSON, *RIGHT IN THE OLD GAZOO: A LIFETIME OF SCRAPPING WITH THE PRESS* 160-61 (1996).

153. Many, if not most, of the grantees of the NEH, LSC, and CPB are, of course, already attempting to do so, sometimes with considerable success. See Andrea Adelson, *A Wider Public for Noncommercial Radio*, N.Y. TIMES, Feb. 10, 1997, at D8 (reporting that, on average, public stations rely on federal funds for only 16% of their budgets). Such efforts can also help government-funded groups test and augment the strength of their support in the economic and philanthropic markets rather than in the political one alone. See Lawrie Mifflin, *For WNET, a New Fund and a New Security*, N.Y. TIMES, Apr. 17, 1997, at C15 (reporting that station exceeded its goal and established endowment, which is improving its programming).

154. These mandates should also be extended to information about contributions that now escape disclosure requirements altogether. The Internet has vastly increased the potential timeliness and accessibility of such data. See Michael Taub, *Government Data At Your Fingertips*, N.Y. TIMES, Feb. 17, 1997, at A45 (describing Websites providing campaign finance information).

Sixth, government can enable voters and consumers to exercise more control over the resources that special interest groups need to survive. Voucher programs and other forms of privatization and decentralization that require service providers to compete for these resources exemplify this technique. Under the appropriate conditions, this approach might fruitfully be extended to other areas as well.¹⁵⁵

But a strong caveat is in order. Even the kinds of remedial interventions that I have suggested should be designed and implemented only with great caution. Reformers should approach their meliorative task with a deep appreciation for the integrity, complexity, and fragility of both the processes through which groups form, act, and compete, and the ways that these group processes affect individual values, incentives, and behavior.¹⁵⁶ Clumsy or misguided reforms can easily distort these processes and undermine the legitimacy of the pluralistic system on which liberal democracy vitally depends. Given these stakes, the costs of error are certain to be high.

One of the most important of these costs is the diminished respect for government, a delegitimation that discredits even those governmental actions that are essential or prudent. Much the same political energy and rhetoric that have been so effectively deployed against special interests throughout our history, and which have been particularly successful in reducing the federal government's role since the 1970s, can all too readily be turned against the project of government itself. This may foster a corrosive defeatism and cynicism about politics, impeding the pursuit of social goals—whether cherished by liberals or by conservatives¹⁵⁷—that cannot be attained without common action undertaken, or at least coordinated or regulated, by government.

This possibility leads to a final remedy, one that government is well-equipped to develop and support. In the end, government's most fundamental responsibility is to see that the public understands the nature and functioning

155. Without necessarily endorsing the details of the proposal, I note in this regard Bruce Ackerman's interesting scheme to distribute whatever funds are to be used for political campaigns on an equal basis to voters who would then allocate them directly to candidates or parties. See Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, AM. PROSPECT, Spring 1993, at 71. For a very brief sketch of my own doubts about limiting campaign spending, see Peter Schuck & Bruce Brown, *Lessons from Lippo*, WALL ST. J., Feb. 27, 1997, at A16. See also Smith, *supra* note 98.

156. Antitrust policy is a telling example of how even a relatively uncontroversial justification for governmental intervention in the pluralist system—here, the need to curb aggregations of private power that reduce or threaten competition—can be implemented in ways that frustrate that goal. The “new learning” in antitrust analysis suggests that government antitrust policies have often decreased competition rather than increasing it. See *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* (Harvey J. Goldschmid et al. eds., 1974); Roger Lowenstein, *Trust in Markets: Antitrust Enforcers Drop the Ideology*, *Focus on Economics*, WALL ST. J., Feb. 27, 1997, at A1; see also Posner, *supra* note 143.

157. In order for conservatives to realize much of their political agenda, they too must seek legislative action. The most important examples of this are deregulation, tax reduction, and the reform of existing entitlements.

In Praise of Factions

of democratic politics in its increasingly complex contemporary forms. The strongest bulwark of democracy is a sophisticated, enlightened, participatory citizenry, one that thinks critically about changes private and public goals truly require and about how group politics can contribute to the realization of these goals. The revitalization of civic education in this broad sense is the implicit or explicit project of much public commentary today; on this, at least, there seems to be a national consensus. This is among the most urgent tasks of American society as it approaches the twenty-first century.

