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BEYOND PUBLIC CHOICE AND PUBLIC INTEREST: A STUDY OF THE LEGISLATIVE PROCESS AS ILLUSTRATED BY TAX LEGISLATION IN THE 1980s

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TABLE OF CONTENTS

I. INTRODUCTION	3
II. HISTORICAL OVERVIEW OF CYCLICAL TAX LEGISLATION ...	11
A. <i>Legislation From the Beginning of the Income Tax Through the 1970s: The Evolution of Tax Instrumentalism and Tax Reform</i>	11

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B. <i>The 1981 Act and Its Aftermath</i>	19
C. <i>The 1986 Act</i>	23
D. <i>Aftermath of the 1986 Act</i>	29
E. <i>Summary</i>	30
III. THE PUBLIC INTEREST THEORY OF LEGISLATION	31
A. <i>The Various Strands of Public Interest Theory</i>	31
1. Public Interest Theory in Economics	31
2. The Pluralist School in Political Science	33
3. Ideological Views of the Public Interest	35
B. <i>Criticisms of Public Interest Theory</i>	36
1. (Largely Theoretical) Criticisms by Economists	36
a. <i>When Everyone "Wins," Everyone May Lose</i>	37
b. <i>Wealth-Reducing Transfers and the Theory of</i> <i>Groups</i>	39
2. (Largely Empirical) Criticisms by Political Scientists	42
C. <i>Public Interest Theory and the Problem of Cognitive Bias</i>	45
1. Cognitive Biases and Illusions as Favoring Bad Legislation and Interest Group Transfers	46
2. Can People Really Be "Biased" About What They Want?	48
D. <i>Public Interest Theory and Income Tax Legislation</i>	50
1. Assessing Public Interest Explanations of Income Tax Legislation	51
a. <i>Tax Reform</i>	51
b. <i>Level of Taxation</i>	51
c. <i>Increasing Saving and Investment</i>	52
d. <i>Adjusting for Inflation</i>	53
e. <i>Arguments for Tax Preferences</i>	54
f. <i>Summary</i>	55
2. The Role of Interest Groups in Income Tax Legisla- tion	55
3. Public Comprehension of Income Tax Issues	57
a. <i>The Withholding Illusion</i>	58
b. <i>Fiscal Illusion and the Use of Indirect Taxation</i>	59
c. <i>Taxation of the Wealthy and Large</i> <i>Corporations</i>	60
d. <i>Illusions and Inconsistent Views Relating to Tax</i> <i>Preferences</i>	61
IV. THE PUBLIC CHOICE THEORY OF LEGISLATION	64
A. <i>Overview of Public Choice Theory</i>	64

B. <i>Public Choice Theory as Practiced in the Law Schools</i>	68
1. Style and Its Ad Hominem Significance	68
2. Tautological Yet False: Doernberg and McChesney on 1980s Tax Legislation	71
C. <i>What Public Choice Theory Omits</i>	76
1. Voters	76
2. Politicians	80
a. <i>Politicians' Varied Motives</i>	81
b. <i>Politicians' Means of Pursuing Reelection</i>	87
c. <i>Policy Entrepreneurship</i>	93
3. Organized Interest Groups	94
4. The Media	96
5. Ideas and Ideology	98
6. Political Rules and Structures	101
a. <i>Campaign Financing Laws</i>	101
b. <i>Power of Congressional Leaders</i>	102
c. <i>Power of Political Parties</i>	103
7. Implications of the Factors Apart From Interest Group Influence	104
D. <i>Application of the Broader Model to Tax Legislation</i>	106
V. SOME BROADER IMPLICATIONS OF GOING BEYOND PUBLIC INTEREST THEORY AND PUBLIC CHOICE THEORY	111
A. <i>Electoral and Other Systemic Reform</i>	111
1. Campaign Financing and Expenditure Reform	112
2. Power of Congressional Leadership and Parties	113
3. Depoliticizing Particular Decisional Areas	114
B. <i>Statutory Interpretation</i>	115
C. <i>"Republicanism" and Legislative Deliberation</i>	117
D. <i>Governmental Versus Market Solutions</i>	120
E. <i>Do We Need or Want a Legal-Economic Predictive "Science" of Legislation?</i>	121

I. INTRODUCTION

Just as China in the 1960s had perpetual revolution, so the United States in the 1980s had perpetual income tax legislation. Congress passed historic watershed tax bills in 1981¹ and 1986.²

¹ Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1982) (codified as amended in scattered sections of 26 U.S.C.).

² Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended

Important, though not historic, packages of tax legislation were enacted in 1982,³ 1984,⁴ and 1987.⁵ In 1983 and 1985, Congress began considering the bills that passed the following years; 1988 saw the election of a President who promised significant tax legislation; and 1989 was devoted to wrangling about his proposals (which may pass in 1990).⁶

Even more peculiar than the rapid pace of 1980s tax legislation was the wildly erratic and cyclical⁷ nature of tax policy. In this country, tax policy tends to take either of two forms. First, under what I call an "instrumentalist" approach, tax law ostensibly serves social and economic policy goals (for example, increasing productivity, home ownership, or competitiveness) by providing preferential treatment for selected types of income. This approach is characterized not so much by a fixed agenda as by a willingness to use the tax system to pursue a broad array of goals. Second, the approach that in the last forty years has captured the label "tax reform" aims to tax different types of economic income more equally and to prevent high-income taxpayers from entirely avoiding significant tax liability.⁸

Although tax legislation has shown cyclical tendencies since the early days of the federal income tax,⁹ the problem reached a new level in the 1980s. In the entire history of the income tax system, the 1981 Act was the high water mark of tax instrumentalism.¹⁰

in scattered sections of 26 U.S.C.).

³ Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1984) (codified as amended in scattered sections of 26 U.S.C.).

⁴ Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1986) (codified as amended in scattered sections of 26 U.S.C.).

⁵ Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1989) (codified as amended in scattered sections of 26 U.S.C.).

⁶ Federal budgetary pressures provide only a partial explanation for this activity, and no explanation at all for the watershed 1981 and 1986 Acts. The 1981 Act helped to create these pressures by cutting taxes without a commensurate reduction in spending. The 1986 Act had an explicit premise of revenue neutrality.

⁷ My use of the term "cyclical" should not be confused with the voting paradox of "cycling," or unstable outcomes when voters have multiple alternatives that they rank in different orders, that has been widely discussed in the law and economics and political science literature. See I. McLEAN, PUBLIC CHOICE 25-26 (1987).

⁸ My statement that there are two approaches addresses only one type of cleavage in tax legislation: disagreement about the taxable income base. Other cleavages, such as the dispute about the proper level of progressivity, can also be politically important.

⁹ See *infra* notes 32-38 & 61-84 and accompanying text.

¹⁰ See, e.g., J. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 235 (1985) (arguing that the 1981 Act "was unique only because it was extreme, not because it established new trends in tax legislation").

It provided tax incentives on a previously unheard of scale, through provisions such as sharply accelerated depreciation for capital equipment, universal individual retirement accounts (IRAs) and other savings incentives for individuals, and a host of benefits for particular industries. By contrast, the 1986 Act was the all-time leading example of tax reform.¹¹ It eliminated longstanding tax preferences such as the partial exclusion for capital gains (in existence since 1921) and the investment tax credit (in existence for all but two years since 1962). Moreover, it contained an array of provisions that impeded efforts by high-income taxpayers to eliminate entirely their tax liabilities through the use of remaining preferences.¹² Now in 1990, Congress is considering a return to instrumentalism, through restoration of a capital gains preference and savings incentives similar to those eliminated in 1986.¹³

The oscillating congressional approach would be less surprising if it had resulted from changes in the political landscape; for example, if tax instrumentalists had been defeated in the mid-1980s and then restored to power at the end of the decade. Yet, for the most part, this has not been the case.¹⁴ For example, President Reagan and Congressman Rostenkowski (the chairman of the Ways and Means Committee) played critical roles in shaping both the 1981 and the 1986 legislation. Senator Packwood, in 1986 the chairman of the Senate Finance Committee, started out "sort of lik[ing]" the highly preferential post-1981 law just "the way it [was]."¹⁵ He then spearheaded the dramatic 1986 changes, but more recently has championed the restoration of tax breaks that, as chairman, he helped eliminate.

¹¹ See, e.g., J. BIRNBAUM & A. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987) (recounting the "saga" of the 1986 tax legislation); T. CONLAN, M. WRIGHTSON, & D. BEAM, *TAXING CHOICES: THE POLITICS OF TAX REFORM* (1990) [hereinafter *TAXING CHOICES*] (studying the Act as a vehicle to illuminate the "new politics of reform").

¹² The principal such provisions were the passive loss rules, see 26 U.S.C. § 469 (1988), and the greatly expanded alternative minimum tax, see *id.* §§ 55-59. While the 1986 Act resembled the 1981 Act in reducing tax rates, here it served to counteract, rather than to complement, the change in size of the income tax base.

¹³ See S. 2071, 101st Cong., 2d Sess. (1990).

¹⁴ Some changes in personnel have been significant, such as the election of President Bush, a long-time tax instrumentalist. See, e.g., J. BIRNBAUM & A. MURRAY, *supra* note 11, at 94 (describing then-Vice President Bush's passionate defense of tax preferences for the oil and gas industry).

¹⁵ See *id.* at 19.

How can such erratic behavior by both institutions and individuals be understood and explained? While the tax context may be important, the question also raises fundamental issues about politics and the legislative process. This Article will therefore examine various theories concerning why Congress legislates, evaluating them both in general and as explanations for the recent course of tax legislation. My goal is to provide both a specific case study and a broader positive account of the institutional forces that shape legislation, using each to illuminate the other.

To organize the discussion, I will focus on what are currently the two dominant approaches in the legal and economic literature. First, there is public interest theory, under which the government attempts to improve the general welfare, for example, by financing public goods and correcting instances of market failure.¹⁶ Conceived somewhat more broadly, the public interest view emphasizes the importance of ideology and the desire to make good policy, which are seen as motivating legislators to seek to improve society (according to their perhaps controversial notions of what is good). As I will show, public interest theory has been powerfully challenged in its narrow form as lacking a causal mechanism and failing to explain actual government behavior.¹⁷ In its broader form (relating to ideology), the view has received some empirical support, but seems to over-predict the coherence and stability of legislative policy-making.

Second, there is a branch of public choice theory called the economic theory of regulation.¹⁸ This view holds, in brief, that legislation (along with other government action) is a product supplied to well-organized interest groups that are struggling to

¹⁶ For a description of this view, see Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 336 (1974). As I will discuss, the public interest view can be analogized loosely to the comparably optimistic pluralist or welfare state liberal school of thought in the political science literature. See *infra* notes 154-220 and accompanying text. Examples of this school include D. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (1951) and R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956). But see T. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* (1969) (criticizing the theory).

¹⁷ See, e.g., R. MCCORMICK & R. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* 3-7 (1981) (comparing a market failure approach with a public choice approach in explaining the role of government in the economy).

¹⁸ For convenience and following common usage, I will call this "public choice theory" although my comments will not apply to any branch thereof apart from the economic theory of regulation.

maximize the incomes of their members,¹⁹ often at the expense of the less well-organized.²⁰ In effect, legislation is sold to the highest bidder, with bids being paid in the currency of votes, campaign contributions, and personal benefits such as honoraria.²¹ As I will show, this view has some explanatory power, but in its strongest form is not only theoretically implausible but has been empirically refuted in an extensive political science literature that public choice writers simply ignore. Public choice theory flattens the motivations and overlooks the independent influence of both politicians and the general voting public. Its explanation of why interest groups often succeed in "rent seeking" (securing transfers from the general public that are negative-sum for society²²) turns out to be merely one application of a broader principle: that government policy tends to provide visible benefit in exchange for less visible (even if unduly high) cost. Finally, public choice theory fails to explain fully not only the 1986 Act, where special interest groups were generally the big losers, but also the 1981 Act, where such groups were unusually big winners.

The problems with public choice theory have recently begun to attract critical attention.²³ Unfortunately, however, many of the

¹⁹ See Posner, *supra* note 16, at 335-36.

²⁰ See, e.g., M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) (questioning the customary view that individuals in large groups act to achieve common or group interests).

²¹ See, e.g., Doernberg & McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 926 (1987) [hereinafter *Accelerating Rate*] ("[T]he 'economic theory of regulation' sees government action supplied in response to . . . well-organized groups that are willing to pay for it in votes, campaign contributions, and so forth." (footnote omitted)); cf. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) [hereinafter *Statutory Interpretation*]. Macey adds to the forms of payment "whatever else politicians value," without addressing whether interest groups can supply everything that politicians value. See *id.* at 228.

²² See, e.g., G. TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING* 55 (1989) (defining "rent-seeking" as a situation in which a government proposal has a negative social impact).

²³ See, e.g., Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) (finding public choice theories too simplistic to adequately explain the legislative process); Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63 (1990) (finding that purely economic assessments of welfare create misperceptions about the role of social well-being in legislation); Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984) ("[A]pproaches which confine themselves to a view of political actors as narrowly egocentric maximizers explain and predict legislative outcomes poorly."); Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988) [hereinafter M. Kelman] (extending the Critical Legal Studies analysis of the legal

theory's critics, unable to imagine any third alternative to public interest theory and public choice theory, have seemingly assumed that, to the extent one of the two theories is false, the other must be true. If and when legislation is not just rent seeking by interest groups, it must be altruistic, socially beneficial, or a source of immense public satisfaction.²⁴ As I will show, however, this panglossianism is neither logically nor empirically supportable. The foes of public choice theory, like its friends, fail to understand how self-interested political behavior apart from wealth maximization shapes legislative outcomes.

Public interest and public choice writers, because of their shared failure to consider the implications of self-interest aside from wealth maximization, make an assumption that often turns out to be false. They assume that legislation is primarily directed to some substantive end and intended to have particular real world effects (whether improving society or enriching a particular group). In fact, politicians' claims to intend real world effects are often a pretext, rather than a serious effort. Even if legislation nonetheless has substantial real world effects, from a subjective standpoint these may be incidental.

In many cases, Congress legislates because its members and others who influence it value and benefit from the activity of legislating. The reasons for such behavior can be divided into two categories. First, proposing and enacting legislation is a means of symbolic communication with members of the general public, of causing them to like a politician without the inconvenience (and possible political inconsequence) of actually having to benefit them tangibly.²⁵ Thus, without regard to its actual effects, legislation

economist's world view to public choice material); Kelman, *Why Public Ideas Matter*, in THE POWER OF PUBLIC IDEAS 31 (R. Reich ed. 1988) [hereinafter S. Kelman] (arguing that public spirit is an important factor in the policy-making process); Orren, *Beyond Self-Interest*, in THE POWER OF PUBLIC IDEAS, *supra*, at 13 (using the shortcomings of political and economic models to show self-interest as a poor theory of public choice); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 48-49 (1985) [hereinafter *Interest Groups*] (describing a continuum between interest-group pressures and individual deliberation by legislators, along which legislative decisions are made).

²⁴ See Hovenkamp, *supra* note 23, at 100-06; S. Kelman, *supra* note 23, at 52-53.

²⁵ The classic work concerning this type of political behavior is M. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964); see also C. ELDER & R. COBB, THE POLITICAL USES OF SYMBOLS (1983) (describing the role of symbols in political activities). Members of Congress seek reelection in many ways other than through conveying tangible benefits through legislation. See, e.g., M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977) (noting that casework and pork barreling are more safe and profitable than lawmaking activities for a reelection oriented congressman); D. MAYHEW,

can promote reelection. Second, succeeding legislatively is a means of exercising and demonstrating one's power. It is inherently gratifying (as when an emperor enjoys seeing statues of himself), and it increases one's prestige and status in political circles. Thus, without regard to its actual effects, legislation can promote self-interested goals apart from reelection.²⁶

To the extent that one seeks to legislate for reasons apart from anticipated real world effects, it may be enough that the stated goal of legislation is superficially plausible and relates to areas of public concern. The proponent need not invest much effort in considering whether the legislation actually will do what it promises. Any such assessment is difficult in any case, but even where possible it may be politically unimportant. Politics does not have a well-functioning marketplace of ideas.

The various views of the legislative process that I have outlined are not mutually exclusive. Indeed, all can apply simultaneously,²⁷ and only a complex multi-factored approach can begin to do justice to the underlying reality. I will argue, however, that the particular factors I emphasize—voters' taste for symbolism and politicians' taste for power and prestige—are extremely important yet have largely

CONGRESS: THE ELECTORAL CONNECTION 5 (1974) (arguing that congressmen can usefully be viewed as "singleminded seekers of reelection"); N. POLSBY, *POLITICAL INNOVATION IN AMERICA: THE POLITICS OF POLICY INITIATION* 162-63 (1984) (describing how senators specialize and publicize their interests to enhance their political futures); A. RANNEY, *CHANNELS OF POWER: THE IMPACT OF TELEVISION ON AMERICAN POLITICS* 151 (1983) (showing how incumbents increasingly concentrate on defining a public image); H. SMITH, *THE POWER GAME: HOW WASHINGTON WORKS* 122-27 (1988) (listing the enormous advantages enjoyed by incumbents in getting elected).

²⁶ See, e.g., R. FENNO, *CONGRESSMEN IN COMMITTEES* (1973) (noting alternative goals of gaining influence within Congress, creating good public policy, and fostering career aspirations beyond Congress); J. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 42, 129-30 (1984) (noting goals of enhancing intra-Washington reputations and promoting personal interest and values); H. LASSWELL, *POWER AND PERSONALITY* 38 (1948) (noting politicians' intense craving for respect); J. MANLEY, *THE POLITICS OF FINANCE* (1970) (naming importance, power, and prestige as the primary attractions of a seat on the House Ways and Means Committee); R. RIPLEY, *CONGRESS: PROCESS AND POLICY* 118-19 (4th ed. 1988) (describing politicians' satisfaction upon the completion of a bill); H. SMITH, *supra* note 25, at 34-36 (describing the ostentatious wealth characterizing the Washington political scene); Price, *Congressional Committees in the Policy Process*, in *CONGRESS RECONSIDERED* 161, 167 (L. Dodd & B. Oppenheimer 3d ed. 1985) (noting that congressmen seek "power, prestige and preferment within Congress").

²⁷ For example, all of the theories would be consistent with proposed legislation, poorly thought out in terms of its likely effects, that at once ideologically pleased its proponents, made them important congressional "players," and favored campaign contributors or constituents.

been ignored by previous commentators. These factors indeed are dominant as explanations of recent tax legislation, where other causal factors have reduced importance due to the muddiness of ideological cleavages in taxation and the severe limits to both the public's and politicians' understanding of tax issues.²⁸

Under the particular historical circumstances of the 1980s, the principal effect of the symbolic and prestige factors on tax legislation was to create the legislative equivalent of "churning" a portfolio account. Since both of the dominant opposing policies (tax instrumentalism and tax reform) sounded appealing, but only the one less recently tried could be presented as a bold new departure, Congress shuttled back and forth between them. I will suggest, however, that these factors need not always lead to alternating tax reform and tax instrumentalism. They can lead just as easily to one instrumentalist bill after another, with tax incentives being reduced only when their beneficiaries become unpopular or revenue concerns are pressing. The alignment during the mid-1980s between tax reform and the symbolic and prestige factors was somewhat fortuitous and may prove short-lived. In particular, tax reform requires that tax issues be politically prominent—as they were throughout the 1980s²⁹ but may not always be hereafter. It therefore may be facing at least temporary setbacks.

This modest prediction, however, pretty well exhausts the capacity of my model (or any that does not ignore important causal factors) to forecast the future. Factors such as prestige and symbolism have inherently unpredictable consequences. Moreover, the tax system is too much at the mercy of outside events (such as war, the performance of the economy, and intellectual fashions) to follow a predictable path. One of this Article's principal purposes will be to show the serious limitations of any attempted science of prediction, whether derived from public choice theory³⁰ or

²⁸ See, e.g., J. BUCHANAN & R. WAGNER, *DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES* 129-34 (1977) (explaining taxpayers' difficulties in evaluating the true costs and benefits of government services); S. HANSEN, *THE POLITICS OF TAXATION: REVENUE WITHOUT REPRESENTATION* 179-80 (1983) (noting the public's ignorance about specific tax provisions); R. MUSGRAVE & P. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 100-01 (5th ed. 1989) (asserting that taxpayers underestimate the cost of taxation that they actually bear).

²⁹ For example, taxes were a major issue of contention in the 1980, 1984, and 1988 presidential campaigns. Moreover, the 1981 and 1986 Acts were the most prominent legislative stories of their respective years (although the 1981 Act shared top billing with President Reagan's military and domestic spending proposals). Cf. S. HANSEN, *supra* note 28, at 177 (noting the importance of tax issues in congressional races).

³⁰ Judge Richard Posner states that the goal of law and economics, a movement with

political science.³¹ Aside from serving as a corrective to legal arguments based on incomplete understandings, a richer understanding of legislative politics, although desirable for its own sake, will turn out not to be quite so useful as one might have hoped.

The discussion proceeds as follows. Section II reviews the recent history of tax legislation. Section III examines public interest theory and its inadequacies as revealed in part by public choice theory. Section IV discusses public choice theory and, through discussion of its inadequacies, develops a richer account of legislative behavior that stresses the symbolic and prestige factors. Section V explores some of the broader implications of the preceding discussion, for topics ranging from statutory interpretation, to current legal theories about "republicanism," to the question of how one should assess the tradeoff between internal rigor and empirical accuracy that ambitious theoretical models, such as those in law and economics, inevitably involve.

II. HISTORICAL OVERVIEW OF CYCLICAL TAX LEGISLATION

A. *Legislation From the Beginning of the Income Tax Through the 1970s: The Evolution of Tax Instrumentalism and Tax Reform*

The trend of cyclical tax instrumentalism and tax reform, which reached its peak in the 1980s, has its roots in the early days of the federal income tax. The income tax of 1864 contained a number of tax preferences for real estate and farm income.³² By the 1930s, attacks on "loopholes"³³ for unfairly benefiting the wealthy had become an occasional feature of tax politics, inspiring periodic legislation.³⁴ Despite these attacks, Congress continued to enact and retain significant tax preferences, including those for capital

scientific aspirations that includes public choice theory, is "to increase our ability to predict and control our environment." Posner, *The Future of Law and Economics: A Comment on Ellickson*, 65 CHI-KENT L. REV. 57, 61 (1989).

³¹ It is instructive that John Witte's perceptive and thorough study of tax politics, published in 1985, closes with the prediction that the dramatic tax reform proposals then being discussed probably would not lead to sweeping legislation. See J. WITTE, *supra* note 10, at 385-86. This prediction was proven wrong the following year.

³² See J. WITTE, *supra* note 10, at 69.

³³ The term "loophole" is out of fashion, largely because it seems to connote the exploitation of unintended technical gaps in the law, whereas much tax planning relies on opportunities to reduce one's liability that Congress intentionally provided.

³⁴ See J. WITTE, *supra* note 10, at 98-104.

gains, life insurance, oil production, and interest on municipal bonds.

The full potential for cyclical legislation could not be realized until World War II raised the stakes and the number of interested parties by permanently changing the income tax from a low-revenue "class tax" into a high-revenue "mass tax."³⁵ The postwar era saw an initial flurry of legislation that generally expanded tax preferences.³⁶ At the same time, preferences became more regularly controversial. Throughout the 1950s, liberal Democratic Senators such as Hubert Humphrey and Paul Douglas, concerned with giving real effect to the nominal progressivity of the income tax system, drew attention to and unsuccessfully sought to repeal "loopholes."³⁷ President Eisenhower, however, put an end to major change in either direction by deciding after 1954 to oppose all significant tax legislation.³⁸

The cyclical pattern started in earnest under President Kennedy, who in 1961 proposed tax legislation that would prove seminal for both stages in the cycle. On the one hand, he urged what he called "tax reform."³⁹ This important term merits a brief explanation before we consider the tax instrumentalist part of Kennedy's program.

The term "tax reform" has such a "motherhood"-type sound that its opponents sometimes either deny that it has specific content or else try to appropriate it. Senator Russell Long once said (during Senate debate about "reform" provisions that his committee had deleted from a tax bill), "I have always felt that tax reform is a

³⁵ See S. HANSEN, *supra* note 28, at 86; Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFFALO L. REV. 685, 685-86 (1989).

³⁶ The Revenue Acts of 1945 and 1948 focused principally on marginal rates and personal exemption amounts, rather than on the rules for taxing particular kinds of income. See J. WITTE, *supra* note 10, at 131-35. However, tax preferences were an important subject (and for the most part were expanded) in four revenue acts enacted between 1950 and 1954. See *id.* at 137-50.

³⁷ See, e.g., L. EISENSTEIN, *THE IDEOLOGIES OF TAXATION* 183, 185, 202, 220 (1961) (explaining the difficulty of defining "loophole"); H. HUMPHREY, *TAX LOOPHOLES* 7-12 (1952) (stating that during the 1940s, nearly every major tax bill raised taxes on the many and granted millions of dollars in loopholes to the few); J. WITTE, *supra* note 10, at 141-42 (noting the numerous provisions added to a tax bill before passing the Senate).

³⁸ See J. WITTE, *supra* note 10, at 150-54. Eisenhower took this stance in order to prevent Congress from reducing taxes. See *id.*

³⁹ See Special Message to the Congress on Taxation, 1961 PUB. PAPERS 290, 290-91 (Apr. 20, 1961) [hereinafter Special Message].

change in the law that I favor, or if it is the other man defining tax reform it is a change in the law that he favors."⁴⁰ In fact, however—as Senator Long himself probably knew⁴¹—the term has a specific meaning in both political and academic circles. It refers to moving in the direction of uniform and comprehensive taxation of economic income (generally, by broadening the existing tax base⁴²) on the ground that such movement will promote equity and economic efficiency.⁴³ Political tax reform often focuses more narrowly on “abuses” by high-income taxpayers, such as deducting lavish personal living expenses or completely avoiding tax liability.⁴⁴

Henry Simons, who formulated the now widely accepted economic definition of income as the sum of the fair market values of the taxpayer’s consumption and change in net worth during the relevant accounting period,⁴⁵ used the term “tax reform” as early as 1943 to describe his proposals for moving toward implementation of this definition.⁴⁶ By the late 1950s and early 1960s, Simons’ views (and use of the term “tax reform”) had caught on among

⁴⁰ J. WITTE, *supra* note 10, at 192 (quoting 122 CONG. REC. 18,553 (1976)).

⁴¹ Senator Long was well known during his tenure as a highly intelligent man, but one given on the Senate floor to rhetorical “histrionics” at the expense of strict objectivity. See T. REESE, *THE POLITICS OF TAXATION* 173-74 (1980). As an example, he once claimed that the case of “Grandma Jones,” a fictional aging widow who owned six shares of oil company stock, was representative for purposes of analyzing who benefits from the capital gains preference. See L. EISENSTEIN, *supra* note 37, at 132, 154-55. On another occasion (witnessed by the author), Long pretended ignorance of well-known tax accounting principles, arguing that intangible drilling costs ought to be deducted rather than capitalized, despite creating future capital value, because “that money has been spent, and it’s gone.” Shaviro, *Perception, Reality, and Strategy: The New Alternative Minimum Tax*, 66 TAXES 91, 109 n.119 (1988). In 1986, on the verge of voluntary retirement from the Senate, Long expressed a more sympathetic view of tax reform, calling the 1986 Act “the best revenue bill in fifty years.” J. BIRNBAUM & A. MURRAY, *supra* note 11, at 282.

⁴² Tax reform can also involve narrowing a tax base that is broader than economic income or that taxes a type of income more than once. See H. SIMONS, *FEDERAL TAX REFORM* 40 (1950).

⁴³ See, e.g., 2 TREASURY DEP’T REPORT TO THE PRESIDENT, *TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH* (1984) (stating that fair and simple taxation of the family unit is a “vital component” of the Department’s proposals).

⁴⁴ See *TAXING CHOICES*, *supra* note 11, at 36.

⁴⁵ See H. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 50 (1938).

⁴⁶ See H. SIMONS, *supra* note 42, at v (prefatory note by Aaron Director). Most of this book had been circulated by Simons in 1943 under the title *Post War Federal Tax Reform*. See *id.*

academics and were inspiring congressional hearings and a spate of scholarly publications.⁴⁷

President Kennedy's 1961 tax proposals were stronger on the rhetoric of tax reform than on delivery. His most prominent reform proposal—denying deductions for business meals and entertainment that conveyed untaxed personal benefits to the recipients—may have been chosen as much for its rhetorical salience as for its relative importance on the tax reform agenda. It permitted Kennedy to fulminate against “expense account living” and “luxury spending” that he worried would harm the “moral fibre” of our society.⁴⁸ This tendency of political tax reform to focus on the rhetorically salient would be repeated frequently in the years to come.

In addition to its reform aspects, Kennedy's legislative package included a new and important element of tax instrumentalism. An economic slowdown late in the Eisenhower years had prompted public discussion of a roughly contemporaneous decline in levels of saving and investment in the American economy.⁴⁹ Concerns about economic growth had in the past been thought to suggest rate reduction.⁵⁰ Kennedy, however, called instead for tax relief that was directly targeted to investment in capital equipment.⁵¹ He proposed a tax credit, under which corporations could reduce their tax liabilities by specified percentages of their increased investment in depreciable assets.⁵² This proposal was relatively novel for a tax preference (with the exception of capital gains) in having a claimed

⁴⁷ See, e.g., Bittker, *An Optional Simplified Income Tax*, 21 TAX L. REV. 1, 3 (1965) (noting the introduction of a 1964 tax reform amendment in the Senate); Blum, *Federal Tax Reform—Twenty Questions*, 41 TAXES 672, 672 (1963) (noting an American Bar Association project to study federal income tax reform); Davidson, *Objectives of and Guides for Tax Reform*, in HOUSE COMM. ON WAYS & MEANS, 86TH CONG., 1ST SESS., TAX REVISION COMPENDIUM OF PAPERS ON BROADENING THE TAX BASE 139 (Comm. Print 1959) [hereinafter TAX REVISION COMPENDIUM] (explaining that this issue in tax reform is the relation of income tax rates to economic progress); Jacoby, *Guidelines of and Guides for Tax Reform*, in TAX REVISION COMPENDIUM, *supra*, at 157 (noting that American society is becoming more egalitarian in the distribution of income, wealth, and economic power); Lanning, *Some Realities of Tax Reform*, in TAX REVISION COMPENDIUM, *supra*, at 19 (stressing the need for a tax revision extending to the entire taxing system). The scholarly usage dominated political discourse. See Special Message, *supra* note 39, at 290-94; J. BIRNBAUM & A. MURRAY, *supra* note 11, at 14-16.

⁴⁸ See Special Message, *supra* note 39, at 299.

⁴⁹ See J. WITTE, *supra* note 10, at 156.

⁵⁰ See *id.* at 89; see also A. MELLON, TAXATION: THE PEOPLE'S BUSINESS 93-107 (1924) (claiming that the “vital defect” in the tax system of the time was that the tax burden was borne by “wealth in the making,” not by “capital already in existence”).

⁵¹ See Special Message, *supra* note 39, at 290-94.

⁵² See J. WITTE, *supra* note 10, at 156.

macroeconomic effect on aggregate investment rather than targeting a particular industry.

In retrospect, the claim that a capital investment incentive of this sort can significantly increase aggregate investment has largely lost intellectual credibility. Many scholars support a proposal that superficially seems to differ from the investment tax credit only in how far it goes: adoption of a consumption tax, under which business investment, instead of merely being tax-favored, would not be taxed at all until it was consumed.⁵³ Moreover, everyone agrees that this broader proposal would have some tendency to promote investment (assuming that government spending and the amount raised through taxes remained unchanged), although the magnitude of the effect is unknown.

The Kennedy approach, however, today is recognized as not merely a lesser form of the consumption tax but fundamentally flawed. A non-universal investment incentive (such as one that favors investments in machines but not human capital, and that does not benefit companies, such as newly founded ones, that have no tax liability to offset) tends to shift the allocation of investment, leading to reductions in its profitability before tax, far more than to increase the amount of investment.⁵⁴ Moreover, when the tax system simultaneously favors returns from business investment and permits interest expense deductions, taxpayers are encouraged to engage in tax arbitrage transactions, pairing tax-favored returns against fully deductible interest, that either may be shams, or else may be very poor investments that lose money before tax.⁵⁵ Historical data, although suspect given the difficulty of ruling out independent variables, tends to confirm the lack of correlation between enactment or repeal of investment incentives and aggregate levels of investment.⁵⁶

⁵³ See, e.g., Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974) (arguing that a tax on personal consumption would simplify reporting and more equitably distribute tax burdens); Isenbergh, *The End of Income Taxation* (forthcoming 45 TAX L. REV. (1990)).

⁵⁴ See C. STEUERLE, TAXES, LOANS, AND INFLATION 130-36 (1985); Isenbergh, *supra* note 53. At a certain point, a non-universal investment incentive might be broad enough for its effect on aggregate investment to outweigh its effect on the allocation of investment. Consider, for example, the pre-1988 Japanese system, which exempted from tax most interest income and capital gains. See Homma, Maeda, & Hashimoto, *Japan*, in *COMPARATIVE TAX SYSTEMS: EUROPE, CANADA, AND JAPAN* 406-15 (J. Pechman ed. 1987).

⁵⁵ See C. STEUERLE, *supra* note 54, at 136.

⁵⁶ Gross private domestic investment, as a percentage of gross national product,

In the early 1960s, the problems of using the investment tax credit to encourage aggregate investment were not well understood, and Kennedy's proposal gained credibility through prominent scholarly backing.⁵⁷ Whether influenced by this support or not, the Revenue Act of 1962⁵⁸ included the credit in significantly expanded form.⁵⁹ (It also included Kennedy's business meal and entertainment proposals, although in significantly weakened form.) Enactment of the investment tax credit did not result from lobbying by the business community, its principal direct beneficiary. Business was split, with many companies preferring rate cuts and more favorable depreciation to enactment of the credit. Reflecting this lack of business support, Republicans in the House of Representatives voted 163-0 in favor of an unsuccessful floor amendment that would have deleted the investment credit from the legislation. Congressional Democrats overwhelmingly supported the credit despite vocal opposition by organized labor.⁶⁰

At least in the short run, the instrumentalist side of the 1962 Act proved more influential than its reformist side. The Revenue Act of 1964⁶¹ expanded tax preferences,⁶² again on the broad instrumentalist ground of increasing investment.⁶³ The Tax Reform Act of 1969⁶⁴ moved the other way, responding to an uproar that greeted publication of information about the number of wealthy individuals who were legally paying no tax.⁶⁵ Among other

increased slightly after enactment of the investment tax credit in 1962 and its reenactment in 1971. However, it fell after the enactment of investment incentives in 1978 and 1981, and rose slightly after the repeal of such incentives in 1986. See PRESIDENT OF THE UNITED STATES, ECONOMIC REPORT OF THE PRESIDENT, app. B at 310 (1989) (Table B-2) [hereinafter ECONOMIC REPORT].

⁵⁷ See J. WITTE, *supra* note 10, at 158-59; Bittker, A "Comprehensive Tax Base" as a Goal of Income Tax Reform, 80 HARV. L. REV. 925, 926 n.2 (1967).

⁵⁸ Pub. L. No. 87-834, 76 Stat. 960 (codified as amended at 12 U.S.C. § 1464 (1988) and in scattered sections of 26 U.S.C. (1988)).

⁵⁹ Congress revised Kennedy's investment tax credit proposal both to benefit more types of assets and to reward all investment in favored assets, not just increases in a taxpayer's level of investment. See J. WITTE, *supra* note 10, at 157.

⁶⁰ See *id.* at 156-57, 407 n.4.

⁶¹ Pub. L. No. 88-272, 78 Stat. 19 (codified as amended in scattered sections of 26 U.S.C. and in 42 U.S.C. §§ 409, 411 (1988)).

⁶² See J. WITTE, *supra* note 10, at 160-65.

⁶³ See *id.* at 162, 408 n.15.

⁶⁴ Pub. L. No. 91-172, 83 Stat. 487 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.).

⁶⁵ See 115 CONG. REC. 2773 (1969) (statement of Treasury Secretary Joseph Barr before the Joint Economic Committee); see also *Treasury Chief Warns of Taxpayer Revolt, Cites \$50 Billion a Year in Preferences*, Wall St. J., Jan. 20, 1969, at 4, col. 3.

changes, the 1969 Act repealed the investment tax credit and added a new provision called the minimum tax, which attempted to prevent complete tax avoidance by wealthy individuals through a 10 percent levy (above a substantial exemption amount) on the value of certain tax preferences.

The Tax Reduction Act of 1971⁶⁶ restored the investment tax credit, in addition to adding other incentives such as more favorable depreciation.⁶⁷ After further expansion of tax preferences in 1975,⁶⁸ Congress at least symbolically reversed course again with the Tax Reform Act of 1976,⁶⁹ which, while disowned by some reformers,⁷⁰ did expand the minimum tax, add new anti-tax shelter rules to the Code,⁷¹ and directly repeal or restrict certain preferences.⁷²

In 1978, President Carter called for further tax reform, but his proposals went nowhere.⁷³ Tax incentives and "capital formation" were the order of the day. This emphasis reflected the influence of special interest political action committees (PACs), which were coming to dominate campaign financing and were aided by structural changes in Congress that shifted power away from committee chairmen and other congressional leaders.⁷⁴ It also reflected a shift in national mood. The late 1970s were a period of intense taxpayer frustration. Despite repeated tax cuts, real federal income tax burdens had risen continuously throughout the decade: inflation-fueled "bracket-creep" and the increases in applicable marginal tax rates which attended increases in taxpayers' nominal incomes more than offset Congress's efforts. At the state level, "tax revolts" were erupting, most notably in California where the passage

⁶⁶ Pub. L. No. 92-178, 85 Stat. 497 (codified as amended in scattered sections of 26 U.S.C.).

⁶⁷ See *id.* § 501, 85 Stat. 497, 535-49 (1971) (codified as amended at 26 U.S.C. §§ 991-997 (1988)).

⁶⁸ See Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (codified as amended in scattered sections of 26 U.S.C.).

⁶⁹ Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended in scattered sections of 26 U.S.C.).

⁷⁰ See J. WITTE, *supra* note 10, at 194.

⁷¹ See Tax Reform Act of 1976, Pub. L. No. 94-455, § 465, 90 Stat. 1520, 1531-33 (codified as amended at 26 U.S.C. § 465 (1988)).

⁷² In particular, the 1976 Act ostensibly repealed the exclusion for pre-death appreciation of capital assets inherited from a decedent, although this provision later was repealed before its effective date. See J. WITTE, *supra* note 10, at 195.

⁷³ See *id.* at 204-07.

⁷⁴ See TAXING CHOICES, *supra* note 11, at 25; see also J. BIRNBAUM & A. MURRAY, *supra* note 11, at 18; J. WITTE, *supra* note 10, at 240-43.

of Proposition 13⁷⁵ imposed severe constitutional restrictions on property taxation.⁷⁶ In the same period, public faith in the effectiveness of government spending declined precipitously.⁷⁷ In this climate, even liberal newspapers ordinarily sympathetic to tax reform began publishing articles that seemed to favor tax instrumentalism.⁷⁸

On a small scale in 1977⁷⁹ and a larger one in 1978,⁸⁰ Congress expanded tax preferences both for particular industries and for investment in general. Thus, for example, oil companies were exempted from minimum tax requirements,⁸¹ and taxation of capital gains was reduced,⁸² all with an eye toward increasing aggregate investment.⁸³ The predicted increase failed to materialize.⁸⁴

In 1980, Ronald Reagan was elected President on a platform calling for major tax cuts, not only through rate reduction, but also through increased incentives for business investment.⁸⁵ Taxes had been a central issue in the 1980 presidential campaign, with Reagan promising dramatic tax cuts and opponents asking how he could simultaneously cut taxes, raise defense spending, and balance the budget.⁸⁶ Reagan initially campaigned only for a rate reduction for individuals. On June 25, 1980, however, he appeared on the steps of the Capitol to endorse a major business investment incentive, the "10-5-3" depreciation plan, under which all depreciable property would be fully written off in either ten, five, or three

⁷⁵ CAL. CONST. art. XIII A, §§ 1-6.

⁷⁶ See J. WITTE, *supra* note 10, at 207-08. Paul Samuelson termed the passage of Proposition 13 the "major political or economic event of the 1970s." S. HANSEN, *supra* note 28, at 1.

⁷⁷ See Ladd, *The Polls: Taxing and Spending*, 43 PUB. OPINION Q. 126, 134 (1979).

⁷⁸ See J. WITTE, *supra* note 10, at 206-07.

⁷⁹ See Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, 91 Stat. 126 (codified as amended in scattered sections of 26 U.S.C.).

⁸⁰ See Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 (codified as amended in scattered sections of 26 U.S.C.).

⁸¹ See *id.* § 422.

⁸² See *id.* §§ 402-403.

⁸³ See JOINT COMM. ON TAXATION, 96TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE REVENUE ACT OF 1978, 252-54, 269-70 (Comm. Print 1979).

⁸⁴ See, e.g., ECONOMIC REPORT, *supra* note 56, at 340-41 (indicating a decrease in total gross investment between 1979 and 1980).

⁸⁵ See J. BIRNBAUM & A. MURRAY, *supra* note 11, at 17.

⁸⁶ See, e.g., J. WITTE, *supra* note 10, at 220-21 (noting that the tax issue was more important in the 1980 campaign than in any other election); Greider, *The Education of David Stockman*, ATLANTIC MONTHLY, Dec. 1981, at 27, 29 (discussing the tax debate of the 1980 campaign).

years.⁸⁷ This plan was expected to reduce tax revenues by tens of billions of dollars per year.⁸⁸ Even so, Charls Walker, a prominent corporate lobbyist and head of the American Council for Capital Formation, was able to use his position in the Reagan campaign to sell the plan to an apparently befuddled candidate.⁸⁹ Walker's success made clear that in 1980, unlike 1962, large capital-intensive companies were powerful participants in the tax policy making process, actively seeking benefits for themselves.⁹⁰

B. *The 1981 Act and Its Aftermath*

Reagan's sweeping election victory was viewed as a mandate for substantial tax reduction by both congressional Democrats and those within the new Administration.⁹¹ The White House and the Democrats parted company, however, on the question of *whose* tax reduction proposals would be enacted. The Democrats, who had long controlled Congress and retained a majority in the House of Representatives, were determined to pass their own bill advancing Reagan's stated goals of "savings, investment, and productivity."⁹²

In February 1981, the Reagan Administration issued its initial tax proposal, consisting principally of the rate cuts promised during the campaign and depreciation slightly less accelerated than under the 10-5-3 plan.⁹³ Within a month, Chairman Rostenkowski declared the Reagan plan dead and announced a Democratic substitute.⁹⁴ The two plans were highly similar, except that the Democrats provided slightly more favorable depreciation, gave somewhat more tax relief to middle- and low- income taxpayers, and

⁸⁷ See J. WITTE, *supra* note 10, 220-21; see also J. BIRNBAUM & A. MURRAY, *supra* note 11, at 17 (explaining the 10-5-3 depreciation plan).

⁸⁸ See Edsall, *How a Lobbyist Group Won Business Tax Cut*, Wash. Post, Jan. 17, 1982, at G1, col. 4.

⁸⁹ See J. BIRNBAUM & A. MURRAY, *supra* note 11, at 16-17. Walker explained that Reagan agreed to the plan, despite its possible effects on the deficit, because "[h]e didn't know what he was doing." *Id.* at 17.

⁹⁰ A study by the Joint Committee on Taxation concluded that the 10-5-3 plan would cost Treasury \$536 billion over its first ten years, effects on economic growth aside. See Edsall, *supra* note 88, at G1, col. 4.

⁹¹ See J. WITTE, *supra* note 10, at 221.

⁹² See *New Role for Rostenkowski Gets Him into the Thick of House Power-Playing*, 39 CONG. Q. WEEKLY REP. 863, 864 (1981).

⁹³ See J. WITTE, *supra* note 10, at 221, 222; Message to Congress Transmitting the Proposed Package on the Program for Economic Recovery, 1981 PUB. PAPERS 115, 123-24 (Feb. 18, 1981).

⁹⁴ See J. WITTE, *supra* note 10, at 222-23.

added a greatly expanded saving incentive, the universal individual retirement account (IRA), to which one could contribute up to \$2,000, deducting the amount contributed and excluding the inside buildup of interest income until retirement.⁹⁵ Even at the time, doubts were expressed about the likely effectiveness of IRAs as a means of increasing saving.⁹⁶ Today they are widely discredited in this respect, much as investment tax credits are discredited as a means of increasing investment.⁹⁷

Rostenkowski soon reached agreement with Senate Finance Committee Chairman Dole on a plan that combined the revenue-reducing features of the Reagan and Rostenkowski plans, along with some additional tax breaks.⁹⁸ On June 4, 1981, however, Reagan rejected the congressional plan and announced a substitute proposal of his own, which significantly reduced the proposed increases in depreciation.⁹⁹ There followed what the *Washington Post* later dubbed the "Lear Jet Weekend," as business leaders flew in from around the country to protest the reduction in depreciation.¹⁰⁰ By June 9, the Administration had not only returned to the 10-5-3 plan, but had also agreed to additional tax breaks worth billions of dollars to business.¹⁰¹

The stage was now set for a bitter confrontation between the White House and congressional Democrats. The battle raged on two levels. On television, House Speaker O'Neill accused Reagan of sacrificing the working class to help the wealthy,¹⁰² and Reagan

⁹⁵ See *id.* at 223.

⁹⁶ See J. BIRNBAUM & A. MURRAY, *supra* note 11, at 244.

⁹⁷ When maximum annual contributions are as low as \$2,000, IRAs have only a negligible effect at the margin on taxpayer decisions about how much to save, and largely change only the form in which savings are held. One need not even save \$2,000 in order to establish an IRA: it can be funded by simply borrowing (or not repaying) an additional \$2,000 of debt, perhaps even with deductible interest. See generally R. MUSGRAVE & P. MUSGRAVE, *supra* note 28, at 305; C. STEUERLE, *supra* note 54, at 127; Andrews, *supra* note 53, at 1173-74; Isenbergh, *supra* note 53. Some argue that IRAs may actually *reduce* aggregate saving, due to the income effect on taxpayers who spend the reduction in tax liability. See Isenbergh, *supra* note 53. Even if this claim is overstated and IRAs increase aggregate saving, the effect is probably trivial in relation to the revenue cost. See, e.g., CBO Reports, 46 TAX NOTES 958 (1990) (noting conclusion in Congressional Budget Office report that IRAs might not induce much new saving because of cap on contributions while causing substantial long-term revenue loss).

⁹⁸ See J. WITTE, *supra* note 10, at 224.

⁹⁹ See *id.* at 224; Greider, *supra* note 86, at 46.

¹⁰⁰ See Edsall, *supra* note 88, at G1, col. 4.

¹⁰¹ See *id.*

¹⁰² See O'Neill Forecasts Loss For Reagan Tax Plan, But View is Disputed, N.Y. Times, June 8, 1981, at A1, col. 1.

responded that the Democrats favored high taxes whereas he wanted to reduce everyone's taxes.¹⁰³ In the chambers of Congress, by contrast, the process was simply one of "competition for authorship of tax concessions."¹⁰⁴ As the two sides bid for the support of business community, the Democrats eventually reached the point of proposing the "full expensing of capital investments,"¹⁰⁵ along with further saving incentives and a long list of narrower tax breaks.¹⁰⁶ Reagan's highly similar bill prevailed, however, largely due to his mastery of television and the Democrats' refusal to endorse more than two years of unconditional rate cuts.¹⁰⁷

Among other features, the 1981 Act provided cost recovery that, including the effects of the investment tax credit, proved more generous than expensing.¹⁰⁸ It also provided lucrative tax benefits for particular groups such as the oil industry, truckers, financial institutions, and multi-national corporations, as well as IRAs and an "All Savers" provision that permitted permanent exclusion of up to \$1,000 of interest income per taxpayer.¹⁰⁹ Commentators recognized that the 1981 Act, in its massive display of both tax instrumentalism and the influence of lobbyists, was "historically in a category by itself."¹¹⁰

The revenue reductions contained in the 1981 Act, coupled with Reagan's immense defense buildup and the bipartisan opposition to substantial domestic budget cuts,¹¹¹ established a dominant political framework for the 1980s. Enormous and (in nominal

¹⁰³ See Television speech of President Ronald Reagan (July 27, 1981), *reprinted in* N.Y. Times, July 28, 1981, at B6, col. 1.

¹⁰⁴ Greider, *supra* note 86, at 51; *see also* J. WITTE, *supra* note 10, at 225-35; Rudder, *Fiscal Responsibility and the Revenue Committees*, in CONGRESS RECONSIDERED, *supra* note 26, at 211-12. David Stockman later remarked about the bidding war: "The hogs were really feeding. The greed level, the level of opportunism, just got out of control." Greider, *supra* note 86, at 51.

¹⁰⁵ J. WITTE, *supra* note 10, at 227. Richard Rahn, chief economist for the U.S. Chamber of Commerce, found this "nothing short of astounding. If you'd told me a few years ago that the Democrats would propose expensing, I would have said you were out of your mind." *Id.* (quoting 39 CONG. Q. WEEKLY REP. 1137 (1981)).

¹⁰⁶ *See id.* at 227-28.

¹⁰⁷ *See id.* at 228-31.

¹⁰⁸ *See* JOINT COMMITTEE ON TAXATION, 97TH CONG., 2D SESS., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, at 35-37 (Comm. Print 1982).

¹⁰⁹ *See* J. WITTE, *supra* note 10, at 221-35.

¹¹⁰ *Id.* at 235.

¹¹¹ *See* D. STOCKMAN, THE TRIUMPH OF POLITICS 208, 211-14 (1986) (regarding President Reagan's opposition to budget-cutting).

terms) unprecedented budget deficits were inevitable. Economists disagree about the extent to which the deficit is actually a problem;¹¹² its most obvious significance is that, in comparison to tax-financed pay-as-you-go budgeting, it disguises (and may shift to the future or, if there is unanticipated inflation, to foreigners) the incidence of who pays for the cost of government programs. Politically, however, the budget was widely perceived as a problem, which led to a new direction in legislative tax policy. In 1982 and 1984, Congress enacted deficit-reduction bills that raised revenue largely through incremental reforms, such as scaling back depreciation and creating a revised and expanded minimum tax.¹¹³ These bills were pushed through by congressional leaders, principally Senate Finance Committee Chairman Robert Dole, over the opposition of the business groups whose tax preferences were reduced.¹¹⁴

Meanwhile, the 1981 Act became increasingly controversial because of widely publicized instances of tax avoidance by high-income taxpayers. Corporate tax planning began attracting unfavorable attention in 1982 in response to the newly authorized safe harbor leasing deals, whereby companies with tax losses effectively sold their excess deductions and credits to profitable companies for hundreds of millions of dollars.¹¹⁵ In 1984, a labor-funded public interest lobbying group called Citizens for Tax Justice gained media attention by releasing a study showing that more than half of 250 prominent corporations had paid no tax for at least one year in the early 1980s, often while reporting large profits to shareholders. In 1985, the Treasury Department released a study showing that roughly 30,000 individuals with earnings exceeding \$250,000 had paid little or no tax, largely due to the deduction of tax shelter losses. Tax shelters had by this time become both prominent and disreputable, because of heavy marketing, over-aggressive interpretations of tax law, what seemed

¹¹² See, e.g., R. EISNER, *HOW REAL IS THE FEDERAL DEFICIT?* 1-8 (1986).

¹¹³ See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, §§ 201, 205(a), 206, 96 Stat. 324, 411, 427, 431 (codified as amended at 26 U.S.C. §§ 55, 48, 168 (1988)).

¹¹⁴ See S. HANSEN, *supra* note 28, at 92-93; Rudder, *supra* note 104, at 215-18.

¹¹⁵ See J. BIRNBAUM & A. MURRAY, *supra* note 11, at 11. Safe harbor leasing was repealed in 1982, see Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, §§ 208-210, 217, 96 Stat. 324, 432-448, 472 (1982) (codified as amended at 26 U.S.C. §§ 168, 48, 103 (1988)), but apparently not forgotten, see J. BIRNBAUM & A. MURRAY, *supra* note 11, at 11.

unduly high ratios of taxes saved to cash invested, and the use of investments (such as jojoba beans and llama breeding) that many viewed as too esoteric to have much economic value.¹¹⁶

Congress took heed of the change in public mood. The 1982 and 1984 Acts were in some measure efforts to curb perceived abuses, in addition to raising revenue. On a more ambitious scale, Democratic Senator Bill Bradley introduced a comprehensive tax reform bill in which the elimination of many tax preferences would pay for reducing the top marginal rate for individuals from 50 percent to 30 percent.¹¹⁷ Congressman Jack Kemp soon introduced a Republican version of tax reform that was similar except for retaining more investment incentives.¹¹⁸ Both bills aimed at revenue and distributional neutrality in comparison to preexisting law. That is, they were not intended to change aggregate tax revenues, the aggregate tax burden imposed on each income class (relief for low-income taxpayers aside), or the amount of tax paid by corporations. These bills thereby effectively ratified the revenue and distributional consequences of the 1981 Act, while reversing its instrumentalist strategy, in order to present tax reform unsullied by extraneous issues. The bills attracted favorable attention, but little was expected to come of them.¹¹⁹

C. *The 1986 Act*

The Tax Reform Act of 1986 began as a small political miscalculation, or at least an excess of caution. President Reagan's advisors, planning strategy for the 1984 presidential campaign, mistakenly believed that Walter Mondale was planning to endorse Bradley-style tax reform. To ward off the issue, Reagan announced a Treasury Department study of tax reform that would not be released until after the election.¹²⁰

¹¹⁶ See J. BIRNBAUM & A. MURRAY, *supra* note 11, at 10-12.

¹¹⁷ See Fair Tax Act of 1983, S. 1421, 98th Cong., 1st Sess. (1983).

¹¹⁸ See Fair and Simple Tax Act of 1984, H.R. 6165, 98th Cong., 2d Sess. (1984).

¹¹⁹ See, e.g., J. BIRNBAUM & A. MURRAY, *supra* note 11, at 30, 33 (stating that many legislators working on tax reform expressed doubts as to its feasibility); J. WITTE, *supra* note 10, at 385 (noting that if Treasury I were passed and untouched by further legislation it would revolutionize the tax system).

¹²⁰ See J. BIRNBAUM & A. MURRAY, *supra* note 11, at 39-40. Congressional Democrats were so skeptical of Reagan's reformist intentions that they greeted his announcement of the study, during his 1984 State of the Union address, with derisive laughter. See TAXING CHOICES, *supra* note 11, at 45.

In the absence of outside supervision, the Treasury study was written largely by nonpolitical senior staffers with an ideological commitment to tax reform.¹²¹ The resulting document, Treasury I, proposed the repeal of almost all express statutory tax preferences (including many enacted in 1981) other than the home mortgage interest deduction,¹²² thus paying for a reduction of the top marginal rate to 35 percent. While Treasury I resembled the congressional tax reform proposals in claiming revenue and distributional neutrality, it shifted \$150 billion in tax liability over five years from individuals to corporations. The shift resulted from Secretary Regan's demand for a euphonious individual rate structure of 15-25-35 percent, in place of the 16-28-37 percent, proposed by his staffers, that he thought "sounded like a football call." The resulting nominal tax cut for individuals proved critical to the political success of tax reform.¹²³

The proposal evoked favorable press coverage¹²⁴ but massive political opposition from various interest groups.¹²⁵ The Administration quickly disowned Treasury I, but eventually decided to pursue tax reform, motivated largely by President Reagan's fondness for lower rates¹²⁶ and by the lack of an alternative agenda for Reagan's second term.¹²⁷ In May 1985, Reagan gave a television speech to hail the release of Treasury II, a revised tax reform plan that, largely for political reasons, restored a host of preferences, such as for depreciation, capital gains, and the oil industry.¹²⁸ Despite its compromises, Treasury II inherited from Treasury I both the media's approbation and the interest groups' opposition.¹²⁹

¹²¹ See J. BIRNBAUM & A. MURRAY, *supra* note 11, at 46-51. The study was overseen by a political appointee, Treasury Secretary Regan, but he had personal and ideological reasons for favoring a sweeping tax reform proposal. See *id.* at 44-46.

¹²² See *id.* at 51-58. "Structural" tax preferences such as the realization requirement were unaffected. See *id.* at 55-58.

¹²³ See *id.* at 59-60.

¹²⁴ See *Taxation Sensation*, NEW REPUBLIC, Dec. 24, 1984, at 5; *Up Go the Trial Balloons*, TIME, Dec. 10, 1984, at 20; Samuelson, *Regan Tax Plan Even-Handed*, Wash. Post, Dec. 6, 1984, at D1, col. 1; Silk, *If Tax System is Overhauled*, N.Y. Times, Nov 28, 1984, at D2, col. 1.

¹²⁵ See TAXING CHOICES, *supra* note 11, at 67-68.

¹²⁶ While Reagan liked the rate cuts, his substantive understanding of tax reform was low by any imaginable standard. For example, he seems to have believed that the proposed tax reform was not a tax increase for *any* individual or corporation, even though he knew that it was a tax cut for many and revenue-neutral on balance. See TAXING CHOICES, *supra* note 11, at 72.

¹²⁷ See *id.* at 70.

¹²⁸ See *id.* at 74-77.

¹²⁹ See J. BIRNBAUM & A. MURRAY, *supra* note 11, at 110; TAXING CHOICES, *supra*

The White House tried to counter this opposition with populist denunciations of "abuse," but public response was tepid.¹³⁰

Tax reform would have died at this stage but for the enthusiastic support it received from the previously anti-reform Chairman Rostenkowski. Seeing, by his own account, a "challenge" that would enable him to demonstrate leadership and prevent Republicans from seizing tax reform as an issue, Rostenkowski rejected Treasury II as a starting point, but had his staff issue a comparably reformist proposal. He then began trying to steer the proposal through the Ways and Means Committee, initially with little success. By October 15, 1985, when Rostenkowski suffered a highly publicized defeat to banking lobbyists, the Committee not only had agreed to little reform, but had approved new tax preferences worth billions of dollars per year. At this point, however, criticism by the Washington media, along with changes in Rostenkowski's tactics, helped bring about a change in direction. A principally Democratic group of committee members united in support of reform, and after a month of closed-door markups, they produced a bill that in broad concept resembled Treasury II, but that shifted more tax burdens to corporations and the wealthy (in particular, by adding a 38 percent rate bracket for high-income individuals and increasing Treasury II's proposed rates for both corporations and capital gains).¹³¹

These changes led to nearly unanimous Republican opposition on the House floor, abetted by White House indecision about whether the bill was still acceptable. Early in December, the Republicans (aided by about a quarter of the House's Democrats) defeated a procedural resolution to consider the bill, and it briefly appeared to be dead. After a personal visit to House Republicans by President Reagan, however, during which he promised to veto tax reform if the Senate did not eliminate the 38 percent bracket and reduce the tax increase for business, the two parties' leaderships were able to win approval of the bill by a comfortable margin.¹³²

note 11, at 80.

¹³⁰ See TAXING CHOICES, *supra* note 11, at 95; Fessler, *Members Find Little Support for 'Reform,'* 43 CONG. Q. WEEKLY REP. 1744 (1985); Cannon, *President's Tax Tour Ends Quietly*, Wash. Post, Oct. 15, 1985, at A3, col. 1; Cannon & Dewar, *Tax Overhaul Hit in Poll, GOP Caucus*, Wash. Post, Sept. 25, 1985, at A3, col. 1.

¹³¹ See TAXING CHOICES, *supra* note 11, at 88-95, 106-08, 111-12, 116-27.

¹³² See *id.* at 127-32. The House voted by 258-168 to begin considering the tax reform bill and then adopted it by voice vote. See *id.* at 132-33.

The prospects for enactment of tax reform still appeared dim. Senate Finance Committee Chairman Bob Packwood professed to "sort of like the tax code the way it [was],"¹³³ and maneuvered transparently to discourage enactment by the House.¹³⁴ Moreover, at a planning retreat only three of the Senate Finance Committee's twenty members had expressed support for tax reform.¹³⁵ The Committee had a long history of being even less sympathetic to reform than Ways and Means.¹³⁶ Nonetheless, given the political prominence of tax reform, the support for it by a popular President from his own party, and the challenge it presented him in his first year as chairman, Packwood concluded that it was a "leadership issue" on which he had to proceed.¹³⁷

Packwood's strategy, like Rostenkowski's, was to present his own package to his committee, although in his case it was premised on explicit advance bargaining with committee members about what existing tax benefits were most important to them. The effort to combine low rates with less reform left Packwood with a revenue shortfall that he could make up only through bizarre schemes such as denying business deductions for the payment of excise taxes.¹³⁸ The end result was a proposal that, unlike Treasury II or the initial Rostenkowski and eventual House bill, failed to qualify as "reform" in the eyes of the news media.¹³⁹

Things only worsened when committee markup began. As had happened in Ways and Means, the members began passing amendments that not only rejected specific reforms but created tax breaks more generous than under existing law. Some of these were but thinly rationalized, such as special treatment for "productivity property," which more or less meant property of a sort manufac-

¹³³ J. BIRNBAUM & A. MURRAY, *supra* note 11, at 19.

¹³⁴ See *id.* at 163 (describing Packwood's claim, during the House Republican revolt, that the Senate would not change the bill's anti-business slant as a "blatant and disingenuous attempt to kill the bill"); see also TAXING CHOICES, *supra* note 11, at 130 (stating that Packwood had informed President Reagan that "the Senate traditionally accepts the basic structure of House-passed tax legislation").

¹³⁵ See TAXING CHOICES, *supra* note 11, at 147.

¹³⁶ See, e.g., R. FENNO, *supra* note 26, at 153-54 (noting that special interest groups exert more pressure and influence on the Finance Committee than on Ways and Means); J. MANLEY, *supra* note 26, at 267-68 (stating that the Senate is more receptive to interest groups and lobbyists than Ways and Means).

¹³⁷ See TAXING CHOICES, *supra* note 11, at 146-47.

¹³⁸ See *id.* at 148-50; see also J. BIRNBAUM & A. MURRAY, *supra* note 11, at 195-98.

¹³⁹ See TAXING CHOICES, *supra* note 11, at 151.

tured in the home state of a Finance Committee member.¹⁴⁰ Finally, on April 18, 1986, Packwood, like Rostenkowski six months earlier, suspended markup. The press reprised its earlier theme about the triumph of the greedy special interests over the public good, but with a difference. Rostenkowski had been portrayed merely as losing the good fight in a committee purchased by PAC money. By contrast, "Senator Hackwood," as the *New Republic* called him,¹⁴¹ was himself to blame. He had served up "sausage," not tax reform, and failed to provide "leadership."¹⁴²

Packwood sharply changed course, and tried what he deemed thoroughgoing real reform. First he trotted out David Brockway, the Chief of Staff of the Joint Committee on Taxation, to describe the broad contours of a possible plan for slashing the top rate to as low as 25 percent. When press and committee reaction proved positive, the Brockway plan became the Packwood plan.¹⁴³ Packwood then assembled a "core group" of seven committee members, including himself, who found the plan particularly attractive, and together they agreed on a set of specific details, finally emerging with a top individual rate of 27 percent.¹⁴⁴

The low top rate helped to produce a public impression that the plan was an even more radical reform than Treasury I. This impression was not wholly wrong. The plan eliminated not only preferential treatment for capital gains (in common with Treasury I but no subsequent proposal), but also the IRA deduction (which even Treasury I had slightly expanded).¹⁴⁵ In large part, however, the Packwood plan relied on a different kind of reform than Treasury I. In addition to retaining the committee's earlier decisions about the taxation of business income, Packwood's plan sharply accentuated an ongoing trend (visible since Treasury II) of replacing direct base-broadening by the repeal of tax preferences with indirect base-broadening through what I have elsewhere called "selective limitations": provisions that differentiate between taxpayers by

¹⁴⁰ See J. BIRNBAUM & A. MURRAY, *supra* note 11, at 200.

¹⁴¹ See TAXING CHOICES, *supra* note 11, at 154.

¹⁴² See Birnbaum, *Packwood Finds his Leading Role on Tax Bill Provides a Boost in Senate Reelection Campaign*, Wall St. J., July 7, 1986, at 34, col. 1; Evans & Novak, *Tax Reform—Or Sausage?*, Wash. Post, Apr. 18, 1986, at A21, col. 4; Rosenbaum, *Tax Bill: Leadership at Issue*, N.Y. Times, Apr. 24, 1986, at D1, col. 3.

¹⁴³ See TAXING CHOICES, *supra* note 11, at 165-67.

¹⁴⁴ See *id.* at 169-71, 175.

¹⁴⁵ See J. BIRNBAUM & A. MURRAY, *supra* note 11, at 223 (noting the Packwood plan's elimination of the capital gains preference and the IRA deduction).

denying generally allowable tax benefits solely when the taxpayer is deemed to over-use or misuse them.¹⁴⁶ In particular, the plan relied heavily on (1) a greatly expanded alternative minimum tax that in effect rationed tax preferences by preventing their use to eliminate too much of one's tax liability, and (2) a new anti-tax shelter proposal, the passive loss rules, under which an individual's losses from business investments in which she did not "materially participate," while deductible against gains from such investments, generally could not be deducted against income from sources such as salary, interest, and dividends.¹⁴⁷

Within two weeks of the initial Packwood announcement, the Senate Finance Committee approved his plan, with only minor modifications, by a vote of 20-0. The Senate approved the committee bill, with even less change, by 97-3. Tax reform then went to a House-Senate conference to reach agreement on a single bill. On several occasions, the conference nearly broke down over the issue of how steeply taxes on corporations should be increased, with House Democratic conferees aiming about \$40 billion higher over five years than Republican Senate conferees. Eventually Rostenkowski and Packwood, in closed door sessions, succeeded in negotiating a compromise, and the resulting Tax Reform Act of 1986 was passed by both houses and signed by President Reagan.¹⁴⁸

Among the 1986 Act's principal features were the following: (1) reduction of the maximum individual rate from 50 percent to an apparent 28 percent (although an actual 33 percent¹⁴⁹), (2) reduction of the top corporate rate from 46 percent to 34 percent, (3) repeal of the capital gains preference, (4) adoption of a depreciation system for capital assets that was both less accelerated as a whole and more neutral as between such assets, (5) repeal of the universal IRA deduction, (6) adoption of selective limitations such as the passive loss rules and expanded minimum tax, and (7) elimination of tax liability for those below the poverty line (restoring the situation of the late 1970s, prior to inflationary bracket creep). In addition, the Act shifted expected tax liabilities totalling an anticipated \$120 billion over five years from individuals to

¹⁴⁶ See Shaviro, *Selective Limitations on Tax Benefits*, 56 U. CHI. L. REV. 1189, 1191-92 (1989).

¹⁴⁷ See 26 U.S.C. § 469 (1986) (applying to individuals and certain closely held corporations).

¹⁴⁸ See TAXING CHOICES, *supra* note 11, at 172, 179, 192, 203-25.

¹⁴⁹ The 33 percent rate resulted from the phaseout of personal exemptions and the benefit of a lower 15 percent rate. See 26 U.S.C. § 1(g) (1988).

corporations.¹⁵⁰ Many individuals nonetheless came inaccurately to believe that their nominal tax liabilities had in general increased. This misperception largely resulted from a contemporaneous reduction in income tax withholding, which led many to receive smaller refund checks or owe increased amounts upon filing post-reform tax returns.¹⁵¹

D. *Aftermath of the 1986 Act*

While the 1986 Act was somewhat of a public relations failure,¹⁵² its economic impact may have been modestly positive. Studies by some leading economists suggest that the Act slightly improved the allocative efficiency of investment without discernibly affecting the aggregate level of saving and investment (which increased post-1986, despite the elimination of various tax incentives, but possibly for reasons unrelated to the Act).¹⁵³

In 1987, as part of a deficit reduction package, Congress enacted a set of tax provisions that for the most part further advanced the reform agenda of the 1986 Act. By 1988, however, the political winds were beginning to shift. George Bush was elected President on a platform calling for the restoration of various tax preferences, including those for capital gains and oil and gas. Bush failed to gain enactment of his proposals in 1989, despite substantial bipartisan congressional support, due to the opposition of the Democratic leadership. To help counter Bush's proposals politically, the Democrats called for restoration of universal IRA deductions. This proved acceptable to Bush, and as the 1990 legislative year

¹⁵⁰ See Rosenbaum, *Big Shortfall in Corporate Taxes Thwarts Key Goal of 1986 Law*, N.Y. Times, Mar. 6, 1990, at 1, col. 1 (noting that the actual shift to corporations was far lower than \$120 billion, apparently due in part to lower-than-expected corporate profits and in part to tax planning devices such as the increased use of corporate debt). The shift resulted principally from the dramatic base-broadening for business income, much of which is earned by corporations. See e.g., TAXING CHOICES, *supra* note 11, at 3, 6 (stating that the Act broadened the base by eliminating, among other things, the favorable tax treatment of capital gains and the investment tax credit and concluding that elimination of the investment tax credit was the primary cause of the shift).

¹⁵¹ See Bristol, *NTA-TIA Conference Considers the Post Tax Reform World*, 39 TAX NOTES 1027, 1027 (1988) (citing J. Minarik, Personal Tax Issues Raised by Tax Reform (May 1988) (unpublished manuscript)).

¹⁵² See, e.g., K. PHILLIPS, THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH app. f at 247 (1990) (citing several polls in which the majority of respondents believed that tax reform was unfair, too complicated, and benefitted the rich).

¹⁵³ See Brannon, *An Early Review of Tax Reform*, 45 TAX NOTES 943, 943-48 (1989).

began, it appeared possible that both the capital gains preference and the IRA deduction would be restored. The federal budget deficit remained a potential obstacle, however.

E. *Summary*

The preceding overview of modern tax legislation suggests a number of different points. First, the tax system has been extremely unstable, with frequent legislation that oscillates between emphasizing tax instrumentalism and tax reform. Second, the macroeconomic objectives of increasing aggregate saving and investment are often prominent, but are pursued by strangely ineffective means. Third, the ambitions of prominent political actors—for prominence and praise as well as reelection—appear to be extremely important. Fourth, the news media can play a critical role, both as a passive transmitter (as when Reagan's 1981 speeches were telecast) and as an active interpreter (as in the criticism of "Senator Hackwood"). Fifth, business interests variously win (as in 1981), lose (as in 1986), and benefit fortuitously without having much direct impact (as in 1962).

Comparing 1981 with 1986, the crucial difference seems to be how the Democratic and Republican parties tried to compete with each other. In 1981, this competition involved bidding for business support as a means of getting the credit for enacting a tax cut. In 1986, it involved sacrificing business interests in order to avoid being perceived as anti-reform. The forces driving the 1981 and 1986 outcomes were essentially similar, although the outcomes were radically different.

To develop a more systematic understanding, we must examine theoretical frameworks that have been developed outside of the tax context. Legal and economic literature suggest two frameworks, public interest theory and public choice theory. As we will see, the political science literature is considerably richer and more empirically based. For convenience, however, I will organize discussion around the two frameworks that are familiar from law and economics, incorporating into them related political science viewpoints.

III. THE PUBLIC INTEREST THEORY OF LEGISLATION

A. *The Various Strands of Public Interest Theory*

In contemporary law and economics literature, the public interest theory of legislation¹⁵⁴ is little more than a strawman. Writers describe it as an old-fashioned and now universally rejected school of economic thought, discuss it very briefly, and then move on to the real (public choice-based) discussion.¹⁵⁵ The term is nonetheless useful because it describes a basic attitude, involving optimism about the legislative process, that in sympathetic hands often has specific content. I will mention three varieties of what I (but not necessarily the exponents) call public interest theory: the traditional economic view, the pluralist view from political science, and the ideological view.

1. Public Interest Theory in Economics

Market economists since Adam Smith have recognized that government could play a wealth-enhancing role in the economy by responding to instances of market failure. Smith identified the problem of public goods, noting that there were "certain public works and certain public institutions, which it can never be for the interest of any individual, or small number of individuals, to erect

¹⁵⁴ Some writers use the term "public finance theory" instead of "public interest theory." See *Accelerating Rate*, *supra* note 21, at 924-26.

¹⁵⁵ See, e.g., R. MCCORMICK & R. TOLLISON, *supra* note 17, at 3-5 (stating that the theory is deficient because it assumes an "all-knowing, benevolent government"); Doernberg & McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891, 896 (1987) (stating that tax reform "cannot be explained as an altruistic attempt by politicians to improve the Code"); *Accelerating Rate*, *supra* note 21, at 924-26 (concluding that the theory "provides little help in understanding why taxes change, as it gives little insight into why taxes actually exist in the first place"); Kalt & Zupan, *supra* note 23, at 279 (explaining that public interest theories "have correctly been viewed as normative wishings, rather than explanations of real world phenomena"); *Statutory Interpretation*, *supra* note 21, at 223 (stating that "the current distrust of government represents a major shift away from the dominant public perception of 'government as helper'"); McChesney, *Regulation, Taxes, and Political Extortion*, in *REGULATION AND THE REAGAN ERA: POLITICS, BUREAUCRACY, AND THE PUBLIC INTEREST* 223 (R. Meiners & B. Yandle eds. 1989) (noting that "[b]elief that government regulates in some disinterested 'public-interest' fashion to repair market failure has crumbled"); Tullock, *Public Choice in Practice*, in *COLLECTIVE DECISION MAKING* 30-33 (C. Russell ed. 1979) (stating that political scientists no longer believe that politicians and bureaucrats are solely interested in the public good). Posner is an exception; he gives public interest theory relatively extensive and sympathetic (although still ultimately skeptical) consideration. See Posner, *supra* note 16, at 336-41.

and maintain."¹⁵⁶ Later economists discussed using government to correct externalities, or costs and benefits associated with consumption or production that are not reflected in market prices. By the middle of the twentieth century, welfare economists such as Arthur Pigou and William Baumol had recognized that these theoretical justifications for government action could reach quite far.¹⁵⁷ Moreover, John Maynard Keynes had pioneered the view that the government should take responsibility for economic stability and prosperity through macroeconomic budgetary policy.¹⁵⁸

Economic literature about the government was almost entirely normative, rather than descriptive. The question of whether actual government behavior might vary sharply from ideal behavior tended to be ignored,¹⁵⁹ under the assumption (often merely implicit¹⁶⁰) that government could be trusted to pursue the public interest. Pigou argued that recent increases in public education and affluence would permit sufficient monitoring of government to ensure its probity and unselfishness.¹⁶¹ Keynes assumed control of government by a small and enlightened intellectual elite.¹⁶²

A cynic might say that economists had reason to favor expansion of the government's role, since this promised to enhance their power, prestige, and employment. Legislation of which they disapproved "typically elicited laments about the ignorance of politicians and recommendations for the hiring of more economists in key governmental positions."¹⁶³ There are other explanations for their optimism, however. They may have shared the widespread faith in government that dominated public perceptions for several

¹⁵⁶ A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 651 (E. Cannan ed. 1937).

¹⁵⁷ See W. BAUMOL, WELFARE ECONOMICS AND THE THEORY OF THE STATE 55-56 (2d ed. 1965); A. PIGOU, THE ECONOMICS OF WELFARE 329-35 (4th ed. 1962). Even support for income redistribution, often considered conceptually separate, can be expressed in terms of public goods and externalities. See Thurow, *The Income Distribution as a Pure Public Good*, 85 Q.J. ECON. 327 (1971).

¹⁵⁸ See J. KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY 380 (1936).

¹⁵⁹ See J. BUCHANAN & R. WAGNER, *supra* note 28, at 80-81; Grossman, *Tobin on Macroeconomics: A Review Article*, 83 J. POL. ECON. 829, 845-46 (1975).

¹⁶⁰ See Farber & Frickey, *supra* note 23, at 890; Posner, *supra* note 16, at 335 n.1, 336; see also M. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 17-18 (1981); R. MCCORMICK & R. TOLLISON, *supra* note 17, at 4.

¹⁶¹ See A. PIGOU, *supra* note 157, at 333.

¹⁶² See J. BUCHANAN & R. WAGNER, *supra* note 28, at 78-80.

¹⁶³ M. HAYES, *supra* note 160, at 17-18.

decades after the New Deal.¹⁶⁴ They may have thought—as Ronald Coase apparently did—that perceived moral differences between private and public action¹⁶⁵ might make the latter relatively altruistic. Or, as Pigou's views suggest, they may have believed that democracy naturally produces public interest outcomes. If the public interest is the sum of everyone's private interests, there is universal suffrage, and people accurately perceive and act in their interests, it may seem logical to expect "good" legislation: legislators must supply it in order to be reelected. This rosy view of politics was well in keeping with a contemporaneous school of thought in the political science literature.

2. The Pluralist School in Political Science

One of the dominant themes in American political history, reflected in the study of political science, is the relationship between "special interests" and the public or general interest. Concern about interest groups dates back to James Madison, who in the famous *Federalist No. 10* discusses "faction," or the tendency of particular groups (principally, but not exclusively, economic groups such as the rich, poor, debtors, creditors, farmers, and manufacturers) to seek legislation injurious to members of other groups.¹⁶⁶ While the terms "special interest" and "interest group" tend to be pejorative, the role that such groups play has not always been viewed negatively. Madison argued that the evils of faction could largely be controlled, through means including the creation of a polity too large and diverse for any one interest group to command a ready majority.¹⁶⁷ Alexis de Tocqueville later described the American passion for participating in political and social groups of all kinds as an essential and largely beneficial aspect of American democracy.¹⁶⁸

¹⁶⁴ See *Statutory Interpretation*, *supra* note 21, at 223.

¹⁶⁵ See Posner, *supra* note 16, at 340.

¹⁶⁶ Madison defines 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." *THE FEDERALIST NO. 10*, at 63 (J. Madison) (M. Dunne ed. 1901). He describes the "various and unequal distribution of property" as the principal cause of faction, but views ideological or religious factions as likewise important and "sown in the nature of man." *Id.* at 64.

¹⁶⁷ See *id.* at 66-70.

¹⁶⁸ See A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 191-98 (P. Bradley ed. 1945) (1st ed. 1838); *id.* at 106-20.

Among certain political scientists, principally in the 1950s, the vision of political power shared among a wide array of interest groups took on a distinctly laudatory cast. Exponents of pluralism¹⁶⁹ argued that the consequent dispersal of governmental power yields numerous benefits for society, including political stability, widely distributed political satisfaction, and a process of negotiation and compromise between interests that promotes political moderation and acceptance of others' reasonable claims.

The above claims focus on by-products of political activity, more than on the desirability of specific political outcomes. Yet pluralists were similarly optimistic about such outcomes. While mostly denying the existence of a public or general interest, apart from the aggregation of particular interests,¹⁷⁰ pluralists shared an, at least implicit, notion of equity, under which each interest should be weighed accurately (based on numbers and intensity) in the political balance. To demonstrate that the existing balance of power was reasonably equitable, pluralists argued that each person is represented by numerous interest groups, including "potential" groups, that, while as yet unorganized, stand ready to protect their members if necessary.¹⁷¹ With groups' power generally proportionate to size and intensity of interest,¹⁷² legislative outcomes tend to aggregate accurately the underlying interests of all individuals and thus of society. Moreover, since everyone's interests are heard and

¹⁶⁹ For examples of pluralism in the sense in which I use the term, see A. BENTLEY, *THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES* (1908); R. DAHL, *supra* note 16; R. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961); E. LATHAM, *THE GROUP BASIS OF POLITICS* (1952); C. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY: DECISION MAKING THROUGH MUTUAL ADJUSTMENT* (1965) [hereinafter *INTELLIGENCE OF DEMOCRACY*]; D. TRUMAN, *supra* note 16; Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734 (1983). Some pluralists became less optimistic over time. See, e.g., C. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977) [hereinafter *POLITICS AND MARKETS*] (arguing that corporate power distorts democracy).

¹⁷⁰ See, e.g., A. BENTLEY, *supra* note 169, at 258-59 (stating that "[t]he balance of group pressures is the existing state of society"); R. DAHL, *supra* note 16, at 146 (asserting that governmental decisions are grounded in the appeasement of group pressures); D. TRUMAN, *supra* note 16, at 50-51, 358 (arguing that "a totally inclusive interest . . . does not exist"); cf. *INTELLIGENCE OF DEMOCRACY*, *supra* note 169, at 276-85 (suggesting that some values or interests might be collective or universal, but arguing that a decentralized and pluralistic political process would inevitably favor these values).

¹⁷¹ See *INTELLIGENCE OF DEMOCRACY*, *supra* note 169, at 229 ("[A]lmost any value that any even relatively small number of citizens moderately or strongly wishes to see weighed into the policy-making process will be weighed in at some value significantly above zero."); D. TRUMAN, *supra* note 16, at 51-52 (discussing potential groups).

¹⁷² See *INTELLIGENCE OF DEMOCRACY*, *supra* note 169, at 242-45.

weighed, decisions that were not abstractly correct in advance may be legitimated *ex post* by universal, process-based consent.¹⁷³

This pluralist defense of the legislative process differs significantly in emphasis from the public interest view of the economists. It emphasizes wealth distribution and value choices concerning the nature of the good that are not objectively reducible to wealth. Economists, by contrast, often emphasize maximizing aggregate social wealth. In addition to having different concerns, the pluralists and public interest economists were not conscious allies; indeed, they appear to have been largely unaware of each other. Their respective views nonetheless can be amalgamated as part of a single broader view. The pluralist account of politics strongly suggests that wealth-maximizing policies generally will be adopted.¹⁷⁴ Moreover, it provides an attractive account of how decisions apart from wealth maximization are made.

3. Ideological Views of the Public Interest

We have thus far defined public interest theory objectively, or as holding that legislation actually tends to be "good" in the economic or pluralistic sense. The theory can also be defined subjectively, or as describing people's motives without regard to what is actually good. In this sense, it holds only that legislators or those who influence them pursue altruistic or ideological goals as ends in themselves, and seek to do good (as they conceive of the good) rather than solely to pursue self-interest in the narrow sense.

The question of whether (and to what extent) political actors' motives are altruistic or ideological is extremely important. However, it raises very different issues than the branches of public interest theory discussed above. Accordingly, for convenience I will defer discussing it until we have completed our examination of public interest theory and begun to explore the difficulties of public choice theory.¹⁷⁵

¹⁷³ See *id.* at 240, 254.

¹⁷⁴ By definition, a wealth-maximizing policy helps winners more than it hurts losers. A pluralist would therefore predict, all else being equal, that such a policy will be more strongly supported than opposed. A wealth-maximizing policy can be made Pareto-optimal (and thus have no losers) if full compensation is paid to those who otherwise would lose. See *id.* at 195 (arguing that pluralistic decision-making creates "strong tendencies toward Pareto optima").

¹⁷⁵ See *infra* notes 466-81 and accompanying text.

B. *Criticisms of Public Interest Theory*

One could not sensibly assert that the public interest view of American politics is wholly false. Surely the government does many things that increase social well-being, such as maintaining public roads, enforcing contracts, and deterring violent crime and foreign invasion. Moreover, the political system reflects and responds to the public's wishes,¹⁷⁶ at least in the extreme sense that no one proposing the policies of a Pol Pot or a Nicolae Ceausescu would have good prospects of sustained electoral success.¹⁷⁷ Disagreements with the public interest view are in part a matter of degree (the pluralists were not unrelievedly sanguine¹⁷⁸), as well as of emotional predilection regarding whether to focus on the system's elements of success or failure.

Nonetheless, the public interest view has been criticized on theoretical and empirical grounds for misapprehending both the balance between good and bad and its underlying causation. In keeping with academic fashions, the attack by economists has been largely theoretical and that by political scientists largely empirical.

1. (Largely Theoretical) Criticisms by Economists

By the early 1960s, many economists had come to realize that Congress often has little interest in deferring to their wisdom. For example, Congress had never attempted to tailor excise taxes to correlate with professionally estimated externalities.¹⁷⁹ Moreover, economists' empirical investigations of government activity failed to confirm their belief that government acts to correct market failure.¹⁸⁰ Finally, the fashion that Mark Kelman calls "economic

¹⁷⁶ The public's wishes may diverge from social well-being, for example, if people are deceived about what is in their interest, ignore a general interest of society, or want to oppress a minority. Yet, the public's wishes provide, at a minimum, strong evidence of where social well-being lies. See H. PITKIN, *THE CONCEPT OF REPRESENTATION* 209-10 (1967) (arguing that a representative, in order to serve her constituents' interest, should follow their wishes unless she has a "good explanation of why their wishes are not in accord with their interest").

¹⁷⁷ Cf. *INTELLIGENCE OF DEMOCRACY*, *supra* note 169, at 232. Lindblom notes correctly that a highly centralized system of decision-making, in comparison to one where power is dispersed among many interest groups, is more likely to yield policies that hurt some and benefit no one outside of government. See *id.*

¹⁷⁸ See, e.g., R. DAHL, *supra* note 16, at 138 (noting the exclusion of blacks and Communists from the political process).

¹⁷⁹ See *Accelerating Rate*, *supra* note 21, at 925-26.

¹⁸⁰ See, e.g., R. MCCORMICK & R. TOLLISON, *supra* note 17, at 5 (noting that often "there is a sizeable gap between standard economic rationalizations for state interven-

imperialism," or extending economic analysis "to all spheres of human activity,"¹⁸¹ suggested viewing legislators through the conventional prism of rational self-interest. Economists began to believe that politicians would reduce social welfare deliberately if this happened to benefit them.¹⁸² Economists almost simultaneously became aware of public interest theory as a contestable way of thinking and by consensus rejected it.¹⁸³ We can divide the elements of economists' rejection of public interest theory into two categories.¹⁸⁴

a. *When Everyone "Wins," Everyone May Lose*

The pluralists applaud a system where power is decentralized and everyone occasionally wins—for example, where each interest group constituency receives a share of government largesse. To many economists, however, this pleasant distributional dream is instead an efficiency nightmare that threatens to reduce social wealth and leave everyone worse off than if there were no largesse at all. They identify two principal reasons for the inefficiency of a system that gives everyone the benefit of an occasional wealth

tion in the economy and the actual properties of specific instances of state intervention"); Posner, *supra* note 16, at 336 (stating that "fifteen years of . . . research . . . have demonstrated that regulation is not positively correlated with the presence of external economies or diseconomies or with monopolistic market structure").

¹⁸¹ M. Kelman, *supra* note 23, at 206.

¹⁸² See, e.g., J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 19-20 (1962) (arguing that the same basic values and self-interest that motivate individuals in the economic sphere also apply in the political sphere). Perhaps the very naiveté of the earlier economists' view of politicians, see M. HAYES, *supra* note 160, at 128, contributed to a harsh backlash.

¹⁸³ See, e.g., Kalt & Zupan, *supra* note 23, at 279 (noting that "public interest theories of politics" were rejected and "replaced by models of political behavior that are consistent with the rest of microeconomics"); Tullock, *supra* note 155, at 30-31 (discussing the change in attitude toward the motives of government officials from public interest to individual interests). Some law and economics scholars espouse a public interest view of much of the common law as developed by the courts. See, e.g., W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987) (stating that "the common law of torts is best explained as if the judges . . . were trying to promote efficient resource allocation").

¹⁸⁴ For convenience and because it does not seem germane here, I ignore a third category of economic analysis tending to weaken public interest theory: the study of voting and election paradoxes such as cycling, logrolling, and the consequences of having (in many cases) a choice between only two candidates. For discussions of these phenomena, see A. BRETON, *THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT* 123-39, 155-57 (1974); A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 114-41 (1957); I. MCLEAN, *supra* note 7, at 25-27.

transfer. First, the means of transferring wealth may involve using resources inefficiently.¹⁸⁵ For example, assume that each of the country's 435 congressional districts pays \$1 billion dollars of Federal taxes and is the site of \$1 billion dollars of wasteful Federal pork barrel spending (such as building army bases that serve no military purpose). Each district benefits greatly from its own pork barrel project (since it receives the entire benefit and bears only 1/435th of the cost), yet loses overall because, given its share of the costs of all projects, it is exchanging \$1 billion dollars cash for a worthless asset.¹⁸⁶

The second reason advanced by economists for the inefficiency of governmental wealth transfers is that, when they are available, people sometimes expend substantial resources seeking them. For example, imagine that each military base depends politically on the efforts of lobbyists who must churn out favorable propaganda and make campaign contributions to members of Congress.¹⁸⁷ Many of the resources used in seeking all the reciprocal transfers will be consumed, not just transferred, and thus are essentially wasted.

If everyone loses in the aggregate from transfers of government largesse, one might think that all could simply agree to dispense with the transfers. This solution is impeded, however, by a collective action problem, or "prisoner's dilemma." Recall, for example, that each congressional district benefits from its own pork barrel project, whether or not any other district has a project. No district benefits from foregoing its own transfer unless its decision influences significant numbers of others to forego seeking transfers as well. In the vast and decentralized political arena celebrated by

¹⁸⁵ See, e.g., Posner, *The Social Costs of Monopoly and Regulation*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 71, 71-72 (J. Buchanan, R. Tollison & G. Tullock eds. 1980) (identifying the costs of seeking transfers as an additional "social cost" which produces inefficiency); Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY, *supra*, at 39, 49 (noting that non-competitive behavior produces costs among those seeking a transfer, whether or not they are successful). For a discussion of the reasons of this claimed inefficiency, see *infra* text accompanying notes 188-200.

¹⁸⁶ A more conventional example in the literature involves monopolies. If every industry establishes a monopoly via favorable government regulation, then everyone associated with an industry seemingly "wins," yet on balance many industries (or everyone) may lose, since all are input purchasers and consumers as well as producers and thus in varying measure bear the welfare triangle costs of monopoly. See Tullock, *supra* note 185, at 44.

¹⁸⁷ Another way of looking at this cost is as an opportunity cost of using the same resources productively. See G. TULLOCK, *supra* note 22, at 14.

the pluralists, any such coordination between different groups' decisions about whether to seek transfers may be impossible.

b. *Wealth-Reducing Transfers and the Theory of Groups*

A question still remains as to why the transfers obtained by districts or interest groups should be inefficient (costs of seeking them aside). This premise was explicit in the economists' analysis described above.¹⁸⁸ Yet one might expect efficient transfers (such as militarily useful bases) to be the norm even if the persons seeking a transfer are utterly indifferent to its efficiency.¹⁸⁹ As an example, anyone who seeks an army base presumably must claim that it will be militarily useful. Those outside the locality have self-interested reasons for opposing the base unless this claim is persuasive. In political competition, the stronger arguments for transfers seemingly should defeat the weaker ones.

The problem, economists argue, is that this asks too much of people outside the area where the useless army base would be located. Information and political action—such as determining that a base is useless and punishing politicians who support it—are costly to voters unless they happen to enjoy politics as a hobby. Therefore, most voters choose to become well-informed about only a small number of issues, principally those in which they have a substantial direct stake—such as a military base in one's own district.¹⁹⁰ On all other issues, voters engage in "efficient shirking": they make no effort even to understand, because the cost of one's efforts would exceed the expected benefit.¹⁹¹ In particular, voters shirk with regard to widely shared public goods (including the avoidance of "public bads" such as inefficient expenditures). Shirking is individually efficient not only because each person's share of the benefit (or avoided detriment) is small, but because of a collective action problem. If all affected voters cooperated to learn and implement their interests, they all might benefit on balance despite the costs of information and political action. Yet

¹⁸⁸ See *supra* text accompanying notes 186-87.

¹⁸⁹ See Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983) (predicting that the means used by interest groups to redistribute wealth will tend to be efficient).

¹⁹⁰ See D. MUELLER, PUBLIC CHOICE 117-19 (1979).

¹⁹¹ See, e.g., McCormick & Tollison, *Wealth Transfers in a Representative Democracy*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY, *supra* note 185, at 293 (applying this insight to a theory of lobbying).

each individual voter, having only a trivial capacity to affect political outcomes, is tempted to free ride on others' efforts and is aware that others may free ride on hers. From each voter's perspective, "everyone else" will determine the outcome. One is therefore better off not incurring the costs of diligence, regardless of whether or not others assume this burden.¹⁹²

Accordingly, economists expect voters to function for most purposes as virtual ciphers who ignore the legislative process for rationally self-interested reasons, and who in turn are ignored by participants in the process. This view, however, fails to describe the behavior of voters who belong to small interest groups that seek transfers from the rest of the public. One example of such an interest group is the group of members of a congressional district who seek a useless military base. The benefits expected by members of an interest group may be sufficiently great to justify seeking information and engaging in political action. Moreover, while the free rider problem still exists,¹⁹³ it is less acute than for the rest of the public. Small groups find it cheaper than do large groups to coordinate their members' efforts and monitor shirking.

The result is a "systematic tendency for 'exploitation' of the great [in number] by the small."¹⁹⁴ Contrary to the expectations of the pluralists, "potential groups" of great numbers remain unorganized and ineffective even in the face of exploitation. Consumers, for example, often lose to business interests. The former are a vast and undifferentiated group while the latter are divided into industries, each containing only a small number of firms that can solve the free rider problem fairly well.¹⁹⁵

This explanation still does not account for why interest group transfers should be inefficient, the costs of obtaining and administering them aside. In the military base example, assuming that the government would spend \$1 billion dollars in a particular district, residents in that district would benefit even more if the cash were paid to them directly instead of being spent on the base.¹⁹⁶ If, as we have posited, the residents have the power to direct a \$1 billion

¹⁹² See M. OLSON, *supra* note 20, at 11-16.

¹⁹³ The free rider problem occurs because the transfer is a public good for members of the interest group, who therefore are tempted to shirk and rely on each others' efforts.

¹⁹⁴ *Id.* at 29 (footnote omitted and emphasis deleted).

¹⁹⁵ See *id.* at 126-27, 142-43.

¹⁹⁶ When the \$1 billion is spent on a useless military base, the local residents benefit by less than \$1 billion: if the money were theirs they would spend it differently.

dollar expenditure, one would expect them to have it paid directly to themselves. This result would be efficiency-neutral, the costs of seeking the transfer aside. To the economist, \$1 billion dollars in the hands of one group is no better or worse than one billion dollars in the hands of another group.¹⁹⁷

As Gordon Tullock explains, however, a direct transfer of this sort would simply be too "raw."¹⁹⁸ Rent-seekers, those who pursue transfers artificially contrived by the political process,¹⁹⁹ are constrained to advocate inefficient means of transferring wealth because only then can they conceal from the public at large what is really going on. The public, despite its general indifference to politics, seems to enjoy following obvious scandals.²⁰⁰

In short, the public is not quite the cipher economists otherwise assume. This explains the need for a fig leaf that reduces the value of a transfer to its recipients. Yet it still does not fully explain why the transfer should be inefficient. For example, those who seek a local army base should be at most indifferent to questions of military need; they have no reason to *prefer* that the base be useless. More generally, people can conceal rent-seeking motives behind valid as well as spurious rationales.

The economists' probable response to this problem is twofold. First, economists who already believe in the chronic inefficiency of entire areas of government activity (such as economic regulation) find it reasonable to assume that in each particular case their general belief will be validated. Second, if rent seekers are indifferent to anything beyond their private gain and all other voters are sufficiently ignorant, then rationales need not have much plausibility—for one to be correct would be wildly coincidental. Indeed, if the public is highly cynical, the rationale for a transfer may need to reduce significantly the percentage of value that is transferred (or the directness of the transfer), even if the rationale need not otherwise be plausible.

The economic theory of legislation will be discussed more critically in Section IV.²⁰¹ For now, it is enough to assert that the

¹⁹⁷ See Craswell, *Ballade of Distributional Considerations*, 39 J. LEGAL ED. 54 (1989) (noting that legal economists study a variety of topics but leave "[a]ll distributional issues aside").

¹⁹⁸ G. TULLOCK, *supra* note 22, at 19.

¹⁹⁹ See R. AMACHER & H. ULBRICH, *PRINCIPLES OF ECONOMICS* 677 (4th ed. 1989); Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575, 575 (1982).

²⁰⁰ See G. TULLOCK, *supra* note 22, at 21, 76-77.

²⁰¹ See *infra* text accompanying notes 292-508.

theory makes some sense on its face, and that to the extent it is believed, it is highly damaging to any strong version of the public interest view.

2. (Largely Empirical) Criticisms by Political Scientists.

In recent years many political scientists, like economists, have become skeptical of the pluralist/public interest view of legislation. This skepticism arises principally from empirical studies of who interest groups represent and how interest groups participate in the legislative process. The pluralists' optimism about the balance and universality of group representation in Washington is contradicted by substantial evidence. For example, registered interest groups disproportionately represent corporate business interests²⁰² (as expected under the economic theory of groups), despite recent growth among citizen, civil rights, and social welfare groups.²⁰³ The extent to which one's interests are represented also tends to vary positively with wealth.²⁰⁴ Even without explicit reference to the economic theory of groups, political scientists have come to recognize that "potential groups" cannot redress the balance. Thus, Elmer Schattschneider distinguished organized and unorganized groups, noting the implausibility of assuming that "a few workmen who habitually stop at a corner saloon for a glass of beer are essentially the same [in political influence] as the United States Army" ²⁰⁵

Schattschneider's work suggested that influence upon legislation was as highly skewed as one would expect from the interests' uneven

²⁰² See, e.g., M. HAYES, *supra* note 160, at 15-16 (surveying the academic debate concerning the extent of corporate power); E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 31 (1960) [hereinafter *SEMI-SOVEREIGN PEOPLE*] (assessing the scope of business influence in American politics); K. SCHLOZMAN & J. TIERNEY, *ORGANIZED INTERESTS IN AMERICAN DEMOCRACY* 72-73 (1986) (noting that the multiplicity of business and trade organizations to which General Electric belongs manifests its political input).

²⁰³ See K. SCHLOZMAN & J. TIERNEY, *supra* note 202, at 75. Lindblom, initially perhaps the most optimistic of the pluralists, later decided that excessive corporate power was a serious problem. See *POLITICS AND MARKETS*, *supra* note 169, at 347-51.

²⁰⁴ As Elmer Schattschneider put it, "[t]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent. Probably about 90 percent of the people cannot get into the pressure system." *SEMI-SOVEREIGN PEOPLE*, *supra* note 202, at 35. But see K. SCHLOZMAN & J. TIERNEY, *supra* note 202, at 73-74 (noting that although the well-off may be favored by economic representation, "it is the have-nots among [interest] groups who command the preponderance of . . . organized political representation").

²⁰⁵ *SEMI-SOVEREIGN PEOPLE*, *supra* note 202, at 28.

representation in Washington. His classic study of interest group lobbying on the Smoot-Hawley Tariff demonstrated that business groups seeking high tariffs were virtually unopposed by those (such as consumers) who would have benefitted from low tariffs.²⁰⁶ Instead of pluralist competition, he found a pattern of pervasive logrolling, whereby business lobbyists agreed to "reciprocal non-interference,"²⁰⁷ or support for each other's high tariff demands. If one group sought a tariff on items that a second group needed to purchase, the second group would settle for a "compensatory duty" on its own products.²⁰⁸ Thus, the legislative process was a positive sum game for its participants, and probably a highly negative sum game for the country as a whole.²⁰⁹

A later case study of tariff politics, by Raymond Bauer, Ithiel de Sola Pool, and Lewis Dexter, showed a very different pattern for the period from 1953 to 1962.²¹⁰ Then, in keeping with pluralist expectations, interest groups on all sides of the issue participated. Yet Bauer, Pool, and Dexter still rejected, albeit on different grounds, the pluralist belief that legislative policy is a product of the balance of interest group power. They found that interest groups were weak and under-financed, tended to offset each other, and thus left legislators substantial freedom to follow their own inclinations.²¹¹

More recent studies suggest that a large number of cases, although intermediate to those studied by Schattschneider, on the one hand, and by Bauer, Pool, and Dexter on the other, are often closer to the former.²¹² Interest groups may not always dictate to the extent they did in the enactment of Smoot-Hawley, but today they are often well-financed and influential, and usually are found

²⁰⁶ See E. SCHATTSCHNEIDER, *POLITICS, PRESSURES, AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929-1930 REVISION OF THE TARIFF* (1935).

²⁰⁷ *Id.* at 135-36.

²⁰⁸ See *id.* at 144-46.

²⁰⁹ See *id.* at vii (noting that a thousand leading economists petitioned President Hoover to veto the Smoot-Hawley Tariff).

²¹⁰ See R. BAUER, I. POOL & L. DEXTER, *AMERICAN BUSINESS AND PUBLIC POLICY: THE POLITICS OF FOREIGN TRADE* (2d ed. 1972) [hereinafter *AMERICAN BUSINESS*].

²¹¹ See *id.* at 396-99.

²¹² See, e.g., M. HAYES, *supra* note 160, at 25-39 (providing a typology of political processes utilizing a transactional theory of lobbying); J. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* (1973) (studying empirically the first session of the 91st Congress); K. SCHLOZMAN & J. TIERNEY, *supra* note 202, at x-xii (considering the empirical debate on the determinative role of interest group competition).

only, or at least disproportionately, on one side of an issue. While some case studies support the pluralist account,²¹³ one remains puzzled why interest groups should play such varying roles.

In an influential review of the Bauer, Pool, and Dexter study, Theodore Lowi pioneered the notion that the role played by interest groups depends upon the nature of the issue at any given time.²¹⁴ Lowi posited three principal categories of public policy: distribution, regulation, and redistribution.²¹⁵ Distribution involves pork barrel issues, the quest by narrow interest groups for subsidies, chiefly at the expense of the rarely represented general public.²¹⁶ The contestants, as reported by Schattschneider,²¹⁷ accommodate each other through logrolling and reciprocal noninterference.²¹⁸ Regulation involves direct choices between the interests of well-organized competing groups (such as one industry against another). It thus fits the pluralist model of negotiation and compromise and also manifests instability as the winning alliances change.²¹⁹ Finally, redistribution again involves direct choices between competing groups, but here the groups are large social classes, such as rich versus poor or big business versus organized labor. While redistribution resembles regulation in having opposite sides represented, redistribution is more conflictive and ideological in style, and more stable in outcome. The classes are long-term antagonists but, given the scale and duration of conflict, a balance of power develops and persists.²²⁰

Lowi's topology suggests that the pluralists are clearly wrong about distributional issues, and possibly wrong about redistributional ones as well, given the wealth bias of interest group representation. Even issues that superficially look like pure (pluralist)

²¹³ See Lowi, *American Business, Public Policy, Case-Studies, and Political Theory* (Book Review), 16 WORLD POL. 677, 681 (1964).

²¹⁴ See *id.* Lowi's topology was widely adapted. See M. HAYES, *supra* note 160, at 19-39; R. RIPLEY & G. FRANKLIN, CONGRESS, THE BUREAUCRACY, AND PUBLIC POLICY 20 (rev. ed. 1980); Smith, *Toward a Comparative Theory of the Political Process*, 1 COMP. POL. 498, 498-500 (1969).

²¹⁵ See Lowi, *supra* note 213, at 689. Lowi expressly excludes foreign policy from his topology. See *id.* at 689 n.17.

²¹⁶ See *id.* at 692-95.

²¹⁷ See E. SCHATTSCHNEIDER, *supra* note 206, at 135-41, 144-46.

²¹⁸ Lowi argues that Bauer, Pool, and Dexter found a different pattern on tariff legislation because by the 1950s, tariffs were no longer a distributive issue but a regulatory one. See Lowi, *supra* note 213, at 694-95.

²¹⁹ See *id.* at 695, 699.

²²⁰ See *id.* at 691, 707-13.

regulation might also be distributional if some interested parties are unrepresented. For example, several groups that have cooperated to win a transfer from the general public might then more visibly compete regarding its allocation among themselves.

C. *Public Interest Theory and the Problem of Cognitive Bias*

Thus far, in examining the problems with public interest theory, we have defined the public interest as maximizing social wealth and distributing it equitably. Reserving for later the issues raised by ideological motives, we have assumed both that people seek wealth (defined narrowly, although taking account of the psychic cost of time and effort), and that they are rational in deciding how to seek it. Failures by the political system to maximize and distribute equitably social wealth have been attributed to poorly aligned incentives (as when free rider problems distort responses due to information costs) and to unequal political access and power.

The one hint that people may be more idiosyncratic than the rational-pursuit-of-wealth model recognizes came when I noted that a district seeking a wealth transfer may need to conceal this objective (and reduce the value transferred) by using the fig leaf of a militarily useless Army base. This example is not necessarily inconsistent with the model: it can be seen as showing the need to raise information costs for those outside the district so that they will not find it worth their while to question the expenditure.²²¹ Yet the example raises some interesting problems with the model. Might people be unusually susceptible to spurious claims about the need for military spending? If so, does this show a lack of rationality? Alternatively, might it suggest that people prefer high military spending without regard to effectiveness?²²² Such a preference, while seemingly perverse, cannot be called irrational if "rationality" implies only the selection of appropriate means to advance one's objectives.²²³

I have in mind two related issues with different implications for public interest theory. The first is whether people's cognitive biases

²²¹ See, e.g., G. TULLOCK, TOWARD A MATHEMATICS OF POLITICS 103-04 (1967) [hereinafter MATHEMATICS] (discussing the importance of a political program's degree of complexity, which must be low enough that its beneficiaries understand it and high enough that those burdened by it ignore it).

²²² See Isenbergh, *supra* note 53.

²²³ See, e.g., A. DOWNS, *supra* note 184, at 5 ("[T]he term *rational* is never applied to an agent's ends, but only to his means.").

and illusions shape political choices in such a way as to provide further grounds for skepticism about the theory. The second is whether we can properly say that people are cognitively biased. If they want something and the political system gives it to them, how can they be wrong and the "true" public interest different from what they want?

1. Cognitive Biases and Illusions as Favoring Bad Legislation and Interest Group Transfers

We have been thinking of people as making rationally self-interested decisions based on limited knowledge. They process with reasonable accuracy the information that has come to their attention, and seek more information if the expected benefit of doing so exceeds the expected cost. While this assumption does not lead inevitably to public interest legislation (instead, it makes certain types of political "market failure" predictable), it appears at least moderately helpful. Interest group transfers must be sufficiently small or well-concealed to avoid arousing the public from its rational ignorance. Note also that politicians may have every incentive to alert the public to inefficient transfers supported by their opponents.

Unfortunately, the above view of human behavior is to a certain extent false. Instead of seeking information, people often shun it lest it prove unpleasant, for example, by contradicting their cherished beliefs. As Gordon Tullock has commented, "[t]he liberals who read *The National Review* or the conservatives who read *The Nation*, are few. Neither group really wants information which might lead it to change its mind."²²⁴ For similar reasons, political rhetoric often is designed to soothe rather than inform, and so mollifies by confirming stereotyped views even if world events must be ignored or misinterpreted.²²⁵

To the extent people receive new information, they tend to process it in systematically inaccurate ways. Empirically demonstrated examples include the "constancy principle" (interpreting information in such a way as to make it consistent with one's predispositions), "consistency bias" (agreeing with people one likes and disagreeing with those one dislikes), "positivity bias" (the common though not universal tendency to interpret ambiguous

²²⁴ MATHEMATICS, *supra* note 221, at 127-28.

²²⁵ See M. EDELMAN, *supra* note 25, at 8.

information in a positive rather than a negative light), and "agreement bias" (tending to agree with what one hears).²²⁶ In addition, people often mistakenly consider visual information more trustworthy than verbal information; as a Reagan Administration official once put it, "What are you going to believe, the facts or your eyes?"²²⁷ These biases can be exploited by politicians or interest groups to benefit themselves at the expense of the general public. Examples include the "big lie" technique of constant repetition²²⁸ and the calculated crafting of a likeable personal image—as when President Bush publicizes showering with his dog and disliking broccoli.²²⁹ These methods affect principally the public's factual beliefs, but some have suggested that self-interested politicians can also shape the public's preferences. John Kenneth Galbraith's claim that businesses, through advertising, can first create and then satisfy new consumer desires²³⁰ may apply to politicians and legislation.²³¹

Perhaps the most far-reaching study of how people's irrationality (from a narrow self-interest perspective) can further interest group

²²⁶ C. ELDER & R. COBB, *supra* note 25, at 11.

²²⁷ H. SMITH, *supra* note 25, at 412; *see also* A. RANNEY, *supra* note 25, at 14-15 (people consider television more believable than newspapers because it is more personal).

²²⁸ Consider the advice that Treasury Secretary Brady recently gave to advocates of restoring the capital gains preference:

[R]epeat yourself and repeat yourself and repeat yourself. If we link the idea of double taxation and capital gains to the idea that American companies are being prejudiced and in their home districts they are losing tax and job opportunities because of the fact that we are not competitive on a cost of capital basis, I think we can make it work. But you have to keep repeating yourself and repeating yourself and repeating yourself. . . . Be simplistic about it, take the heat, weather the old rich-poor gag, and I think we'll get it done.

I Tell You Three Times: Brady Boosts Savings and Investment Incentives, 46 TAX NOTES 987, 987 (1990).

²²⁹ The Center for Media and Public Affairs reported that Bush's dog Millie was more often mentioned in major media stories during the first six months of the Bush Administration than were the secretaries of education, agriculture, and veterans' affairs combined. *See* Shepherd, "News of the Weird," *Chicago Reader*, Mar. 23, 1990, § 3, at 1.

²³⁰ *See* J. GALBRAITH, *THE AFFLUENT SOCIETY* 156 (1958).

²³¹ *See* M. HAYES, *supra* note 160, at 105; MATHEMATICS, *supra* note 221, at 15-16. Tullock argues, however, that the Galbraithian view is overstated: "Suppose we consider the establishment of a new 'service' industry which gives its customers floggings in return for a reasonable fee. It will be generally agreed that no matter how zealously the slogan 'Fifty Lashes Every Friday' was promulgated, the company would be unable to establish a mass market." *Id.* at 159 n.7.

dominance is Murray Edelman's *The Symbolic Uses of Politics*. Edelman argues that, in a mass society where government is enormously powerful but remote from everyday life, politics becomes a "passing parade of abstract symbols . . . [onto which most people project] private emotions, especially strong anxieties and hopes."²³² They ignore substance because they feel powerless, lack information, cannot accurately assess the effects of a politician or a policy, and are seduced by the emotional content of verbal abstractions. Instead of demanding tangible benefit from government policy, they settle for easily provided symbolic reassurance, such as speeches blaming scapegoats for their problems and anxieties, or regulatory legislation that supposedly protects the "little man" but actually enriches narrow elites.²³³

Edelman names the large, unorganized groups of people that seek symbolic satisfaction "Pattern B" groups, to contrast them with "Pattern A" groups, or small and well-organized interest groups in the traditional sense.²³⁴ Pattern A groups have sufficient information and power to make rational, materially self-interested judgments about policies and politicians. They consciously manipulate symbols in order to win public backing for policies that favor their interests. The result is much as predicted by the economic theory of groups, except that (1) a Pattern A group's success depends in large part on its ability to manipulate symbols, and (2) members of the Pattern B groups are not merely rationally ignorant, but contented "defenders of the very system of law which permits the organized to pursue their interests effectively."²³⁵ Edelman's analysis therefore suggests more transfers to interest groups than would follow from rational ignorance and collective action problems alone.

2. Can People Really Be "Biased" About What They Want?

The previous section suggested that people's cognitive biases and taste for deceptive symbolic reassurance help to show why the public interest theory of legislation is wrong. One could argue, however, that if people are getting what they want, as Edelman's and even Galbraith's views suggest, then by definition the public

²³² M. EDELMAN, *supra* note 25, at 5.

²³³ *See id.* at 4, 22-27.

²³⁴ *See id.* at 36.

²³⁵ *Id.* at 40.

interest is being served. For example, assume that consumers support existing safety regulation of the automobile industry but that an economist could show that the regulation has no effect on safety and enriches the industry at the consumers' expense.²³⁶ The economist's view is of no relevance if definitionally people's interest is whatever they think it is.

In this simple case, it may be easy to show that the public interest is not being served. If people support the safety regulation because they want to save lives, and the regulation, contrary to their belief, fails to do so, then they are not really getting what they want.²³⁷ Yet what if people, in addition to wanting increased safety if possible, want to be comforted and reassured by a show of government concern? (This desire may be responsible for their clinging to the false belief that the regulation saves lives.) They may implicitly regard the cost of the regulation as a price worth paying for psychic reassurance in a world where automobiles are unavoidably dangerous.

Making the problem even harder is the fact that not all legislation that economists scorn as wealth-reducing is based on falsifiable factual claims. Consider farm subsidies that lower the gross national product (by supporting an "inefficiently" large farm sector), but cater to a popular sentiment that farmers and rural life are admirable. If one assigns sufficient value to increasing the size of the farm sector, the subsidy is by definition "wealth-maximizing." It provides a public good (more farms) that private individuals might not be able to provide through voluntary contributions, even if everyone wanted a society with more farms, due to collective action problems. Thus, while an economist can demonstrate that the subsidy has costs (since it lowers the gross national product), she cannot show that it is bad without specifying the appropriate value choice about farms.

The underlying danger is clear. To insist that publicly supported policies are bad, and thus that people do not know their own interests, is to risk engaging in the insidious elitism of ascribing

²³⁶ This example is derived from Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677 (1975), but I do not mean to imply agreement with Peltzman's claims about auto safety regulation. See C. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 77-80 (1990); M. Kelman, *supra* note 23, at 239-45.

²³⁷ Cf. G. TULLOCK, *supra* note 22, at 30 (discussing whether costs were imposed when an eighteenth century medical patient asked to be bled based on the mistaken belief that this treatment would cure his illness).

"false consciousness" to anyone whose values differ from one's own. Even granted that people often misperceive their interests, it is wise to be skeptical of anyone who claims to know better. Economists are only human, and may suffer like the rest of us from ideological bias and egocentrism.

Nonetheless, strong grounds exist for resisting the view that transfers to small interest groups must serve the public interest if they are popularly supported. Public support may be founded on misapprehension of causal relationships or on the failure to understand costs. The psychic reassurance provided by legislation may even correlate positively with the likelihood that it will be ineffective.²³⁸ One also may question whether the public benefits from being deceived, or truly wants to be deceived, even if its embrace of false factual claims suggests some such (at least subconscious) inclination.

A further problem is suggested by Edelman's account of government as systematically creating public anxiety through the manipulation of supposed crises (as with McCarthyism or the drug war) and then easing this anxiety through symbolic responses.²³⁹ Despite the sense of relief created by the symbolic response, government may have lessened public well-being, just as, though one may be better off paying blackmail than not, it may be better still if the blackmailers could not make their threats.²⁴⁰

D. *Public Interest Theory and Income Tax Legislation*

We have now examined a number of reasons for considering public interest theory overly optimistic. Information costs and collective action problems lead to transfers from the many to the few, and may reduce social well-being even if everyone is among the favored "few" on some issues. Unequal political power and access impeach the pluralists' account of broad-based negotiation and compromise. People's cognitive biases and response to symbols facilitate manipulation by the well-informed.

How does income tax legislation fit into this picture? To address this question, we will examine in turn the recent legislation

²³⁸ See, e.g., R. NOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS 101 (1971) (noting Congress's preference for writing legislation with "fatuous, self-contradictory wish-lists").

²³⁹ See M. EDELMAN, *supra* note 25, at 69-70.

²⁴⁰ See, e.g., Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983) (discussing the reasons for the criminalization of blackmail).

itself, the role played in tax matters by interest groups, and public comprehension of tax issues.

1. Assessing Public Interest Explanations of Income Tax Legislation

There are a number of different ways in which we could try to explain the consistency of recent income tax legislation with public interest theory. As we will see, however, these explanations, though not entirely wrong (and hard to assess given the ambiguity of what is good tax law), do not seem to explain very much.

a. *Tax Reform*

The enactment of sweeping tax reform legislation in 1986 looks like a good example of public interest theory at work. Many would agree that tax reform is a good thing, both in principle and, to a lesser extent, as enacted. Moreover, the basic reform principle of repealing tax preferences in order to pay for lower rates seems the very antithesis of what one would expect based on interest group theories of politics (optimistic pluralism aside). The 1986 Act therefore poses a significant challenge for such theories. Yet it falls far short of validating public interest theory. One is left wondering how to explain either the frequency of anti-reform legislation or the congressional habit of oscillating between reform and instrumentalism. Moreover, one must explain the tendency of the 1986 Act, magnified at each stage of the legislative process, to address perceptions of abuse through selective limitations at the expense of straightforward base-broadening. This had obvious political advantages, but greatly increased the Act's complexity and reduced its efficiency.²⁴¹ Although the shift to selective limitations does not necessarily contradict attributing public interest motives to Congress, which may simply have been misguided, it does perhaps justify heightened skepticism.

b. *Level of Taxation*

The level of taxation responds to some extent to public opinion. Tax increases in the late 1970s as a result of inflation-caused bracket creep, and public dissatisfaction with governmental perform-

²⁴¹ See Shaviro, *supra* note 146, at 1190.

ance,²⁴² contributed to the 1981 tax cut. Concern about the post-1981 budget deficit helped prompt tax increases in 1982 and 1984. If the public interest with regard to spending levels is defined as whatever the public wants (a plausible definition, given that people often are the best judges of their own interests, if one disregards the issue of redistributive spending to benefit voting minorities such as the poor), this example may seem to support a public interest view.

One nonetheless cannot make a strong case that tax legislation, by adjusting expected revenues, rationally implements the public interest in this sense. The real societal burden of government is of course a function of spending, not taxation, which merely represents one way of paying for spending. During the 1980s, federal government spending increased in real terms despite a popular and powerful President's stated policy of reducing it.

Voters often support tax cuts without spending cuts because they are more aware of overt than actual burdens.²⁴³ For similar reasons, they prefer taxes with disguised incidence to those with clear incidence (a major reason for the political utility of the 1986 Act's shift of expected tax liability from individuals to corporations).²⁴⁴ Thus, what Susan Hansen calls "fiscal illusion" has much to do with decision-making about revenue and spending levels, and the prevalence of such illusion permits politicians to increase even literal and direct taxes without incurring the public's wrath.²⁴⁵

c. *Increasing Saving and Investment*

Much instrumentalist tax legislation is enacted on the stated ground that it will increase aggregate saving and investment. Such legislation seems to respond to concern about the United States' low levels of private saving and investment over the last thirty years, compared either to previous levels or to those in foreign countries such as Japan. Yet the clear, historically documented ineffectiveness of the means employed to remedy this problem seriously weakens

²⁴² See S. HANSEN, *supra* note 23, at 243-44.

²⁴³ See *id.* at 34. Voters may also rationally hope to transfer the costs of government to future generations through deficit spending or to lenders through unexpected inflation. The latter strategy is unlikely to work for very long.

²⁴⁴ See *supra* notes 123 & 150 and accompanying text. The perceived (and perhaps actual) progressivity of raising corporate income taxes had a mixed political impact, increasing Democratic support for tax reform at the expense of Republican support.

²⁴⁵ See S. HANSEN, *supra* note 23, at 22-23, 35-36.

a public interest explanation, since one would think that by now, if not as early as 1962, the lesson would have been learned. Such ineffectiveness suggests alternative explanations for saving and investment incentives, such as the manipulation of "capital formation" as a symbol by self-interested politicians or interest groups.²⁴⁶

d. *Adjusting for Inflation*

One possible public interest explanation for the wanderings of the tax base during the 1980s would focus on how inflation distorts income measurement and the after-tax cost of capital. The tax system does not index depreciation deductions to reflect inflation, whereas an economically accurate system, which one could argue is both in the public interest and understood to be so, would adjust for inflation.²⁴⁷ (Such a system would also index the basis of all assets and treat only real interest, or nominal interest minus the rate of inflation, as income or a deductible expense.) Due to high inflation in 1981, highly accelerated cost recovery arguably was necessary (in the absence of indexing) to measure with reasonable accuracy income from capital assets. Once inflation receded, the 1981 allowances became highly preferential, and accordingly they were reduced (through slower depreciation and repeal of the investment tax credit) between 1982 and 1986. Therefore, assuming that it is desirable to measure real income with reasonable accuracy (and also assuming that indexing is too complicated), the tax system seems to have responded appropriately to the problems posed by fluctuating levels of inflation.

This explanation may have some merit. Perhaps high inflation added credibility to the arguments of those favoring business incentives in 1981. Once inflation declined, the 1981 system became such a powerful tool for controversial tax shelters that it in effect brought about its own demise. Yet, the public interest argument cannot be taken very far. Demonstrating causation is

²⁴⁶ A reason (aside from their ineffectiveness) for dismissing as symbolic rather than substantive current proposals to boost savings and investment through tax incentives is their small scale. As Eugene Steuerle asks, "Does anyone really believe that raising or lowering taxes by a few billion . . . can have much effect on saving or investment in an economy that approaches \$6 trillion per year in output . . . ?" Steuerle, *Leadership and the Rostenkowski Plan*, 46 TAX NOTES 1591, 1591 (1990).

²⁴⁷ See, e.g., J. DODGE, *THE LOGIC OF TAX* 251 (1989) (noting that indexing for inflation is a direct solution to the inflation problem which accelerated depreciation addresses only indirectly).

problematic, particularly in 1981. Political arguments for accelerated depreciation focused far more on the raw need to increase investment than on the significance of inflation. Inflation's main political impact may simply have been predisposing the public, for the unrelated reason of bracket creep, to view all tax cutting arguments with sympathy. Even if the 1981 changes, at then existing inflation rates, corrected overtaxation of capital income rather than creating undertaxation, the likelihood remains that they affected the allocation of investment (arguably inefficiently) far more than its amount.²⁴⁸

e. *Arguments for Tax Preferences*

Perhaps the broadest public interest argument about tax legislation would seek to justify the continual existence, even after 1986, of extensive tax preferences. Preferences may significantly affect the allocation of economic resources, even if they have little impact on the relatively inelastic categories of consumption, saving, and investment. These allocative effects are not necessarily bad. Consider, for example, a preference that increased the relative return from an item with positive externalities.²⁴⁹ Also consider the argument that preferences for the domestic oil industry are desirable because they lessen our dependence on unreliable foreign sources.²⁵⁰ Such an argument surely *might* have merit, and one could hardly hope to assess it a priori or based solely on general theories about taxation.

While public interest arguments for any one tax preference may be plausible, such arguments are difficult to accept in the aggregate. The public rationales for preferences often seem suspiciously weak.²⁵¹ Even where plausible, they often contradict each other

²⁴⁸ One cannot even make a strong case for the putative improvement in income measurement on horizontal equity grounds. Since nominal as well as real interest expense remained deductible, debt financing permitted owners of capital assets to avoid being tax penalized by inflation even without incentives, and the incentives enabled them to be undertaxed.

²⁴⁹ An example is research and development, which may attract too little investment in a non-tax world since the person who makes the investment may lose some of the expected profits to competitors.

²⁵⁰ See, e.g., STAFF OF JOINT COMM. ON TAXATION, 99TH CONG., 1ST SESS., TAX REFORM PROPOSALS: TAXATION OF CAPITAL INCOME 103 (Comm. Print 1985) (noting the Reagan Administration's contention that tax incentives for oil drilling were necessary to prevent a reduction in domestic oil production and an increase in "vulnerability to oil import interruptions").

²⁵¹ Saving and investment incentives are one example. Incentives for domestic oil

or the effects of other government action.²⁵² It also is unclear how one would explain legislative changes in tax preferences over time; the public interest view would require relating these to changes in national needs.²⁵³ As we will see below, perhaps the strongest argument against the public interest view of preferences is systemic. Once one has examined the politics of tax legislation, one may conclude that there is no reason to expect more than a very mild positive correlation (if that) between tax preferences and valid social or economic arguments.

f. Summary

A public interest view of tax legislation is not entirely wrong. Good arguments for a provision do not hurt and may even help. Public sentiment, founded on voters' assessments of what is in their individual or collective interest, clearly plays a political role. Yet, the public interest view does not explain very much, and thus invites consideration of how well the broader theoretical objections to public interest theory apply to tax legislation.

2. The Role of Interest Groups in Income Tax Legislation

In attempting to explain the deficiencies of tax legislation, an obvious first place to look is the role played by interest groups. Such an examination is aided by the unambiguous nature of some underlying facts, which have been as stable over time as legislative outcomes have been unstable. Observers have consistently agreed that public participation in the tax legislative process is heavily skewed in favor of business groups that seek tax favors for themselves and that, through "Schattschneiderian" logrolling, almost never oppose favors for each other.²⁵⁴ In most cases, opposition

production may be another; it has been argued that their real effect is to "drain America first," or exhaust our oil reserves at a time when foreign oil is readily available, thus leading to increased dependence in the event of a future cutoff. *See id.* at 103-04.

²⁵² Consider, for example, the tax treatment of education, which is favored through the charitable deduction, *see* 26 U.S.C. § 170(b)(1)(A)(ii) (1988), but disfavored through the nondeductibility of interest on student loans, *see* 26 U.S.C. § 163(h) (1988).

²⁵³ For example, consider trying to explain why oil, gas, and various other minerals received the tax benefit of percentage depletion long before anyone anticipated the energy crisis.

²⁵⁴ *See, e.g.,* J. BIRNBAUM & A. MURRAY, *supra* note 11, at 16-19 (discussing the "new era" in tax policy marked by the influence of business lobbyists); TAXING CHOICES, *supra* note 11, at 10-11 (noting that tax policy is "dominated by those organized interests able to secure" tax advantages); D. DAVIES, UNITED STATES TAXES AND TAX POLICY 285-87

to tax breaks comes only from the Treasury Department,²⁵⁵ congressional tax staffers (principally from the nonpartisan staff of the Joint Committee on Taxation²⁵⁶), and a handful of public interest lobbying groups such as Common Cause and Citizens for Tax Justice.²⁵⁷ Despite the rise of public interest lobbying, the political importance of conventional interest groups has probably increased in recent years due to their own growth,²⁵⁸ new techniques for grass roots lobbying,²⁵⁹ the increased costliness of congressional elections,²⁶⁰ and the decline of party allegiance²⁶¹ and the congressional seniority system as constraints on interest group influence. In Lowi's terminology, tax legislation generally is

(1986) (noting the strong influence special interest groups have on congressional tax and finance committees); J. MANLEY, *supra* note 26, at 338, 361, 376 (noting the tendency of industry lobbyists to support each others' proposals); T. REESE, *supra* note 41, at 200 (noting that "rarely does any organized interest argue against another group's tax cut . . ."); H. SMITH, *supra* note 25, at 263 (noting that interest groups rarely compete with one another and that political action committees help interest groups exert "very powerful influences"); Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145, 1166 (1957) (suggesting that when an interest group works for a special provision, it will not find opponents in other interest groups). There are a few cases in which interest groups compete to raise each other's taxes relative to their own, as in the longstanding battles between stock and mutual insurance companies, or between taxable and tax exempt businesses.

²⁵⁵ See Surrey, *supra* note 254, at 1164-66.

²⁵⁶ See TAXING CHOICES, *supra* note 11, at 90.

²⁵⁷ See *id.* at 248-49. Public interest lobbying groups are a recent phenomenon, unobserved, for example, by Stanley Surrey in his 1957 article. See, e.g., Surrey, *supra* note 254, at 1166 (noting that "there are no private pressure groups actively defending the integrity of the tax structure").

²⁵⁸ See B. CONABLE, CONGRESS AND THE INCOME TAX 121 (1989); H. SMITH, *supra* note 25, at 31.

²⁵⁹ See H. SMITH, *supra* note 25, at 236-40.

²⁶⁰ See *id.* at 32, 156-57.

²⁶¹ See *id.* at 218.

distributive,²⁶² leading one to expect that it will be a positive-sum game for participants at the expense of the general public.

3. Public Comprehension of Income Tax Issues

As discussed previously, the economic theory of groups provides only one ground for pessimism about the legislative process. A second ground focuses on systematic cognitive biases and the public's susceptibility to the manipulation of symbols. These problems, like those caused by interest groups, are very prominent in the tax area.

In matters of taxation, it is quite clear what people principally want: to pay as little tax as possible while receiving as much value from government services as possible.²⁶³ Narrowly conceived self-interest prevails, probably because the stakes are directly monetary and the coercion that underlies taxation is so direct and unpleasant. Issues like abortion or the Cold War are sufficiently laden with complex emotional symbolism to evoke broader ideological responses from many. The dominant symbolism of taxation, however, pits the taxpayer against a huge abstraction, the public

²⁶² See Lowi, *supra* note 213, at 705-07. Progressivity is redistributive, *see id.* at 691, but, as Lowi predicts of such issues, *see id.* at 711, has been characterized by stability. Even the recent sharp reduction in the marginal rate of tax applying to wealthy individuals, from 70 percent in 1980 to 28 percent starting in 1988, caused little if any change in effective progressivity. Compare STAFF OF HOUSE COMM. ON WAYS AND MEANS, 101ST CONG. 2D SESS., BACKGROUND MATERIALS ON FEDERAL BUDGET AND TAX POLICY FOR FISCAL YEAR 1991 AND BEYOND 4 (Comm. Print 1990) (noting that "[t]he individual income tax has not become significantly less progressive over the [past decade] although it did become less progressive between 1977 and 1985," and concluding that the Tax Reform Act of 1986 "will make the tax more progressive than it was in 1985," but only by restoring tax rates "to their 1977 levels") with STAFFS OF THE COUNCIL OF ECONOMIC ADVISERS AND THE OFFICE OF MANAGEMENT AND BUDGET, PROGRESSIVITY: AN ANALYSIS OF THE WAYS AND MEANS/CONGRESSIONAL BUDGET OFFICE STUDY 1 (Feb. 1990) (questioning the methodology and interpretation of the tables relied on in the Ways and Means Committee paper as well as that report's failure "to integrate Federal transfer payments with Federal taxes," and concluding that when such transfers are considered, "[a]ny such analysis reveals that the full set of Federal Government taxes and transfers is highly progressive and has remained so").

One could describe the politics of the 1986 Act as regulatory in Lowi's terms. Given the need for a revenue-neutral bill, interest groups' desires for tax breaks necessarily conflicted with each other. However, this conclusion leaves open the question of why Congress decided to adopt a revenue-neutral (or any) tax reform bill in the first place—a decision that clearly did *not* reflect predominant interest group influence.

²⁶³ See L. EISENSTEIN, *supra* note 37, at 3-5; S. HANSEN, *supra* note 28, at 195, 262.

fisc,²⁶⁴ and thus reinforces the motive of narrow self interest. Taxation evokes some responses apart from narrow self interest. For one, people often react with resentment when others, particularly those wealthier than themselves, seem to be paying too little tax.²⁶⁵ Another departure from narrow self interest somewhat offsets this resentment; people often identify empathetically with others' resistance to the tax collector. This sympathy, along with often unrealistic hopes of upward economic mobility, help to explain the longstanding weakness and ambivalence of public support for progressivity even among those seemingly in a position to gain from it.²⁶⁶

Despite resentment and sympathetic identification, a narrow self interest model works reasonably well for taxation. People mostly want to pay as little as possible (assuming no effect on government services). This motivation provides a basis for considering whether public opinion is well informed and rational about tax matters. When people make systematically inaccurate judgments about their self interest in evaluating a policy, they can fairly be described as ignorant or irrational.

From this perspective, public opinion about taxation suffers from a number of serious defects. Rational ignorance is mixed with just plain ignorance, creating rich opportunities for the enactment of bad or deceptive tax legislation. The following are some of the most important misunderstandings.

a. *The Withholding Illusion*

While people generally prefer to pay as little income tax as possible, they often do not know how much they pay. They tend to ignore the significance of income tax withholding, and thereby confuse fluctuations in the amount due (or refundable) upon filing an annual return with fluctuations in the amount actually paid for the year.²⁶⁷ This preference permits politicians to disguise

²⁶⁴ See Surrey, *supra* note 254, at 1166.

²⁶⁵ See J. BIRNBAUM & A. MURRAY, *supra* note 11, at 9; J. WITTE, *supra* note 10, at 166.

²⁶⁶ See, e.g., J. WITTE, *supra* note 10, at 352-62 (noting the weakness of public support for a redistributive income tax).

²⁶⁷ See D. BURNHAM, A LAW UNTO ITSELF: POWER, POLITICS, AND THE IRS 28 (1989); S. HANSEN, *supra* note 28, at 179-80; Bristol, *supra* note 151, at 1027. In addition to being ignorant of how much is withheld, people generally prefer to be overwithheld, see S. HANSEN, *supra* note 28, at 180, either because it is pleasant to learn that one is due a refund or as a convenient (if zero interest) form of forced saving.

increases in tax revenues by simultaneously adjusting withholding.²⁶⁸ Alternatively, if taxes are reduced but withholding is reduced even more, it can lead people inaccurately to believe that their taxes have increased—as may have happened with individuals after the enactment of tax reform in 1986.²⁶⁹

b. *Fiscal Illusion and the Use of Indirect Taxation*

Even accurate knowledge of one's tax bill would provide only an extremely crude measure of the costs one is bearing by reason of government claims on social resources. Yet people tend to assume that it is an accurate measure. As a result, the demand for public goods depends on how they are financed, instead of being a function merely of benefit versus cost.²⁷⁰ As noted previously, government can rely on a variety of fiscal illusions, or means of imposing costs indirectly and otherwise camouflaging them in order to avoid public scrutiny.²⁷¹ Examples include: increased withholding; inflation (the preferred method of the late 1960s and 1970s); deficit spending (the preferred method of the 1980s);²⁷² and taxes whose incidence is disguised or unclear (for example the corporate income tax, which was used to build public support for the 1986 Act as simultaneously revenue-neutral and a tax cut).²⁷³ The public not only is fooled in particular cases, but apparently believes in general that government services can be provided for free.²⁷⁴

Maintaining fiscal illusion was recently an explicit premise of federal budgetary policy. Under President Bush's "no new taxes" pledge and the Bush-Darman "duck test," the merit of a revenue-raising proposal expressly depended on whether the public

Despite the importance attached to having no lump sum payment due with the return, people do not mention convenience of payment when asked to identify the attributes of an attractive tax system. *See id.* at 257.

²⁶⁸ *See* S. HANSEN, *supra* note 28, at 179-80.

²⁶⁹ *See* Bristol, *supra* note 151, at 1027.

²⁷⁰ *See* J. BUCHANAN, PUBLIC FINANCE IN DEMOCRATIC PROCESS 11-21 (1967).

²⁷¹ *See* J. BUCHANAN & R. WAGNER, *supra* note 28, at 129-34; S. HANSEN, *supra* note 28, at 106-13.

²⁷² *See* S. HANSEN, *supra* note 28, at 109-11.

²⁷³ The public preference for taxing corporations is offset to some extent by corporations' political power arising from the role of organized interest groups. Thus, corporations often are taxed less than the public apparently would prefer. *See* J. WITTE, *supra* note 10, at 342-43.

²⁷⁴ *See* S. HANSEN, *supra* note 28, at 39, 262.

perceived it as a tax, not on whether it really was (had the effect of) a tax.²⁷⁵

c. *Taxation of the Wealthy and Large Corporations*

While public opinion does not support a high degree of progressivity, it holds that wealthy individuals should pay their "fair share" of tax. This is a value choice rather than an illusion, but it is associated with some illusions. The public systematically underestimates the amount of tax paid by the wealthy²⁷⁶ or disregards indirect effects of the tax system (such as corporate income taxes borne by shareholders and implicit taxes, that is, reduced pre-tax returns by reason of market responses to a tax preference). At the same time, people often support tax preferences of comparatively greater benefit to the wealthy (such as qualified residence interest) without understanding the possible distributional consequences of such preferences. Finally, people focus excessively on wealthy individuals who pay zero tax while ignoring those who pay very little tax—perhaps failing to appreciate the arithmetical continuity between, say, reducing one's tax liability from \$2,000,000 to \$1,000,000 and from \$1,000,000 to zero. This attitude underlay the 1986 Act's reliance on selective limitations such as the passive loss rules and alternative minimum tax.²⁷⁷

Similar confusion appears with regard to the corporate income tax. Again, the public underestimates the amount paid, supports preferences that permit the corporate tax avoidance it abhors, and focuses disproportionately on complete avoidance. Moreover, the public seems to think of a corporation as if it were a distinct individual, rather than a legal entity owned by individuals. This misconception helps to explain popular outrage over corporations paying zero tax. (Presumably, there would be less outrage if members of a partnership paid no tax on their partnership income

²⁷⁵ See, Bennett, *A Pledge, a Wink, and a Jump into the Unknown*, 47 TAX NOTES 107-08 (1990).

²⁷⁶ See S. HANSEN, *supra* note 28, at 180-81.

²⁷⁷ See TAXING CHOICES, *supra* note 11, at 86; Shaviro, *supra* note 41, at 94-95. One could call disproportionate abhorrence of wealthy people paying zero tax a value choice, rather than an illusion. Yet this characterization ignores indirect tax burdens such as implicit taxes, and exalts symbolism over substance. Wealthy people may be able to avoid the minimum tax simply by rearranging their investment portfolios (i.e., to insure that no one of them has too high a ratio of tax-exempt bonds). This strategy might change perceptions about the tax burden borne by wealthy people without changing the reality. See *id.*

but paid significant taxes on other income.)²⁷⁸ The belief that a corporation is in effect a separate individual also helps to explain why the capital gains preference has far greater political salience than the elimination of double taxation of corporate income.²⁷⁸

d. *Illusions and Inconsistent Views Relating to Tax Preferences*

Public opinion surveys reveal substantial public support for base-broadening tax reform in principle.²⁷⁹ Moreover, people often seem to accept a populist account of the tax law as riddled with "loopholes" that benefit the rich.²⁸⁰ Yet when the questions asked shift from the general to the specific, public opinion seems very different. People respond favorably to a wide range of actual and proposed tax preferences, ranging from exclusions for interest earned on savings or government bonds to deductions for medical and home repair expenses and college tuition fees. Many people favor exempting interest earned on savings despite objecting to the idea that the tax system should be used to promote saving.²⁸¹

It seems plausible (indeed, obvious) that people like tax preferences primarily because they view them as tax cuts. Yet, as already noted, it is an illusion to believe that one has benefitted from a tax cut (government spending remaining constant) unless one's total share of the costs of government, including indirect costs, declines. If I save a few dollars of taxes due to a preference which enables others to save a lot, while the resulting increased deficit and/or inflation affects everyone equally, the preference may leave me worse off.²⁸² Still, if I am like most people, I will probably believe that I am better off.

Voters' perception of personal benefit from preferences is extremely important for tax politics. As John Witte has noted, most of the major preferences have huge constituencies and thus enjoy strong political support.²⁸³ Consider, for example, the deductions

²⁷⁸ See Vickrey, *Cut Corporation Taxes, Not Capital Gains*, 45 TAX NOTES 455-56 (1989).

²⁷⁹ See J. WITTE, *supra* note 10, at 348-49.

²⁸⁰ See, e.g., TAXING CHOICES, *supra* note 11, at 249-50 (describing the media's populist account of tax reform politics); J. WITTE, *supra* note 10, at 348 (noting opinion-poll evidence illustrating that the majority favor closing prevalent tax loopholes for the rich).

²⁸¹ See J. WITTE, *supra* note 10, at 354-56.

²⁸² I am less likely to be worse off if a portion of the costs of government are shifted outside, for example, to foreigners or future generations.

²⁸³ See J. WITTE, *supra* note 10, at 285-88.

allowed to homeowners for qualified residence interest and real property taxes: highly popular and easily visible, they were the only important tax benefits for real estate to survive the 1986 Act unchanged. By contrast, raising the entry point for higher marginal rate brackets would effect a tax cut of potentially enormous significance; it is, however, one that few voters are likely to appreciate. The politics of bracket entry thus differ sharply from those surrounding the homeowners' deductions.²⁸⁴

Taxpayers may value preferences not only for their (perceived) monetary advantages, but also for the psychic benefits they provide. To take advantage of a preference one often must take some action, such as establishing an IRA account. This may be unpleasant if the necessary action is too costly (i.e., to fund an IRA one must cancel that Caribbean vacation). But if the action's cost is sufficiently low (i.e., the IRA can be funded by shifting savings from a pre-existing account), taking advantage of a preference may give one the satisfaction of feeling like an astute planner who has escaped the peril of owing more tax through purposive action.²⁸⁵ Alternatively, if the preference allows one to deduct expenses that one would have incurred anyway, then at least the deduction eases the pain and makes one feel that one's misfortune has been recognized. In general, then, people may value preferences for more than just the monetary benefit.

If it is obvious why people like preferences that reduce their own tax liability, it is less clear why they are so accepting of preferences that reduce others' tax liability. They have, apparently, not yet grasped the notion that preferences function as "tax expenditures," functionally equivalent to direct outlays of government funds. Usually associated with Stanley Surrey,²⁸⁶ this notion has made some headway institutionally and among specialists;²⁸⁷

²⁸⁴ The 1986 legislative process reflected the low visibility of bracket entry points. Lowering such points in order to increase tax revenues was a favored device for revising proposals to achieve revenue-neutrality. *See e.g.*, TAXING CHOICES, *supra* note 11, at 122-28 (noting that revenue neutrality provoked the Joint Committee on Taxation to produce a bill with higher tax rates at lower income levels when attempting to install a top rate of 38 percent).

²⁸⁵ In Edelman's terms, Congress has raised anxiety by nominally subjecting income to tax, and then bought gratitude by permitting sufficiently motivated taxpayers to escape. *See* M. EDELMAN, *supra* note 25, at 28-29.

²⁸⁶ *See* S. SURREY, *PATHWAYS TO TAX REFORM* vii (1973).

²⁸⁷ Since 1972, the Joint Committee on Taxation has annually submitted a tax expenditure budget for the ensuing four fiscal years to the House Committee on Ways and Means, the Senate Committee on Finance, and the House and Senate Committees

but its popular acceptance is impeded by the intuitive gap between paying out government funds and not collecting them in the first place. While the payout recognizably conveys a benefit at other taxpayers' expense, the noncollection of tax looks merely like relieving someone's understandably unpleasant burden. People may not realize that the relieved burden does not disappear (assuming government spending remains constant), but instead is reallocated invisibly.

The above discussion suggests that one oft-heard criticism of tax preferences—that they are enacted without receiving the kind of public scrutiny given direct expenditures—misses the mark. As John Witte correctly notes, scrutiny is not really the issue: many tax preferences are extensively discussed, frequently revised, and subject in general to a level of scrutiny and a process of deliberation quite comparable to that typical of spending programs.²⁸⁸ If preferences provoke less public uproar than spending proposals, this difference should be attributed not to any lack of "scrutiny" but to the fact that people are simply more willing to allow others to take advantage of tax breaks than they are to give them pay-outs.²⁸⁹

One could argue that people's affinity for preferences, both for themselves and for others, is not irrational but rather a form of consumption or a value choice, and that to call these attitudes irrational is merely to inject one's own personal judgments on tax policy. Yet, if the public does not understand the choices it is making, relies on demonstrably false assumptions about the distributional effects of preferences, and holds internally inconsistent beliefs about desirable tax law,²⁹⁰ then the claim that it has illusions and acts irrationally can be made with some confidence.

on the Budget. See e.g., STAFF OF JOINT COMM. ON TAXATION, 101ST CONG., 1ST SESS., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 1990-1994 I (Comm. Print 1989).

²⁸⁸ See J. WITTE, *supra* note 10, at 311, 328-29.

²⁸⁹ Debate about tax preferences versus spending programs often focuses on questions of relative administrative effectiveness. Compare S. SURREY, *supra* note 286, at 148-50 (arguing for direct spending because of the greater administrative ability to structure carefully) with B. CONABLE, *supra* note 258, at 101-03 (arguing for effectiveness of preferences where pre-planning or decentralized problem solving is needed). Such discussions often have an air of rationalization; one suspects that the advocates' positions antedated their consideration of the administrative issues.

²⁹⁰ See S. HANSEN, *supra* note 28, at 259. Hansen suggests that people have only "nonattitudes" about tax and that "there seems little point to further efforts . . . to model the opinions of those who do not have them." *Id.*

Arguably, the enactment of popular tax preferences creates a fool's paradise, where people want the tax system to leave them fiscally better off than under a broad-based regime but it does not, and where the short-run enjoyment of benefiting from a preference is swamped by the invisible distributional effects and efficiency costs of transfers that have been approved because people do not really understand them as transfers. The public is not even left very happy by the outcome, judging from survey evidence of widespread dissatisfaction with the income tax.²⁹¹ The 1986 Act tapped this dissatisfaction, although without successfully alleviating it.

IV. THE PUBLIC CHOICE THEORY OF LEGISLATION

A. *Overview of Public Choice Theory*

In the law and economics literature, the perennially favored alternative to public interest theory is public choice theory. In its broadest sense, public choice theory is simply the economic study of nonmarket (i.e., political) decision-making.²⁹² At this level of generality, it requires no stronger assumption than that people act rationally in light of their objectives, whatever these may happen to be.²⁹³ Following common usage, however, I will use the term "public choice theory" to describe what is actually a sub-genre, sometimes called the economic theory of regulation.²⁹⁴ As we will see, this sub-genre makes considerably stronger and more questionable assumptions.

In the words of Fred McChesney, "[t]he essential insight of the economic model is that, like any other good or service, regulation [i.e., legislation] will be provided to the highest bidder."²⁹⁵ The sellers are legislators, and they are paid in votes, campaign contributions, and personal benefits such as honoraria and free vaca-

²⁹¹ See TAXING CHOICES, *supra* note 11, at 25-27.

²⁹² See D. MUELLER, *supra* note 190, at 1.

²⁹³ See I. MCLEAN, *supra* note 7, at 1.

²⁹⁴ See, e.g., Posner, *supra* note 16, at 345-56 (describing empirical and theoretical bases of economic theory focusing on government as supplier of regulation to effective interest groups). Other branches of public choice theory focus, for example, on the voting paradoxes or on strategy for forming a majority coalition in a two-party system. See, e.g., I. MCLEAN, *supra* note 7, at 45-80 (examining the collective action problems of voters and political coalitions as consumers).

²⁹⁵ McChesney, *supra* note 155, at 223 (footnote omitted).

tions.²⁹⁶ The buyers, drawing on the economic theory of groups, are organized interest groups seeking wealth transfers.²⁹⁷

McChesney's "essential insight" has a certain rhetorical force. If we assume that everything else in life works a certain way, why should politics be any different? As other public choice writers have put it:

The point is that there is no bifurcation of personality as between our "political" and "private" selves. We do not seek to satisfy the "public interest" when we vote and the "private interest" when we buy groceries. We seek our "self-interests" in both cases. While the story of Dr. Jekyll and Mr. Hyde may make for good cinema, it is a poor basis on which to analyze political behavior.²⁹⁸

Unfortunately, this argument is somewhat misleading. Public choice theory does not automatically follow from accepting the continuity between our public and private selves. Take the basic analogy to a market where people buy and sell items such as groceries. This market has two important attributes: specific goods to be bought and sold, and the use of money as a uniform medium of exchange. Standard economic analysis, such as the drawing of supply and demand curves, does not require making theoretical assumptions about what goods people want (i.e., what nonmonetary preferences they bring to market). It assumes only that, once in the market, they generally try to do as well as possible in monetary terms. All else being equal, buyers try to pay as little, and sellers to receive as much, as possible. This assumption seems eminently reasonable. Nonmonetary preferences are not being denied; they merely have little effect at this stage of the process. Thus, the economic model of a market does not (to quote a standard criticism of economists) "posit . . . [a] shallow and incomplete . . . caricature" of human nature²⁹⁹ as concerned only with narrow material gain.

²⁹⁶ See *Accelerating Rate*, *supra* note 21, at 926. McCormick and Tollison prefer to call politicians "brokers" in the sale of benefits from the general public to organized interest groups, but the distinction is merely semantic, since it is still the politicians and interest groups who make deals for mutual benefit at the public's expense. See R. MCCORMICK & R. TOLLISON, *supra* note 17, at 61-77. But see *Statutory Interpretation*, *supra* note 21, at 228 n.24 (describing this distinction as "fundamental").

²⁹⁷ See, e.g., Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 269-74 (1990).

²⁹⁸ R. MCCORMICK & R. TOLLISON, *supra* note 17, at 5.

²⁹⁹ M. Kelman, *supra* note 23, at 206.

Now consider politics. Here we have a "market" where the goods are unspecified unless we make assumptions about people's preferences. Voters, for example, may care about ideological or symbolic issues that have no direct bearing on their monetary interests. In voting, they are deciding what to buy, not how much to pay, since each voter has but one vote and cash sales of votes are discouraged.³⁰⁰ Politicians similarly may care about ideological or symbolic issues that have no direct bearing on their monetary or professional interests. Although public choice classifies them as "sellers" of legislation, there is no theoretical reason why they may not want at times to "buy" particular outcomes.³⁰¹ Even treating politicians purely as "sellers" who seek to maximize professional self-interest, we encounter a further difference between politics and the standard private market. In politics, despite the importance of money, there is no uniform medium of exchange, unless we simply assume that money is all that politicians want, as opposed to, say, power, prestige, and flattering press coverage (either as ends in themselves or as useful for reelection).

Public choice theory ignores these problems with the analogy to a private market, and treats monetary exchange between interest groups and politicians as all that matters.³⁰² The public is not only ignorant but irrelevant. Interest groups are all-powerful and concerned purely with monetary wealth. Politicians are not only self-interested but narrowly so; they are literally for sale.³⁰³ By viewing politics so reductively, public choice theory begins to look like the "shallow and incomplete" caricature of human nature expected by critics of economists. Good economic analysis takes people's preferences as a given and asks what consequences will follow from them, assuming only means-ends rationality. Public

³⁰⁰ There is, of course, a fixed cost to the act of voting itself and a variable cost in the amount of effort (other than enjoyable consumption) that one spends learning about politics.

³⁰¹ See Posner, *supra* note 16, at 341.

³⁰² Presumably because of interest groups' assumed small size (which makes money their most important resource), votes receive considerably less attention than money as a medium of exchange. See Doernberg & McChesney, *supra* note 155, at 897-98.

³⁰³ Some public choice writers concede that some legislation may be public-spirited, rather than purchased by interest groups, but they treat the two categories as entirely separate, and thus fail to enrich their view of interest group legislation. See, e.g., Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-41 (1983) (noting that legislators may "seek[] only to further the public interest"); *Statutory Interpretation*, *supra* note 21, at 228 (noting that legislation may serve "legitimate, public-regarding, macroeconomic goals").

choice theory instead makes crudely reductive assumptions about the preferences that people actually have. It is as if one predicted that people will buy only healthful and nutritious groceries, or will not pay anything extra for Cadillacs with tail fins.³⁰⁴

I should clarify that this is much too harsh for the best public choice writers—who principally teach in economics departments rather than law schools. Gordon Tullock, for example, develops insights about symbolic and expressive voting behavior that parallel and rival Murray Edelman's.³⁰⁵ James Buchanan takes as one of his fundamental premises the importance of ideas. For example, his classic study of Keynes (co-authored with Richard Wagner) shows how the rationalization of deficit spending as a tool of macroeconomic policy dramatically altered American budgetary politics.³⁰⁶ Tullock and Buchanan could be criticized, at most, for not fully incorporating their broader insights into their theoretical models, and perhaps under-estimating the tension between the two.

Much public choice writing, however, particularly from law schools, comes considerably closer to the "crude caricature." As we will see, it thereby falsifies not only human nature, but observable facts about the legislative process. Flattening and minimizing the roles of politicians and unorganized voters, and overlooking empirical evidence that could be found through a simple library search, it resurrects a pure interest group view of politics that

³⁰⁴ Strangely enough, for some public choice writers this crude reductiveness is not an unwitting mistake, but apparently a central reason for the theory's attractiveness. See *infra* text accompanying notes 308-40.

³⁰⁵ In *The Economics of Special Privilege and Rent Seeking*, Tullock states that

[a] voter in voting may be motivated not by actual outcome of the matter up for vote but by a desire to express his own emotions, feeling of virtue, and so on. The voter may, in fact, vote directly against his interest because he realizes that his vote has very little, if any, effect on the actual outcome of the election; hence, he can get a feeling of moral satisfaction out of casting a virtuous vote without significant cost to him.

G. TULLOCK, *supra* note 22, at 21 (footnote omitted). Compare this passage from Edelman's *The Symbolic Uses of Politics*:

[I]ssues are a minor determinant of how people cast their ballots, most voters being quite ignorant of what the issues are and of which party stands for what position. . . .

It does not follow that election campaigns are unimportant or serve no purpose. . . . They give people a chance to express discontents and enthusiasms, to enjoy a sense of involvement. This is participation in a ritual act, however; only in a minor degree is it participation in policy formation.

M. EDELMAN, *supra* note 25, at 3 (footnotes omitted).

³⁰⁶ See J. BUCHANAN & R. WAGNER, *supra* note 28, at 134-42.

political science research has long since discredited.³⁰⁷ In the remainder of this section, I will discuss some representative examples from the legal literature, explore the broader theoretical and empirical problems with public choice theory, and apply the conclusions developed to income tax legislation.

B. *Public Choice Theory as Practiced in the Law Schools*

1. Style and Its Ad Hominem Significance

Public choice articles emanating from the law schools are so distinctive in tone and style as to reveal something about their substance. They tend to be slyly knowing, based on the premise that the author has seen through some set of hollow illusions that political insiders use to conceal from the naive and gullible what is really going on. Consider this opening from a recent piece by Jonathan Macey:

The concept of federalism . . . is one of the most revered sacred cows on the American political scene. Conservatives and liberals alike extol the virtues of state autonomy whenever deference to the states happens to serve their political needs at a particular moment. Yet both groups are also quick to wield the power of the supremacy clause, while citing vague platitudes about the need for uniformity among the states, whenever a single national rule . . . furthers their political interests.³⁰⁸

Macey continues that the relationship between state autonomy and federal supremacy is "one of the most convenient of political expedients," whose real meaning public choice theory reveals.³⁰⁹

Similarly, consider Richard Doernberg's and Fred McChesney's public choice analysis of the Tax Reform Act of 1986. After noting a series of laudatory accounts of the Act, they write:

To the reader of these accounts, the 1986 Act must seem a political fairy tale come to life, a saga of downtrodden good rising victorious over evil. . . .

³⁰⁷ See M. HAYES, *supra* note 160, at 17-18.

³⁰⁸ Macey, *supra* note 297, at 265 (footnote omitted).

³⁰⁹ See *id.* I admit that Macey has chosen a good topic for his cynicism, since many would agree that "for most people . . . issues of federalism take second seat to particular substantive outcomes." McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1488 (1987), *quoted in* Macey, *supra* note 297, at 265 n.2.

This Essay takes issue with these rosy views of the Tax Reform Act of 1986. In our view, politicians are not doing good for the taxpayer as much as they are doing well for themselves.³¹⁰

The pleasures of an easy and jaunty cynicism plainly loom large here. Yet one should not be blind to the underlying anger. Macey, for example, has written that idealized views of deliberative "republican" governance ignore the "frightening power of man to subvert the offices of government for what can only be described as evil ends,"³¹¹ by which he mainly means interest group wealth transfers.³¹² Doernberg and McChesney paint a devastating portrait of politicians as parasitical rent extractors who coerce interest groups into paying tribute, not only to obtain benefits but to avoid harm. Only the politicians win from the "legislative auction"; everyone else loses.³¹³

What is most striking about these portrayals is how they invert the implicit self-presentation of the authors. An academic writer implicitly claims concern for the truth, insight into the truth, and an absence of self-interested motives beyond recognition as a good scholar. Public choice writers emphasize these claims through their role as the unmaskers of unpleasant realities. Politicians, by contrast, are presented as having *no* concern for truth or good policy and as heeding instead an absolute and venal self-interest, centered on money rather than prestige. Opposite in motives, the public choice writer and the politician are also opposite in power. The writer, given his degree of alienation, plainly has none, whereas

³¹⁰ Doernberg & McChesney, *supra* note 155, at 893. Doernberg and McChesney begin their article, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, in a somewhat similar fashion, noting that tax reforms (by which they mean all changes in the tax laws) "arouse a range of emotions, from evangelical zeal to hopeless despair to bemused resignation," but in fact merely reflect legislators' and interest groups' shift from long-term to short-term contracts for the sale of legislation. *Accelerating Rate*, *supra* note 21, at 913-14. Other public choice articles, instead of trying to jar the reader out of naiveté, describe the shift from naiveté to cynicism as an already accomplished fact. See, e.g., *Statutory Interpretation*, *supra* note 21, at 223 (noting that the "current distrust of government represents a major shift away from the dominant public perception of 'government as helper'"); McChesney, *supra* note 155, at 223 (noting that "[b]elief that government regulates in some disinterested 'public-interest' fashion . . . has crumbled").

³¹¹ Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673, 1673 (1988).

³¹² See *id.* at 1680, 1683.

³¹³ See, e.g., Doernberg & McChesney, *supra* note 155, at 898 (noting that "[l]egislative auctions are negative-sum games, and may leave everyone, except the politician, worse off").

the politician not only has nominal power but is enormously skilled at manipulating it and us. Crafty rather than wise, politicians cynically exploit ideas like federalism and tax reform, the better to extract wealth from society. Taking the measure of their interest group victims, they mix threats here with favors there and bluffs with action.³¹⁴ They are a nightmarish fantasy projection, the scholar's evil twin sibling.

One can only speculate about the needs served by this vision. It may soothe an academic's natural frustration with politics by explaining things purposively (much as people often embrace conspiracy theories). It may punish politicians for their undeserved power and lack of deference to scholars and scholarship. It may suggest that, if scholars lack the political influence to which they feel entitled, it is a sign of their integrity rather than of group or personal failure. Yet none of these explanations need be convincing for the extreme and unnuanced account of politicians, so different from the authors' implicit self-presentation, to excite suspicion.

While the legal public choice writers are unrelentingly hostile towards politics, they are contented to the point of complacency towards the academy. They repeatedly remind us that their discipline is making great strides and that increasingly everyone realizes they are correct.³¹⁵ Academic critics of public choice theory not only go unanswered, but are misleadingly cited in footnotes as supporters.³¹⁶ This complacency harms the public choice writers' work by encouraging them to inhabit an airless realm

³¹⁴ See *id.* at 898-99.

³¹⁵ See, e.g., *Accelerating Rate*, *supra* note 21, at 926-27 (stating that analysts increasingly believe that "the economic theory of regulation has supplanted public interest theories in explaining most aspects of politics"); Macey, *supra* note 297, at 265-66 (noting that public choice theory has "replaced the older cartel model as a tool for predicting political behavior"); *Statutory Interpretation*, *supra* note 21, at 223-24 (noting the "recent" and "widespread acceptance of interest group theory"); McChesney, *supra* note 155, at 223; McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, J. LEGAL STUD. 101, 101 (1987) (noting "advance[s]" in the economic theory of regulation, including recognition that "private interest groups other than consumers have an incentive to organize," and that government is treated "not as a unit, but as a complicated network of individuals, each with an incentive to maximize his own interest").

³¹⁶ See e.g., *Accelerating Rate*, *supra* note 21, at 926 n.77 (citing Posner, *supra* note 16, for "discussing the flaws of various theories of government regulation," but misleadingly implying that he criticizes only public interest theory, when in actuality he criticizes both public interest and public choice theory); *id.* at 927 n.81 (citing Kalt & Zupan, *supra* note 23, as supportive because the Kalt and Zupan article mentions the widespread acceptance of public choice theory).

of self-congratulatory preoccupation with their abstract models³¹⁷ at the expense of empirical analysis beyond supportive anecdotes.

A good example is McChesney's widely noted study of politicians.³¹⁸ He begins by stating that, despite the many triumphs of public choice theory, "the role of the politician has not been integrated satisfactorily into the model. The politician has remained a 'mystery actor,' a passive broker among competing private rent seekers."³¹⁹ McChesney proposes to bring the politician to life by developing a model of active rent extraction, under which politicians do not merely certify the high bidder in the "legislative auction," but work to raise the bidding by both promising benefit and threatening harm. The point he makes is powerful as far as it goes, and previous public choice writers had missed it. Yet McChesney ignores the possibility that, if he is trying to bring the politician to life, empirical information about politicians might be relevant. He uses such information only selectively to provide anecdotal backing, as when he mentions "milk bills," or legislation that is introduced to extract campaign contributions from those threatened by it.³²⁰

The major counter-example to the legal public choice writers' lack of a systematic empirical focus is the analysis by McChesney and Richard Doernberg of 1980s tax legislation. The topic makes this analysis of particular interest here, and I discuss it in the next sub-section.

2. Tautological Yet False: Doernberg and McChesney on 1980s Tax Legislation

In two recent articles, *On the Accelerating Rate and Decreasing Durability of Tax Reform*³²¹ and *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*,³²² Doernberg and McChesney examine 1980s tax legislation from the perspective of public choice

³¹⁷ See, e.g., Macey, *supra* note 297, at 266 ("The [economic] model has been employed successfully to define regulatory action, reversal of regulatory action, and regulatory forbearance." (footnotes omitted)). The "success" apparently consists of achieving internal logical consistency at an extremely broad level of generality.

³¹⁸ See McChesney, *supra* note 315. McChesney's article is cited uncritically in many articles. See, e.g., R. AMACHER & H. ULBRICH, *supra* note 199, at 679 n.4; Macey, *supra* note 297, at 266 n.8.

³¹⁹ McChesney, *supra* note 315, at 102 (footnote omitted).

³²⁰ See *id.* at 107-08.

³²¹ See *Accelerating Rate*, *supra* note 21.

³²² See Doernberg & McChesney, *supra* note 155.

theory. They develop two principal arguments. The first is that an explicitly contractual model for tax legislation, under which it is sold to the highest bidder, helps to explain the increasingly rapid pace of recent legislation. Legislators and lobbyists for private interest groups have been making only short-term "deals" in recent years, in response to the increased instability of the legislative process.³²³ Long-term deals are undesirable to risk-averse private interest groups because of rapid turnover on the congressional tax committees and the large number of players (including staff) who can influence legislation, since these factors increase the chance that a long-term deal will fall apart. Moreover, long-term deals are undesirable to members of Congress because the value they can extract appreciates as new groups enter the bidding.³²⁴

The problems with this "legislation as contract" model are twofold. First, the model appears to be false descriptively. Studies of Congress and interest groups suggest that, despite the relationship between campaign contributions and legislative outcomes, nothing so simple as a contract is involved. Interest groups buy access, information, and a greater likelihood of success—not legislation as an explicit *quid pro quo*.³²⁵ Moreover, they tend to concentrate their largesse on precommitted supporters, rather than on the previously uncommitted or opposed.³²⁶ All this is not to deny that campaign financing is a serious problem; it suggests only that the contract model is too simple. Second, the contract model adds nothing in terms of causal explanation. Doernberg and McChesney insert it as a premise at the beginning and then extract it as a conclusion at the end. Yet one does not need this model to explain legislative instability following logically from rapid turnover and an increased number of legislative players. Such instability would follow as well from the likely impact of these changes on the formation and stability of coalitions, and also from the proposition that new legislative players like to erect new statutory monuments to themselves.

³²³ See *id.* at 898-900.

³²⁴ See *id.*

³²⁵ See, e.g., Evans, *PAC Contributions and Roll-Call Voting: Conditional Power*, in *INTEREST GROUP POLITICS* 114, 114-29 (A. Cigler & B. Loomis 2d. ed. 1986) (finding no direct links between PAC contributions and legislative decisions).

³²⁶ As Mayhew notes, members benefit politically from consistency with their past positions. See D. MAYHEW, *supra* note 25, at 67. Thus, there is an element of precommitment to taking a public stand.

Doernberg and McChesney's second argument is a response to those commentators who view the Tax Reform Act of 1986 as a "legislative miracle that defied all the lessons of political science, logic, and history."³²⁷ Finding such praise inherently implausible, they attempt to debunk the 1986 Act, principally on three grounds. First, they note the enormous benefits that legislators derived from tax reform's presence on the political agenda. In 1985, for example, members of the tax-writing committees received campaign contributions totalling \$6.7 million, or about two-and-one-half times their 1983 take.³²⁸ One might observe that even \$6.7 million seems astoundingly cheap given the enormous stakes (in 1985, a typical recent year, the income tax took in roughly \$400. billion,³²⁹ or 60,000 times as much). Doernberg and McChesney ignore this puzzle, however, and assume that anything so good for the members must have been bad for the public.³³⁰

Second, Doernberg and McChesney support their view of the "1986 auction"³³¹ with selective anecdotal evidence. In particular, they cite unmistakable examples of the purchase and sale of tax favors—for example, the grotesque "transition rules," such as the one permitting steel companies, unlike almost everyone else, to receive cash refunds for unused investment tax credits.³³² More broadly, they detail the many failures of the 1986 Act to broaden the tax base, seemingly implying that if any important tax preferences were retained, then none were eliminated.³³³ As part of this argument, they erroneously predicted that widely marketed tax shelters would survive the 1986 Act's passive loss rules.³³⁴

Third, Doernberg and McChesney argue that even if the 1986 Act improved the tax laws, such improvement provides little comfort given the likelihood that Congress will rapidly sell back to interest groups the tax preferences that it eliminated.³³⁵ Here,

³²⁷ Doernberg & McChesney, *supra* note 155, at 892 (quoting J. BIRNBAUM & A. MURRAY, *supra* note 11, at 285).

³²⁸ See Doernberg & McChesney, *supra* note 155, at 901; *Accelerating Rate*, *supra* note 21, at 936.

³²⁹ See ECONOMIC REPORT, *supra* note 56, at 398.

³³⁰ Thus, the title of their article about the 1986 Act asks whether Congress was "doing good" for the public or "doing well" for itself—apparently, mutually exclusive alternatives.

³³¹ Doernberg & McChesney, *supra* note 155, at 900.

³³² See *Accelerating Rate*, *supra* note 21, at 957-58.

³³³ See Doernberg & McChesney, *supra* note 155, at 919-21.

³³⁴ See *Accelerating Rate*, *supra* note 21, at 959.

³³⁵ See Doernberg & McChesney, *supra* note 155, at 922-25.

too, subsequent history proves somewhat awkward for them. As of mid-1990, few tax preferences have yet been "resold" to interest groups, and, if the tax committees are merely waiting for the bidding to escalate, then it is hard to explain why they have tolerated a decline in their campaign contributions since 1986.³³⁶

Doernberg and McChesney's inaccurate predictions and disinclination to look beyond selective anecdotal evidence are only the most obvious problems with their analysis. In addition, they fail to distinguish between causation and the merits. Equipped with only two simple theories of legislation, public interest and public choice, they assume that these are the respective sources of good legislation and bad. If the members of Congress interacted with interest groups, the legislation must have been bad. Because the legislation was bad, the members must have been interacting with interest groups. Yet surely bad legislation can have non-interest-group causation, and interest groups can support good legislation, even if only for selfish reasons. The two separate points do not support each other as strongly as Doernberg and McChesney assume.³³⁷

Moreover, Doernberg and McChesney provide an explanation that is at once tautological and false—their style of explanation is tautological at a broad level of generality, but as applied to the 1986

³³⁶ According to figures compiled from the *Almanac of American Politics*, the Clerk of the House of Representatives, and the Librarian of the Senate, members of the Senate Finance Committee raised \$11,054,456 in 1986—not counting Senator Long, for whom figures were not obtained—and \$10,196,524 in 1988, representing a decline of more than 8 percent. Meanwhile, fundraising by the Senate as a whole apparently increased by more than 10 percent, suggesting an even sharper relative decline. Similar results were obtained for the House Ways and Means Committee. It raised \$3,499,357 in 1985 (the year when it considered tax reform) as opposed to \$3,075,451 in 1987, thus registering a 13 percent decline while fundraising in the House as a whole increased by 18 percent. Even if Congress subsequently restores tax preferences, it is unclear how repeal in 1986 helped the committees to extract more money, since it could have added new preferences without repealing the old ones.

A colleague has suggested to me that perhaps after 1981 it was so easy for companies to avoid taxation that selling new preferences was no longer profitable for Congress, which therefore needed to cleanse the Code so that bidding would resume. This explanation is contradicted by the fact that, during the enactment of tax reform, the Ways and Means and Finance committees continued to vote for new tax preferences (apparently in response to lobbying) until pressure from the media and congressional leadership brought them to heel. Moreover, by lowering marginal tax rates, Congress made tax preferences other than credits less valuable.

³³⁷ More sophisticated writers have noted about the 1986 Act that "a truly remarkable political event need not have produced a truly remarkable legislative document." *TAXING CHOICES*, *supra* note 11, at 260.

Act, it is refuted upon close analysis. Public choice theory inherently risks tautology, and thus lacks any rigor, because it is potentially reconcilable with almost any and all legislation.³³⁸ So long as *someone* benefits from the legislation (as is usually the case), one can claim that the beneficiary purchased it. Thus, perhaps the Federal government's War on Drugs is a political payoff to drug-dealing inner city gangs that could not compete as successfully in a legitimate business environment. McChesney's account of politicians as rent extractors³³⁹ makes this danger of tautology even worse: legislation is consistent with the model so long as it either helps or hurts someone. Rent extraction is of course critical to the claim that the 1986 Act conformed to public choice theory, since the Act on its face repealed special interest tax breaks in exchange for reducing generally applicable marginal rates.³⁴⁰ Yet rent extraction is weakened as an explanation here, not only by Congress's subsequent failure to exploit the new "tax auction" opportunities it ostensibly created, but also by the fact that, below the all-important leadership level, members of the tax committees generally responded to tax reform consistently with their preexisting positions on tax issues. The leaders who flip-flopped (such as Rostenkowski and Packwood) faced distinctive pressures and opportunities in media relations and prestige among their peers to a far greater extent than in fundraising.

This brings us to the most fundamental problem with Doernberg and McChesney's analysis. Failing to consider the process of enactment in any detail, they are unable to explain, and indeed plainly misconstrue, the Act's origins. It is incredible to suggest, as they apparently do, that Regan, Reagan, Rostenkowski, Packwood, Bradley, Kemp, and the myriad other contributors to enactment of the 1986 Act concocted and carried out a scheme to deprive interest groups so that these groups would have to pay more tribute. Yet anything far short of this synopsis reduces Doernberg and McChesney's account to an empty tautology: politicians accept campaign contributions and then either help or hurt the donors.

³³⁸ See Posner, *supra* note 16, at 348 ("[T]he economic theory is still so spongy that virtually any observations can be reconciled with it."); see also Kalt & Zupan, *supra* note 23, at 280 ("Since every economic policy decision produces transfers of wealth, it is always possible to infallibly relate political outcomes to distributional impacts.").

³³⁹ See McChesney, *supra* note 315, at 102.

³⁴⁰ See TAXING CHOICES, *supra* note 11, at 3-6.

The role of the media, ambitious political leaders, public dissatisfaction with the income tax, and the tax reform idea itself (however crudely it was understood) were all essential in 1986, but none plays a role in Doernberg and McChesney's account. Like a man in front of a mirror that he mistakes for a window, Doernberg and McChesney see their own reflections, not what is outside.

C. *What Public Choice Theory Omits*

Doernberg and McChesney's analysis of the 1986 Act shows how wide of the mark public choice theory can be when interpreted narrowly and applied universally. Yet, one should not conclude from the theory's failure here that it lacks significant explanatory power. It needs to be supplemented, not abandoned. To improve public choice theory, we need a more systematic account of how and why it fails to explain legislative politics. This section will discuss the theory's shortcomings and the principal factors that it omits. Though only a complex and multi-faceted approach can achieve reasonable descriptive accuracy, two factors are particularly important: voters' taste for symbolic legislation and politicians' taste for power and prestige. Under circumstances of high publicity, these factors can easily outweigh interest group politics.

1. Voters

Public choice theory treats voters as narrow profit-maximizers who, due to information costs and collective action problems, remain rationally ignorant and thus politically irrelevant to the extent they are not organized into interest groups. The view, however, runs into an immediate logical problem. The rational voter that public choice theory posits would find the act of voting to be irrational, even assuming full knowledge about the candidates and issues. Given the arithmetical unimportance of any one vote, even if the election's outcome is very important, the expected monetary gain from voting in one's interest is almost infinitesimal and the costs of voting (such as the expenditure of time) seem clearly greater.³⁴¹ In view of the adverse cost-benefit tradeoff, the fact that millions of people vote is paradoxical to many public choice writers,³⁴² as is the fact that better-educated voters, whom

³⁴¹ See Farber & Frickey, *supra* note 23, at 893-94; Kalt & Zupan, *supra* note 23, at 282; S. Kelman, *supra* note 23, at 41.

³⁴² See, e.g., A. Downs, *supra* note 184, at 265-74 (discussing this paradox and its

one would think more likely to be aware that voting is "irrational," vote more than others.³⁴³

As the best public choice writers have come to recognize, the paradox suggests that voting is based, not on narrow self-interest, but on consumption motives, typically involving symbolic or expressive behavior.³⁴⁴ Voters "buy" ideological, emotional, or moral satisfaction in the course of satisfying what they may regard as a civic duty, at an individually low cost even if voting conflicts directly against their narrow interests. The satisfaction is derived from the vote itself, as distinct from the electoral outcome, and thus is a strict private good unaffected by its arithmetical unimportance or by collective action problems.³⁴⁵

The low value of a single vote provides only one reason for questioning the rational voter model. Consider as well the significance, described by Murray Edelman, of politics' status as a "spectator sport" that most people observe only from a great distance and as a confusing abstraction:

For most men most of the time politics is a series of pictures in the mind, placed there by television news, newspapers, magazines, and discussions. The pictures create a moving panorama taking place in a world the mass public never quite touches, yet one its members come to fear and cheer, often with passion and sometimes with action. They are told of legislatures passing laws, foreign political figures threatening or offering trade agreements, wars starting and ending, candidates for public office losing or winning, decisions made to spend unimaginable sums of money to go to the moon.

....

Politics is for most of us a passing parade of abstract symbols, yet a parade which our experience teaches us to be a benevolent or malevolent force that can be close to omnipotent. Because politics does visibly confer wealth, take life, imprison and free people, and represent a history with strong emotional and

effect on elections). Olson argues that the cost of voting is effectively zero because it is below the "threshold" [at] which costs and returns [begin to] influence a person's action." M. OLSON, *supra* note 20, at 164 n.102. Unfortunately for this explanation, what is true of the cost of voting should also be true of the expected return.

³⁴³ See H. MARGOLIS, *SELFISHNESS, ALTRUISM, AND RATIONALITY: A THEORY OF SOCIAL CHOICE* 17 (1982).

³⁴⁴ See Kalt & Zupan, *supra* note 23, at 282 (citing G. Brennan & J. Buchanan, *Voter Choice and the Evaluation of Political Alternatives: A Critique of Public Choice* (1982) (unpublished manuscript)); see also G. TULLOCK, *supra* note 22, at 21.

³⁴⁵ See Kalt & Zupan, *supra* note 23, at 282.

ideological associations, its processes become easy objects upon which to displace private emotions, especially strong anxieties and hopes.³⁴⁶

Thus, in economic terms, voters' political consumption functions often embrace considerably more (and less) than the rational calculation of narrow self-interest. Emotional involvement is facilitated by the fact that, even if one's interest in politics remains low, much information (both true and false) may come one's way casually, as when one watches the local news during dinner or glances at newspaper headlines.³⁴⁷

Voters' consumption motives and emotional involvement, along with their capacity to absorb some information passively, suggest fertile opportunities for manipulation by political actors.³⁴⁸ If voters were perfectly manipulable and only interest groups did the manipulating, political outcomes might be roughly the same as under the standard public choice account of voters as ignorant profit-maximizers. Both of these premises, however, are false. On the public's complete manipulability, consider East Germany or Czechoslovakia, where more than forty years of government propaganda apparently failed to persuade very many people, or consider the failure of the advertising campaign for the Edsel. Voters may be strongly inclined to "buy" some things and not others.³⁴⁹ On who manipulates, consider the possible role of political actors apart from interest groups.

Given both the arithmetical unimportance of a single vote and voters' emotional involvement, politics evokes behavior far less centered on narrow wealth maximization than does a private market, even though voters, presumably without schizophrenic personalities, participate in both. Some critics of public choice

³⁴⁶ M. EDELMAN, *supra* note 25, at 5.

³⁴⁷ See MATHEMATICS, *supra* note 221, at 122.

³⁴⁸ Thus, recall Edelman's account of Pattern A or conventional interest groups as manipulating Pattern B groups that settle for symbolic satisfaction. See *supra* text accompanying notes 234-35. Some have argued (and I agree) that Edelman exaggerates the extent to which political symbols function simply as tools to manipulate Pattern B groups. See C. ELDER & R. COBB, *supra* note 25, at 65-66; M. HAYES, *supra* note 160, at 70.

³⁴⁹ For an example relating to interest groups of the importance of people's separately derived views, consider Schattschneider's observation that importers were ignored during consideration of the Smoot-Hawley Tariff because nativism led Congress to view them as un-American. See E. SCHATTSCHNEIDER, *supra* note 206, at 161-62. Consider also the diminished political success of multinational oil companies after the oil shortages of the 1970s made them unpopular. See J. WITTE, *supra* note 10, at 184-85.

theory see politics as a realm of greater altruism, where people sacrifice their own interests in order to act properly towards others.³⁵⁰ This conclusion does not necessarily follow, however, from the lesser importance of monetary self-interest. It depends on what preferences people substitute for wealth maximization. Gary Orren, a believer in political altruism, regards "the human desire for solidarity, for belonging, for attachment, for approval" as a fundamental motivation for people's political beliefs.³⁵¹ Yet this desire can lead to self-interested behavior on a group basis, overcoming collective action problems, as well as to gratuitous hostility to rival social, ethnic, or geographic groups.³⁵² Orren also argues that political beliefs reflect people's desire to find "larger purposes that transcend their own immediate situation."³⁵³ Yet selfishness, at least in the broad sense of a taste for self-justifying and self-flattering beliefs, may play a role.³⁵⁴ Consider the childishy egoistic "ethical imperialism" that some think underlies much of American foreign policy.³⁵⁵

A further aspect of voter behavior apart from altruism arises from the pervasive role of television in bringing prominent national and local politicians into people's living rooms on a regular basis. The false intimacy created can lead voters to identify with and support a politician on much the same basis as the star of a dramatic television series. (Consider again President Bush and broccoli.³⁵⁶) Here, the motive for voting may simply be affection for the politician who seems to be a "regular person" and to understand and share one's values (or to have attractive values of her own). Gary Orren thinks politics has "more in common with religion than with economics."³⁵⁷ In an age of weak party alle-

³⁵⁰ See Kalt & Zupan, *supra* note 23, at 281; S. Kelman, *supra* note 23, at 52-53; Orren, *supra* note 23, at 27.

³⁵¹ Orren, *supra* note 23, at 27.

³⁵² Consider, as an obvious example, the Nazis' hatred of Jews, reflecting (in Edelman's terms) the displacement of anxiety onto a convenient scapegoat.

³⁵³ Orren, *supra* note 23, at 27.

³⁵⁴ See Shaviro, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 535 (1989).

³⁵⁵ See J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 373 (4th ed. 1954) (predicting an Anglo-American post-World War II order "in which the interests and ambitions of other nations would count only as far as understood and approved by England and the United States"); G. TULLOCK, *supra* note 22, at 32.

³⁵⁶ See e.g., Jones, *Study Finds Americans Want News But Aren't Well Informed*, N.Y. Times, Jul. 15, 1990, § 1, at 13, col. 1 (noting that people are four times more likely to know that George Bush hates broccoli than know that April 22 was Earth Day).

³⁵⁷ Orren, *supra* note 23, at 27.

giances and high focus on personality, with frequent ticket-splitting, numerous independent voters, and an increasingly fickle electorate, a better analogy may be to the entertainment industry.³⁵⁸

In summary, the public choice model of voters as narrowly self-interested profit-maximizers seems inaccurate. It confuses low information with no information and ignores important motivations apart from narrow self-interest. To understand more fully the systematic implications of these inaccuracies, it is necessary to examine some of the other descriptive shortcomings of public choice theory.

2. Politicians

Before McChesney's study of rent extraction, public choice writers tended to view politicians as merely passive brokers among the competing interest groups. McChesney makes the important point that politicians have both goals of their own and considerable power over outcomes.³⁵⁹ He thus advances the descriptive power of public choice theory, although limited by his overly narrow consumption function for politicians.

If politicians are as exclusively "money-mad" as McChesney posits, one wonders why they have chosen politics as their profession. Elected positions often pay less than the available private sector alternatives, in addition to bringing long hours and relative job instability.³⁶⁰ The politician who seeks to supplement her income through private arrangements may risk disgrace and even prison, as numerous congressmen and senators have learned in recent years. Moreover, while politics can pave the way to a more lucrative career (such as lobbying), many politicians remain in the business long past the point of maximizing their lifetime earnings potential.³⁶¹

³⁵⁸ See H. SMITH, *supra* note 25, at 400 (analogizing the Reagan Administration to a long-playing television series).

³⁵⁹ This point should have been obvious purely from the economic theory of agency, which posits that, in agent-principal relationships (of which member-constituent and member-interest groups are examples), monitoring the agent is costly for the principal, and agents therefore can engage in shirking, or secretly pursuing their own ends rather than those of the principal. See Farber & Frickey, *supra* note 23, at 894-95; Kalt & Zupan, *supra* note 23, at 282-84.

³⁶⁰ See S. Kelman, *supra* note 23, at 45. For multi-millionaires who spend vast amounts of their own money seeking election, the financial self-interest argument is particularly weak.

³⁶¹ It would be hard to argue, for example, that Senator Dole or Congressman Rostenkowski needs to stay in politics any longer from the standpoint of a future

This is not to deny the extreme importance of money in politics, as both a direct goal of politicians and a means of winning reelection. To replace the public choice account with one that is more realistic, however, we must look more closely at politicians' objectives.

a. *Politicians' Varied Motives*

To the extent that one can generalize, what sort of people are politicians? The medieval sage Maimonides, echoing a long tradition, ranked them with the enchanters, whose defect of the logical faculty leads them to "do wonderful things by strange means and secret arts."³⁶² More recently, some have echoed Lord Acton's maxim that power corrupts;³⁶³ in Henry Adams' words, it causes an "aggravation of self, a sort of tumor that ends by killing the victim's sympathies."³⁶⁴ Many contemporary observers agree that politicians approach "each new situation and each other [person] with the simplest question: What can this do for me?"³⁶⁵

One senses the voice of envy in some of this. Yet even more sympathetic observers agree that politicians generally are motivated to an unusual degree by what is variously described as a "desire for attention and adulation,"³⁶⁶ "intense and ungratified craving for deference,"³⁶⁷ "ache for applause and recognition," and an "urge for that warm feeling of importance."³⁶⁸ Thus, self-interest is agreed to be extremely important to politicians, but not primarily the narrow monetary self-interest emphasized by economists.³⁶⁹

lobbying career. A dramatic proof of many politicians' nonmonetary motives may come in 1992, when members of Congress who run for reelection will lose the right to convert their campaign funds to personal use upon retirement. See Ethics Reform Act of 1989, Pub. L. No. 101-194, tit. v, § 504, 103 Stat. 1716, 1755 (1989) (amending 2 U.S.C. § 439(a) (1988)).

³⁶² M. MAIMONIDES, *THE GUIDE FOR THE PERPLEXED* 228 (M. Friedlander trans. 2d ed. 1956). In the first century A.D., 11 centuries before Maimonides, Philo Judaeus of Alexandria took a similar view. See H. LASSWELL, *supra* note 26, at 8.

³⁶³ See H. LASSWELL, *supra* note 26, at 7-8.

³⁶⁴ H. ADAMS, *THE EDUCATION OF HENRY ADAMS* 147 (modern library ed. 1931).

³⁶⁵ H. SMITH, *supra* note 25, at 113 (quoting T. CROUSE, *THE BOYS ON THE BUS* 71 (1973) (quoting Richard Reeves)).

³⁶⁶ S. Kelman, *supra* note 23, at 46.

³⁶⁷ H. LASSWELL, *supra* note 26, at 38. It is not strictly correct to group Lasswell with the more sympathetic observers of politicians.

³⁶⁸ H. SMITH, *supra* note 25, at 94.

³⁶⁹ Additionally, it appears that many politicians are motivated not only by self-interest, but also by ideological goals and what they consider good public policy. See, e.g., S. Kelman, *supra* note 23, at 46 (citing evidence from surveys of politicians).

(It is of course likely that *some* politicians fit the public choice model, and one would expect to find broad variation among individuals' motives.)

These impressionistic accounts of politicians' motives are confirmed by empirical studies of the U.S. Congress. Perhaps the best two such studies, based on extensive confidential interviews, are Richard Fenno's *Congressmen in Committees* and John Manley's *The Politics of Finance: The House Committee on Ways and Means*.³⁷⁰ Fenno found that three goals espoused by House members are "the most widely held and the most consequential for committee activity."³⁷¹ They are (in no particular order of priority): (1) reelection, (2) "influence" within the House, meaning power and prestige, and (3) good public policy.³⁷² Manley documented the preeminence of the second of these goals, power and prestige, among members of the Ways and Means Committee.³⁷³ In the years since Fenno's and Manley's studies, the quest for power and prestige apparently has been generalized from one's congressional colleagues to the broader Washington political community,³⁷⁴ and success in this quest has become more widely and rapidly available.³⁷⁵

Lasswell even views these motivations as selfish, terming politicians' interest in public policy a psychological "displacement" onto public objects of the craving for deference, "rationalized in terms of public interest." H. LASSWELL, *supra* note 26, at 38.

³⁷⁰ While Fenno's study was published in 1973 and Manley's in 1970, they continue to be cited widely. See, e.g., J. KINGDON, *supra* note 26, at 41 n.11; R. RIPLEY, *supra* note 26, at 151 n.10; Price, *supra* note 26, at 175.

³⁷¹ R. FENNO, *supra* note 26, at 1.

³⁷² See *id.* Kingdon found similar goals. See J. KINGDON, *supra* note 26, at 41-42. Fenno also noted goals relating to a career beyond the House and to private gain, but regarded them as more peripheral. See R. FENNO, *supra* note 26, at 1. For "influence" including both power and prestige, see *id.* at 3-4.

³⁷³ See J. MANLEY, *supra* note 26, at 53-58; see also R. FENNO, *supra* note 26, at 2-5 (finding that the "desire to have more influence inside the House than other Congressmen is the distinctive dominant goal of Appropriations and Ways and Means members"). At the time of these studies, the Ways and Means Committee may have been more of a magnet for influence-seekers than at present, since it possessed the vitally important power of appointment to all House committees, a power that it lost in 1975. See Bullock & Loomis, *The Changing Congressional Career*, in CONGRESS RECONSIDERED, *supra* note 26, at 74.

³⁷⁴ See, e.g., J. KINGDON, *supra* note 26, at 42 (stating that an important goal "of many members of Congress is enhancing their intra-Washington reputation"); Price, *supra* note 26, 167-68 (arguing that congressional members seek power and prestige within the government establishment as well as Congress).

³⁷⁵ See, e.g., H. SMITH, *supra* note 25, at 39 (stating that television helped "throw open the power game"); Bullock & Loomis, *supra* note 373, at 67 (noting that the increasing media coverage of Capitol Hill allows junior members greater exposure

Of the three goals cited by Fenno, reelection, while obviously a prerequisite to all else, is not a serious problem for everyone. Incumbents win reelection well over 90 percent of the time (at least in the House³⁷⁶), and some incumbents, being stronger than others, are particularly safe. While incumbents' success results in part from their doing what they have to do,³⁷⁷ the high success rate does suggest some freedom to pursue goals other than reelection.³⁷⁸ Such freedom is particularly great for many senior members in leadership positions. Their seniority is both evidence of electoral strength and a source of strength,³⁷⁹ while their leadership positions help make influence and policy both more important and more attainable as goals.³⁸⁰ I will reserve for the next subsection consideration of how the goal of reelection affects the legislative process, and focus for now on the goals of attaining power and prestige and making good policy.

Beginning with power and prestige, its implications obviously depend on the context. For a leader, such as the Speaker of the House or a committee chairman, it often depends on winning legislative victories. Wilbur Mills, the Chairman of the Ways and Means Committee from 1958 to 1974, who never lost a tax bill on the House floor,³⁸¹ seemingly regarded his "aura of invincibility" as more important than the content of legislation.³⁸² To this end, he practiced "followership," extensively consulting his colleagues so that he could supply the legislation that they wanted.³⁸³ Chairman Rostenkowski, while less collegial and less consistently

beyond their constituencies).

³⁷⁶ See Dodd & Oppenheimer, *The Elusive Congressional Mandate: The 1984 Election and Its Aftermath*, in CONGRESS RECONSIDERED, *supra* note 26, at 1-3; Erikson & Wright, *Voters, Candidates, and Issues in Congressional Elections*, in CONGRESS RECONSIDERED, *supra* note 26, at 97.

³⁷⁷ See D. MAYHEW, *supra* note 25, at 37.

³⁷⁸ As Mayhew notes, politicians aim to stay in office, not to win 100 percent of the votes. Thus, while there may be some value to winning by large margins (i.e., to deter future challengers), the value of additional votes drops as one's expected majority increases. See *id.* at 46.

³⁷⁹ Seniority is a source of political strength both because it means one has had the opportunity to develop strong constituent ties and because it may assist one in delivering narrow pork barrel benefits (thus purchasing greater freedom in broad policy areas). See M. FIORINA, *supra* note 25, at 50-51.

³⁸⁰ See M. DERTHICK & P. QUIRK, *THE POLITICS OF DEREGULATION* 103 (1985).

³⁸¹ See T. REESE, *supra* note 41, at 110.

³⁸² See J. MANLEY, *supra* note 26, at 111-15; T. REESE, *supra* note 41, at 110-11.

³⁸³ See J. MANLEY, *supra* note 26, at 100, 108 (using the less felicitous term "followmanship").

successful, likewise hates to lose and fights intensely to win.³⁸⁴ At moments of high publicity, the leader's goal of winning often is joined by a second goal: recognition as a statesman.³⁸⁵ Senator Dole's leadership in deficit reduction in 1982 and 1984, and the tax reform efforts of Chairmen Rostenkowski and Packwood in 1986, are good examples of this motivation.

For members not in leadership positions, the routes to power and prestige are more varied. A member can gain status by introducing ideas that become widely discussed, whether or not the ideas are enacted.³⁸⁶ Examples include tax reform, which benefitted Senator Bradley and Congressman Gephardt even before enactment became plausible,³⁸⁷ and Senator Moynihan's recent proposal to roll back scheduled increases in the social security tax.³⁸⁸ In addition, even a junior member can gain influence by emerging as a compromise broker and coalition builder.³⁸⁹ One can gain stature from involvement in the drudgery of committee work and development of legislation.³⁹⁰ With the increased popularity of TV talk shows such as "Nightline" and "20/20," along with C-SPAN's full-time coverage, one can pursue a career as a

³⁸⁴ See, e.g., *TAXING CHOICES*, *supra* note 11, 88-92 (noting the political, policy, and personal considerations that propelled Rostenkowski's leadership and the 1986 Tax Reform Act); Rudder, *supra* note 104, at 215-21 (describing the emergence of Rostenkowski and Senator Dole as leaders in Congress's efforts to reduce the deficit during Reagan's first term).

³⁸⁵ See Hook, *By Shifting Tactics on Clean Air, Dingell Guarded His Power*, 48 CONG. Q. 1453 (1990).

³⁸⁶ As Kingdon puts it: "Affecting policy agendas on the Hill and downtown demonstrates that one is a figure of some consequence, a 'heavyweight' who must be taken seriously." J. KINGDON, *supra* note 26, at 42; see also N. POLSBY, *supra* note 25, at 161-62 (discussing policy innovation as a route to prominence for prospective presidential candidates).

³⁸⁷ See, e.g., H. SMITH, *supra* note 25, at 145 (noting that Gephardt and Bradley co-sponsored the 1986 tax bill which was supported by both Reagan and Congress).

³⁸⁸ See Yang, *Moynihan Basks in the Limelight as Washington Takes Sides on His Plan to Cut Social Security Tax*, Wall St. J., Feb. 28, 1990, at A-6, col. 1.

³⁸⁹ See, e.g., H. SMITH, *supra* note 25, at 143 (discussing Gephardt as the personification of a new breed of Democrats—not only effective on television, but also successful at the "inside game of coalition politics" that results in legislative action); Bullock & Loomis, *supra* note 373, at 77-78 (describing Gephardt as illustrative of how "one member can integrate policy initiatives with personal career goals," and specifically how he has risen within Democratic party leadership in the House).

³⁹⁰ See Price, *supra* note 26, at 16.

television celebrity,³⁹¹ although at the risk of gaining an inside reputation as a "show horse" who is all talk and no action.³⁹²

In the struggle for power and prestige, interest groups can help a member. They can provide the political support that is crucial to winning a legislative contest.³⁹³ (Recall the 1981 bidding war between the Democrats and Reagan for business support of their tax bills.) They can be a source of politically salient ideas (as with Reagan's business tax cut proposal in the 1980 campaign). It seems clear, however, that interest groups are relatively less important in the quest for power and prestige than they are with regard to fund-raising. Ideas, for example, emanate far more from government insiders and academics than from interest groups.³⁹⁴ The political salience of an idea, as with tax reform, often varies positively with it being hostile to what the media perceives as the "special interests."³⁹⁵ Thus, interest groups are far less powerful and important in a world where members compete for power and prestige than in a world of McChesneyian money monsters.

Now consider the goal of making good policy or furthering one's ideology. This goal is so important, according to some studies, that ideology is a better predictor of legislative voting behavior than economic interest variables.³⁹⁶ Moreover, there is anecdotal evidence that members often derive great pleasure from putting ideas into action and having an effect on society.³⁹⁷ Again, while interest groups can help a member (for example, by exploiting an ideology that serves their purposes, or suggesting

³⁹¹ See Ornstein, Peabody & Rohde, *The Senate Through the 1980s: Cycles of Change*, in CONGRESS RECONSIDERED, *supra* note 26, at 13, 18; Bullock & Loomis, *supra* note 373, at 80.

³⁹² See e.g., H. SMITH, *supra* note 25, at 143 (describing Gephardt as unusual because he has experienced success as both a legislator and in the realm of "video politics"); Price, *supra* note 26, at 169-70 (noting that Congress's committee system works to insure that such "show horses" often fail to gain the power and prestige coveted on Capitol Hill).

³⁹³ See Roberts, *Tax Bill Maneuvering: A Political Tug-of-War*, N.Y. Times, July 18, 1981, at 30, col. 5.

³⁹⁴ See J. KINGDON, *supra* note 26, at 23-46, 52-59.

³⁹⁵ See *infra* notes 455-65 and accompanying text.

³⁹⁶ See Farber & Frickey, *supra* note 23, at 897-900; Kalt & Zupan, *supra* note at 23, at 279-85.

³⁹⁷ See, e.g., J. KINGDON, *supra* note 26, at 130 (noting that people in government often advocate ideas to promote their own values); J. MANLEY, *supra* note 26, at 325-26 (describing the feeling of satisfaction many members of the Ways and Means Committee derive from their membership).

workable legislative proposals), their dominance is far less than in fund-raising.³⁹⁸

Perhaps the most serious problem that results from members' goals apart from reelection has little to do with interest groups. In today's Congress, seemingly everyone wants to be an influential policy-maker.³⁹⁹ As one member put it, "Congress exists to do things. There isn't much mileage in doing nothing."⁴⁰⁰ Members often want to participate in making policy to a far greater extent than they know what they want to do.⁴⁰¹ Moreover, those who favor activism in a particular area tend to be the ones who seek and get the committee assignments in that area.⁴⁰² What results is a bias in favor of action over inaction, a reluctance to consider carefully the merits of legislation (which become subordinate to one's own or one's colleagues' personal investment in it), and a tendency to legislate for legislation's sake.⁴⁰³ Where a bill's enactment is a given, it often must be made more complex and less internally coherent in order to reflect the input of more members.⁴⁰⁴ Except where an issue seems too politically risky or controversial, Congress tends not to like the advice: "Don't just do something; stand there."⁴⁰⁵

What is true of members of Congress is true as well of a vast array of other "players" in the Washington political community.

³⁹⁸ See, e.g., J. KINGDON, *supra* note 26, at 49 (finding inverse relationship between the ideological cast of an issue and the importance of interest groups).

³⁹⁹ See H. SMITH, *supra* note 25, at 34, 39.

⁴⁰⁰ J. KINGDON, *supra* note 26, at 41.

⁴⁰¹ See R. FENNO, *supra* note 26, at 69. Or consider the Ways and Means member who told John Manley: "The only way I can interpret what I want to be is power. I don't know what I'd do with it when I got it but I want it where I can reach out and use it when I want it." J. MANLEY, *supra* note 26, at 53.

⁴⁰² See J. KINGDON, *supra* note 26, at 42-43.

⁴⁰³ Cf. *id.* at 32 (noting that Cabinet members want to "put their stamp on something" and "make their mark").

⁴⁰⁴ Consider the great pride members of Ways and Means take in writing their own tax legislation instead of rubber-stamping proposals from the Administration. See J. MANLEY, *supra* note 26, at 325. Members of the Senate Finance Committee are similarly committed to revising whatever Ways and Means proposes. See also R. FENNO, *supra* note 26, at 159-60 (comparing the goals and ideology of the Senate Finance Committee members to those of the Ways and Means Committee members). Kingdon has noted that even when a member demands changes on behalf of constituents or interest groups, she may be trying to enhance her intra-Washington reputation by demonstrating her ability to get her way, as much as working on behalf of those groups. See J. KINGDON, *supra* note 26, at 42. As Stanley Surrey noted, everyone feels entitled to "a little old amendment now and then." Surrey, *supra* note 254, at 1156.

⁴⁰⁵ Congress's interest in legislating could be analogized to academics' interest in publishing articles, whether or not they have something to say.

Like congressmen, congressional staffers, cabinet members and other executive branch political appointees, career bureaucrats, lobbyists, self-styled public interest advocates, journalists, academics, and intellectuals affiliated with think tanks often push for legislation motivated by both desire for influence and concern about policy, as well as sheer enjoyment of the political game.⁴⁰⁶ As one participant described the prevailing ethos:

[Y]ou . . . have to have a loaded gun, and look for targets of opportunity. There are periods when things happen, and if you miss them, you miss them. You can't predict it. They just come along You keep your gun loaded and you look for opportunities to come along. Have idea, will shoot.⁴⁰⁷

b. *Politicians' Means of Pursuing Reelection*

An important factor in support of the public choice writers' claim that Congress cares only about money is the vital link between campaign financing and reelection. Fund-raising has become increasingly important in recent years. Between 1974 and 1986, the average cost of an incumbent's reelection campaign increased more than sixfold, to exceed \$300,000 for House members and \$3 million for Senators.⁴⁰⁸ Political action committees, or PACs, which often are synonymous with interest groups, played a major role in causing the increase and are critical to members' meeting their financing needs.⁴⁰⁹ These needs are never-ending, even for relatively safe incumbents. By assembling a large "war chest," a politician can remain safe by deterring strong challengers, and any surplus can always be used somehow (for instance, to help others' campaigns and thus increase the politician's influence).⁴¹⁰ Members tend to

⁴⁰⁶ See, e.g., J. KINGDON, *supra* note 26, at 139-211 (describing how interest groups, members of the executive branch, congressional staffers and the media influence (and fail to influence) the decisions made by Congress); M. MALBIN, *UNELECTED REPRESENTATIVES* 9-24 (1980) (discussing generally how the size and ideological makeup of congressional staffs have changed in the post-1947 era, and how these changes have influenced policy); N. POLSBY, *supra* note 25, at 159-67 (discussing the cultural norms and biases that cause various political actors to become policy innovators). For an example of Washington's relentless obsession with status and grading "players" on their effectiveness (almost without regard to what effect they are having), see Safire, *Bush's Cabinet: Who's Up, Who's Down*, N.Y. Times, Mar. 25, 1990, § 6 (Magazine), at 30.

⁴⁰⁷ J. KINGDON, *supra* note 26, at 193 (emphasis deleted).

⁴⁰⁸ See H. SMITH, *supra* note 25, at 156.

⁴⁰⁹ See Jacobson, *Parties and PACs in Congressional Elections*, in CONGRESS RECONSIDERED, *supra* note 26, at 131, 150-51.

⁴¹⁰ See, e.g., H. SMITH, *supra* note 25, at 157-58 (discussing the need for increased

raise funds continuously throughout their terms, often spending as much as a quarter of their working time on the process.⁴¹¹

Moreover, the inaccuracy of the claim that members literally sell legislation is by no means fatal to a claim of interest group dominance driven by campaign financing. For example, even if members honestly do what they think is right, the political equivalent of natural selection might ensure that only people who agree with interest groups win elections. We also should not underestimate the capacity of a human being to persuade herself that action in her self-interest also happens to be right—especially since members often only hear the interest group's side of the story, and even in good faith may be swayed by feelings of obligation or gratitude towards contributors.

Yet the implications of campaign financing for interest group politics can easily be overstated. Only a small fraction of the money spent on lobbying takes the form of contributions to candidates⁴¹²—suggesting surprising inefficiency or irrationality on the part of interest groups if campaign financing is the unique engine of legislative success. Moreover, PAC contributions (often an important vehicle of interest group influence) are but a part of the campaign financing universe, responsible in 1987 and 1988 for only 24 percent of all funds in Senate campaigns and 40 percent in House campaigns.⁴¹³ Thus, while campaign financing helps make interest groups important, it does not make them all-important.⁴¹⁴

Even more significantly, campaign financing is only one factor among many that affects reelection and other factors may dilute or even counter interest groups' influence. Perhaps the most thorough study of how members pursue reelection is David Mayhew's

fund-raising and Senator Alphonse D'Amato's use of his war chest to scare off potential Democratic opponents in the 1986 campaign).

⁴¹¹ See *id.* at 155-58.

⁴¹² See Malbin, *Looking Back at the Future of Campaign Finance Reform: Interest Groups and American Elections*, in *MONEY AND POLITICS IN THE UNITED STATES* 232, 251 (M. Malbin ed. 1984).

⁴¹³ See H. Alexander, *What Moral Principles Should Govern Campaign Reform?* 8 (Apr. 26, 1990) (unpublished manuscript) (on file with author). Another important source of funds is mass mailing by a host of single-issue (but not narrowly economic) groups such as pro-choicers, pro-lifers, environmentalists, fundamentalists, supporters of Israel, and opponents of South Africa. See *id.*

⁴¹⁴ An additional point reducing the importance of interest groups is that a politician may be able to "pick her spots" for cooperating with them. If one receives enough money from a few groups, the cost of refusing to cooperate with other groups is reduced (although not eliminated, especially since they can threaten to finance one's opponents).

*Congress: The Electoral Connection.*⁴¹⁵ Mayhew finds that members engage principally in three kinds of activities in pursuit of reelection. The first is *advertising*, or "disseminat[ing] one's name among constituents in such a fashion as to create a favorable image but in messages having little or no issue content."⁴¹⁶ The second is *position taking*, or "the public enunciation of a judgmental statement on anything likely to be of interest" to one's audience,⁴¹⁷ often without regard to actual legislation. Finally, members engage in *credit claiming*, or "acting so as to generate a belief . . . that one is personally responsible for causing the government, or some unit thereof, to do something . . . desirable."⁴¹⁸ A variation of credit claiming is blame avoidance, or deflecting perceived responsibility for unpopular government action.⁴¹⁹

Each of these activities lends importance to factors apart from interest group influence. Consider first advertising. While paid advertising requires campaign funds, it is generally considered inferior to favorable free media, such as television news coverage.⁴²⁰ Not only is free media cheaper (an especial advantage between elections, when members need to retain high visibility⁴²¹), it also tends to have greater credibility and to attract a larger and more attentive audience.⁴²² Members' success with both free and paid media depends in large part on personality (whether actual or apparent), and perhaps even more on sheer repetitive exposure, since in general "to be perceived at all is to be perceived favorably."⁴²³

⁴¹⁵ D. MAYHEW, *supra* note 25.

⁴¹⁶ *Id.* at 49.

⁴¹⁷ *Id.* at 61.

⁴¹⁸ *Id.* at 52-53.

⁴¹⁹ See, e.g., TAXING CHOICES, *supra* note 11, at 103-04 (noting that when the issue of tax reform soured with the electorate, the Democrats still had reason to support it, to avoid being blamed for the perpetuation of perceived inequalities under the existing tax system); H. SMITH, *supra* note 25, at 657-58 (noting that "the incentives of the power game reward . . . finger pointing [and] damage control").

⁴²⁰ Despite its name, free media is not actually free, since politicians often produce their own videotapes for transmission to television stations in the hope that the stations will air the tapes as unattributed straight news. See H. SMITH, *supra* note 25, at 125.

⁴²¹ See *id.* at 126-28.

⁴²² See A. RANNEY, *supra* note 25, at 90-91; L. SABATO, THE RISE OF POLITICAL CONSULTANTS: NEW WAYS OF WINNING ELECTIONS 194-95 (1981).

⁴²³ D. MAYHEW, *supra* note 25, at 50 (quoting Stokes & Miller, *Party Government and the Saliency of Congress*, in ELECTIONS AND THE POLITICAL ORDER 205 (A. Campbell, P. Converse, W. Miller & D. Stokes eds. 1966)); see also H. SMITH, *supra* note 25, at 127 (discussing former Senator Paul Tsongas's admission that, with respect to campaign advertisements, "content mattered less than sheer exposure and the ease people felt

Perhaps the most important type of advertising, especially for members of the House, is favorable word of mouth in one's home state or district.⁴²⁴ This comes in large part from casework, or providing services to constituents other than legislation. Casework principally involves interceding with the federal bureaucracy, although it can be as simple as sending essay materials to high school students or providing hospitality to constituents who visit Washington.⁴²⁵

Advertising, other than the use of paid media, dilutes interest group influence in two respects. First, the need for constant exposure suggests finding ways to be continually newsworthy, and this may involve calling for legislation that is unrelated or even hostile to interest group demands. Second, while advertising can complement making interest group deals, it also, as a separate source of electoral support, lowers the political cost of opposing interest groups.⁴²⁶

Now consider position-taking, or making people feel good by saying things that they like.⁴²⁷ In common with advertising, position-taking can increase a member's political support while having no relation to substance, as when she praises abstractions (such as patriotism or competitiveness) or endorses goals that she does not actually intend to advance through any substantive action.⁴²⁸ At times, it does involve substance, however, as when

about you as a person").

⁴²⁴ In part due to the importance of word of mouth, members of Congress often are more impressed by grass roots lobbying that shows constituent sentiment than by exclusively Washington-based money lobbying. See M. HAYES, *supra* note 160, at 74-75; H. SMITH, *supra* note 25, at 239-40.

⁴²⁵ See D. MAYHEW, *supra* note 25, at 54-55; Cain, Ferejohn, & Fiorina, *Constituency Service in the United States and Great Britain*, in CONGRESS RECONSIDERED, *supra* note 26, at 109, 116. Casework has the advantage of being generally uncontroversial (recent cases like the Keating Five aside), whereas any political position is likely to offend someone. See M. FIORINA, *supra* note 25, at 43-44.

⁴²⁶ See R. RIPLEY, *supra* note 26, at 275; see also H. SMITH, *supra* note 25, at 36-40 (noting that the changes in the media have fragmented the old order of Congress and enabled savvy junior legislators to gain prominence through the news media).

⁴²⁷ When public opinion about a substantive issue is sharply divided, Mayhew recommends muddying one's stance, as by saying of the Vietnam War, "We must have peace with honor at the earliest possible moment consistent with the national interest." D. MAYHEW, *supra* note 25, at 64. Even yes-or-no roll call votes can be used to muddy one's position when there are a succession of votes on procedural issues and amendments. See *id.* at 65-66.

⁴²⁸ A classic example is President Reagan's week-long media blitz about education, which transformed public perceptions about Reagan's impact on education although unrelated to any meaningful proposed action. See H. SMITH, *supra* note 25, at 416-19.

a legislator publicly proposes or votes on significant legislation. Position-taking, like advertising, can lower the cost of opposing interest groups, and can even make such opposition politically beneficial—in effect, a purchase of goodwill that exceeds in value the future campaign contributions foregone.

Finally, consider credit-claiming. Mayhew argues that it encourages pork barrel legislation favoring local interests, because such legislation usually is more plausibly attributed to the local representative than is major national legislation.⁴²⁹ While this may be true on balance, there are countervailing influences. David Stockman, for example, found while in Congress that he could oppose pork barrel legislation and then claim credit for it anyway by attending the ribbon-cutting ceremonies.⁴³⁰ Moreover, a member who, like Stockman, has ideological views about national issues may find that her lack of perceived personal responsibility for legislation on such issues facilitates blame avoidance.

In some cases credit-claiming and blame avoidance become the basis for competition between the Democratic and Republican parties regarding national issues. In such circumstances, interest groups can be either helped or hurt. Thus, during consideration of the 1981 tax bill, the parties bid against each other for interest group backing because each wanted the credit for cutting taxes.⁴³¹ By contrast, in 1986, concern for credit-claiming (in the early stages) and blame avoidance (later on) encouraged the parties to sacrifice the concerns of many interest groups.⁴³² Given the vast number of legislative issues, most of which receive little public attention, members may only infrequently benefit politically from opposing transfers to interest groups from the general public. Yet the public need not feel strongly about an issue, or even remember it beyond the brief period when it appears on television, in order for a pro-interest group position (if portrayed unfavorably) to prove costly.

⁴²⁹ See D. MAYHEW, *supra* note 25, at 53-61.

⁴³⁰ See Greider, *supra* note 86, at 30. Even well-informed interest groups can to some extent be bamboozled by credit-claiming. Thus, Manley notes that Senate Finance Committee members would sometimes press for special interest amendments that they knew would be dropped in conference. See J. MANLEY, *supra* note 26, at 269-70.

⁴³¹ See *supra* text accompanying notes 91-107.

⁴³² See, e.g., TAXING CHOICES, *supra* note 11, at 103-04 (discussing the way in which the "demise of tax reform as a net positive" caused the issue to "boil[] down to blame avoidance, pure and simple," for the Democrats); H. SMITH, *supra* note 25, at 659 (noting that during consideration of the 1986 tax-reform bill, "blame-game politics" were used by President Reagan and congressional leaders to prod Congress into action to avoid "the wrath of voters").

The negative goodwill may outlive the public's memory of the specific story.⁴³³ The political importance of this type of thinking is suggested by evidence that members are obsessed with surveying public opinion and keeping their positions consistent with it.⁴³⁴

Thus, while interest groups may have undue influence, they are not the only important force affecting the legislative process. Public choice writers, driven by the misleading analogy between legislation and goods sold in the marketplace, have missed a far more promising analogy: that between *politicians* and mass-marketed commercial products. Note how Mayhew's reelection activities fit this analogy. Advertising is the creation of a brand name; position-taking (as an end in itself) and the subjects of credit-claiming are what the "product" is actually supposed to do. The problem with this market is poor information. Voters cannot closely monitor how even Congress as a whole affects them, much less the effects of an individual legislator.⁴³⁵ Thus, politicians gain approval without the same level of feedback that may result from using commercial products.

The factors leading to public approval may be unrelated or even adverse to good policy. As an example, position-taking encourages Congress to enact regulatory statutes that provide "fatuous, self-contradictory wish-lists" instead of specific mandates.⁴³⁶ This tendency creates uncertainty and complexity, which a regulatory agency, subject to "capture" by the groups that it is supposed to regulate, must try to resolve.⁴³⁷ Complaints about the agency are relayed to Congress, allowing members to gain further public approval through casework on behalf of complainants without being blamed for the vague legislation.⁴³⁸

⁴³³ See H. SMITH, *supra* note 25, at 422 (noting Presidents who acquired lasting negative images, "Johnson . . . as Machiavellian, Nixon as devious, Carter as wishy washy").

⁴³⁴ See J. KINGDON, *supra* note 26, at 41; H. SMITH, *supra* note 25, at 90.

⁴³⁵ Indeed, the institution and the individual become disjoined, as evidenced by the paradox that the public seems to dislike Congress but to reelect almost all incumbents. See Shavero, *Exchange on Public Choice*, 57 U. CHI. L. REV. 834, 835 (1990).

⁴³⁶ See R. NOLL, *supra* note 238, at 101.

⁴³⁷ See, e.g., M. HAYES, *supra* note 160, at 104 (arguing that the capture of these agencies was intended in the originating legislation, "for only in this way could congressmen minimize the disturbance to the attentive groups important to their reelection while appearing concerned with the broader public interest").

⁴³⁸ See M. FIORINA, *supra* note 25, at 48.

c. *Policy Entrepreneurship*

As we have seen, both reelection and members' other goals (such as serving ideology and enhancing prestige) encourage both public posturing and substantive legislative activity that may be unrelated or even hostile to interest group influence. The phenomenon is commonly called "policy entrepreneurship," or the investment of personal resources in promoting a particular policy, with the anticipated "return" often depending on the enactment of legislation.⁴³⁹ (There may be no way of telling what form the *ultimate* return from enactment of the legislation takes—i.e., whether it is prestige, reelection, or ideological satisfaction—since the motives may all point in the same direction.) Television and the breakdown of party and leadership structures within Congress have led to increased policy entrepreneurship in recent years, since they permit even the most junior members of Congress to have an immediate effect and seek rapid advancement.⁴⁴⁰ Policy entrepreneurship also is encouraged by presidential campaigns, since both active and prospective candidates often demonstrate their seriousness by sponsoring major proposals.⁴⁴¹

I have thus far been critical of policy entrepreneurship, because members' demand for it is high while the discipline of seriously considering a proposal's effects seems low. Augmenting the problems caused by voters' lack of information, prestige within the Washington establishment attaches to power and political importance as an end in itself. The goal is to be an effective "player,"⁴⁴² almost regardless of the consequences of one's "playing." Yet policy entrepreneurship also has a positive side: it produces

⁴³⁹ See J. KINGDON, *supra* note 26, at 129; N. POLSBY, *supra* note 25, at 171-72; Bullock & Loomis, *supra* note 373, at 77; Uslaner, *Policy Entrepreneurs and Amateur Democrats in the House of Representatives: Toward a More Party-Oriented Congress?*, in LEGISLATIVE REFORM: THE POLICY IMPACT 105, 106 (L. Riesebach ed. 1978).

⁴⁴⁰ See, e.g., Bullock & Loomis, *supra* note 373, at 66, 77 (stating that the "policy entrepreneur" aggressively mixes policy goals with personal drives for power, advancement, and reelection); Uslaner, *supra* note 439, at 112 (noting that concern for reelection can be consistent with policy objectives in some cases).

⁴⁴¹ See, e.g., N. POLSBY, *supra* note 25, at 161 (stating that candidates "must display a willingness to grapple with human needs" and "incumbents . . . must find programs to which they can attach their names and from which they can hope to exact a little credit").

⁴⁴² See, e.g., Safire, *supra* note 406, at 22 (claiming that the criteria for becoming a "player" are, among other things: management skill, intelligence or savvy, and originality); Yang, *supra* note 388, at A16, col. 2 (stating that Senator Daniel Moynihan's social security tax cut proposal has given him "new found notoriety").

much good legislation that might not emerge from a less wide-open system. Tax reform is only one example. Consider as well the successes of regulatory legislation, promoted by policy entrepreneurs, that addressed air and water pollution, automobile safety, consumer product safety, and racial discrimination.⁴⁴³ Or consider recent (and arguably beneficial) examples of deregulation, as of the trucking industry, undertaken despite interest group opposition.⁴⁴⁴

Without the incentives and opportunities for policy entrepreneurship that our political system provides, much of this legislation might not have been enacted. Policy entrepreneurship, for all its faults, is the principal alternative to interest group politics, making possible legislation that pits widely dispersed benefits against narrowly concentrated costs.⁴⁴⁵ Yet public choice theory fails to account for it.

3. Organized Interest Groups

The public choice view of organized interest groups is as narrow and stereotyped as the public choice views of voters and politicians. An interest group ostensibly consists of rational profit-maximizers, cooperating to seek transfers from the rest of society because for each participating individual the expected marginal benefit of cooperating exceeds the expected marginal cost. As public choice writers recognize, however, this begs the question of why free riding does not prove as fatal to interest group activity as it does to purposive activity by the *public*. The answers they suggest include the following: (1) groups attract members through tangible goods (such as subscriptions to a trade magazine) and provide lobbying as a by-product for which no separate charge is levied;⁴⁴⁶ (2) groups with a very small number of members can agree internally to cooperate;⁴⁴⁷ and (3) some groups are "privileged," or have at least one member whose share of the benefit from lobbying exceeds the cost thereof to the entire group.⁴⁴⁸

⁴⁴³ See C. SUNSTEIN, *supra* note 236, at 77-80 (discussing the successes of many of the types of regulation described above).

⁴⁴⁴ See, e.g., J. KINGDON, *supra* note 26, at 11-12 (describing how politicians in both major parties built public support for deregulation to overcome interest group opposition).

⁴⁴⁵ See TAXING CHOICES, *supra* note 11, at 254; K. SCHLOZMAN & J. TIERNEY, *supra* note 202, at 84-85.

⁴⁴⁶ See M. OLSON, *supra* note 20, at 132-35.

⁴⁴⁷ See *id.* at 143.

⁴⁴⁸ See *id.* at 48-50. George Stigler suggests that, even for a non-privileged group,

These explanations are not fully convincing, however. As George Stigler notes, the by-product theory invites the "obvious objection" that, if, say, a publisher of trade magazines adds a charge for collective goods such as lobbying, a rival publisher that provides no collective goods should be able to undersell it and steal its membership.⁴⁴⁹ The privileged group and small group explanations, while undoubtedly true in some cases, fail to explain a great number of existing interest groups, including economically oriented ones such as large trade associations.⁴⁵⁰

The answer to the "paradox" of interest group formation, as several empirical studies have revealed, is that, like so much else in politics, the groups respond to more than narrow monetary motives. Interest group rank and file members are in some ways like voters. They join for a variety of reasons, including not only narrow self-interest (i.e., expected economic benefit from successful lobbying and demand for goods like trade magazines), but also what James Q. Wilson calls solidary and purposive incentives: the social and status pleasures of belonging to a cohesive group, and emotional attachment to a group's political goals.⁴⁵¹ They do not closely monitor their leaders' activities, and can be kept in line through symbolic behavior such as position-taking.⁴⁵² Interest group leaders exploit their own resulting freedom to pursue a combination of goals resembling those held by members of Congress, i.e., institutional survival (the equivalent of reelection), ideological goals that

benefit may exceed cost for many members due to asymmetries in interest among members and the marginal effects of one's own participation (i.e., one can only "cheap ride," not "free ride"). See Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulation*, 5 BELL J. ECON. & MGT. SCI. 359 (1974). He admits that this theory lacks firm empirical support as an explanation of actual group formation. See *id.* at 365.

⁴⁴⁹ Stigler, *supra* note 448, at 360.

⁴⁵⁰ See, e.g., D. STONE, POLICY PARADOX AND POLITICAL REASON 173 (1988) (questioning the small group theory as contrary to the reality of large interest groups).

⁴⁵¹ See J. WILSON, POLITICAL ORGANIZATIONS 30-55 (1973). Robert Salisbury has lent credence to this view by arguing, based on historical research, that people generally treat interest group membership as a luxury good, to be purchased when one is well-off and sacrificed in hard times (which makes sense if the principal benefits are intangible rather than monetary). See Salisbury, *An Exchange Theory of Interest Groups*, 8 MIDWEST J. POL. SCI. 1, 15-19 (1969). James Wilson finds that because interest group membership is a luxury good, the extent to which it is purchased varies positively with wealth. The capacity of the wealthy to afford solidary and purposive benefits has the fortuitous (for them) side effect that they are more successful than others in overcoming the collective action problems that impede narrow economic lobbying. See J. WILSON, *supra*, at 56-77.

⁴⁵² See M. HAYES, *supra* note 160, at 77-79; Salisbury, *supra* note 451, at 26-29.

their members may not share, and the desire for power and prestige within the Washington political community.⁴⁵³ This observation suggests once again that legislation reflects considerably more than the narrowly economic goals emphasized by public choice theory.

4. The Media

Public choice writers often seem unaware of the news media's political importance. Any such awareness would cause difficulty for public choice theory, both because it contradicts viewing voters as rationally ignorant ciphers and because narrow economic factors typically do not determine press coverage.⁴⁵⁴

Politicians, whom one may assume are somewhat better informed, regard press coverage as extremely important. They display what is often a full-time obsession with the media, and with television in particular. Press coverage is a tool that they manipulate to enhance their reelection prospects and other professional objectives. Yet it also is an independent force to which they must respond. Consider it first merely as a passive purveyor of information to the public. Schattschneider describes politics as a public brawl in which the audience, not the few active combatants, determines the outcome, and in which the balance of support fluctuates as the audience changes in size.⁴⁵⁵ The media's decisions about which stories to cover do much to determine the size of the audience, in addition to providing the public with a description of the fight. Washington's legions of leakers, whistleblowers, and highly placed confidential sources have long recognized the political importance of attracting press coverage.⁴⁵⁶

The media is more than a passive purveyor of information, however. Its reporting tends to have various predictable biases,

⁴⁵³ See M. HAYES, *supra* note 160, at 61-62; K. SCHLOZMAN & J. TIERNEY, *supra* note 202, 131-33; Salisbury, *supra* note 451, at 27-29. One could add to this a twist on the by-product theory: if interest group leaders sufficiently enjoy participating in Washington power politics, they may accept reduced monetary compensation for the tangible goods they provide, and thus undersell non-lobbying competitors who offer similar tangible goods. See generally J. WILSON, *supra* note 451, at 229 (noting intangible benefits that result from political activism); Salisbury, *supra* note 451, at 28 (discussing the influence of interest group leaders' values on lobbying activity).

⁴⁵⁴ An exception to this conclusion would be trying to maximize consumer demand for news products, but such an approach involves taking account of people's broader nonmonetary tastes and preferences.

⁴⁵⁵ See SEMI-SOVEREIGN PEOPLE, *supra* note 202, at 2-4.

⁴⁵⁶ See H. SMITH, *supra* note 25, at 81-84.

perceptual if not partisan. For example, it focuses on personalities and political "horse races" to a far greater extent than on ideas.⁴⁵⁷ The media often portrays politicians as unprincipled power-seekers, and challenges front-runners and incumbents in particular.⁴⁵⁸ Perhaps most importantly, in the interest group context, the media has a longstanding populist and muckraking tradition, rooted in reporters' personal beliefs and professional self-images as well as in their sense of what makes a good story. This tradition includes both a love of political scandals⁴⁵⁹ and supporting the "little guy" over the establishment.⁴⁶⁰

Muckraking particularly influences reporting about taxation. As Thomas Reese, writing before tax reform, noted:

Since the content of tax policy is both complex and uninteresting to most readers, the press prefers to write about corruption and lobbying. The ideal tax story reports on a political campaign contribution to a member of the tax committee who has gotten a special interest amendment adopted for the contributor.⁴⁶¹

In 1986, this favored way of looking at tax issues, along with intellectual sympathy for comprehensive income taxation,⁴⁶² led to extremely favorable press coverage of tax reform. At each stage, the press simplistically portrayed each tax reform proposal as the outcome of a struggle between "good" reformers serving the public interest and "bad" lobbyists serving the special interests.⁴⁶³

Tax reform is only one example of the media's suspicion of special interests and attunement to intellectually respectable ideas. As another example, consider the largely hostile coverage of the protectionist trade legislation sponsored by Congressman Gephardt

⁴⁵⁷ See, e.g., S. LICHTER, S. ROTHMAN & L. LICHTER, *THE MEDIA ELITE*, 110-11, 129 (1986) [hereinafter *THE MEDIA ELITE*] (noting nonideological bias in reporting); A. RANNEY, *supra* note 25, at 55-58 (arguing that television news portrays politics as a competitive game between individual politicians).

⁴⁵⁸ See, e.g., *THE MEDIA ELITE*, *supra* note 457, at 115 (describing reporters' views on the effect of political power on the personalities of politicians); A. RANNEY, *supra* note 25, at 55-63 (noting adversarial relationship between the press and politicians).

⁴⁵⁹ See *THE MEDIA ELITE*, *supra* note 457, at 5; H. Alexander, *supra* note 413 at 18-19.

⁴⁶⁰ See, e.g., *TAXING CHOICES*, *supra* note 11, at 249-50 (noting that investigative reporting enhances the media's legitimacy as a defender of the public interest); *THE MEDIA ELITE*, *supra* note 457, at 130 (arguing that reporters find gratification from aggressive reporting in the public interest).

⁴⁶¹ T. REESE, *supra* note 41, at 56.

⁴⁶² See *id.* at 55-56; see also *TAXING CHOICES*, *supra* note 11, at 29.

⁴⁶³ See *TAXING CHOICES*, *supra* note 11, at 251.

and others. The media's response was founded apparently on acceptance of free trade principles and suspicion of special interest backing for protectionism.⁴⁶⁴

Thus, the media is potentially a powerful ally of policy entrepreneurs who take positions against what are deemed special interests. Reformers like Bradley, and (once they adopted reform roles) Rostenkowski and Packwood, can develop a symbiotic relationship with the media: they give it a good story, and in return it both portrays them favorably and lends powerful support to their side of the struggle. While the media's extremely short attention span limits its influence,⁴⁶⁵ policy entrepreneurs can try to keep stories alive. Moreover, the media's influence is enhanced because players within Washington (including the reporters themselves) have longer political memories than the less interested general public. A member's inside reputation may affect her future press coverage, and maximizing the amount of one's favorable coverage may be an end in itself.

5. Ideas and Ideology

The critical importance of ideas and ideology is one of the most difficult aspects of politics for most public choice writers to appreciate.⁴⁶⁶ A mechanical view of wealth maximization has the appeal of a pseudo-science, purporting to unmask underlying realities and ostensibly leading to testable theorems and predictions. Yet the truth, of course, is that people often like ideas, find them interesting, and believe in them, with the result that ideas matter a great deal. Individual politicians pursue ideological ends, whether it is Ronald Reagan's anti-Communism or Bill Bradley's tax reform.⁴⁶⁷ An idea can sway people en masse as well as individually, whether it is Keynes's rationalization of budget deficits⁴⁶⁸ or deregulation of the trucking industry.⁴⁶⁹

⁴⁶⁴ See, e.g., Lemann, *The Fall of Jim Wright* (Book Review), N.Y. REV. BOOKS, May 17, 1990, at 18, 21 (noting that the press corps was suspicious of interest group influence on Congressman Gephardt's trade legislation).

⁴⁶⁵ See, e.g., J. KINGDON, *supra* note 26, at 61-63 (discussing the media's limited influence on government policy as a consequence of responsive reporting).

⁴⁶⁶ But see J. BUCHANAN & R. WAGNER, *supra* note 28, at 3-4 (recognizing expressly the influence of ideas on politics); G. TULLOCK, *supra* note 22, at 11-25 (same).

⁴⁶⁷ For evidence that ideology provides a better predictor of congressional voting patterns than does, say, the economic interests of one's constituents, see sources cited *supra* note 396.

⁴⁶⁸ See J. BUCHANAN & R. WAGNER, *supra* note 28, at 31-33.

⁴⁶⁹ See M. DERTHICK & P. QUIRK, *supra* note 380, at 66-74; J. KINGDON, *supra* note

Gordon Tullock has recently shown how an appreciation of the role played by ideas can help to explain one of the central paradoxes of public choice theory: the small size of the lobbying industry. He notes that the returns from lobbying (the ratio between the financial benefit of a favorable outcome and its cost) seem incredibly high—often exceeding 100 to 1.⁴⁷⁰ These returns seemingly should attract more and more entrants until they are bid down to competitive levels. Yet returns remain high, and the lobbying industry remains tiny in size when compared to the government's potential influence over economic outcomes.⁴⁷¹ Tullock's principal explanation for this is the "inefficient technology" forced on interest groups by the need to present their demands for transfers in terms that seem consistent with popular ideas.⁴⁷²

This insight has broader implications than Tullock recognizes. While acknowledging that ideas are politically important, he treats them as a kind of on-off switch (a transfer either is or is not effectively concealed), and assumes that members of interest groups are not fooled by them.⁴⁷³ Once ideas enter the public choice universe, however, their role cannot so easily be contained. What if two ideas, espoused by competing interest groups, are both publicly appealing, but one slightly more so? What if an interest group's economic position remains unchanged but the ideological climate changes to its disadvantage?⁴⁷⁴ What if ideology determines and does not merely rationalize an interest group's goals? It

26, at 132. Note that trucking deregulation is even harder to portray as an exercise in McChesneyan rent extraction than tax reform, given that, while taxes predictably have remained on the political agenda, trucking "re-regulation" predictably has not.

⁴⁷⁰ See G. TULLOCK, *supra* note 22, at 11-12. Tullock cites examples in which the money paid to congressmen by lobbyists (or bribers) seems trivial when compared to the benefits to industry of favorable legislation. Uncertainty concerning the success of the lobbying effort seems insufficient to explain the disparity.

⁴⁷¹ See *supra* notes 328-29 and accompanying text (noting that, even in 1986, during the peak of the lobbying that accompanied the 1986 Act, members of the tax committees received only about 1/60,000 of the amount of annual tax revenues).

⁴⁷² See G. TULLOCK, *supra* note 22, at 18-25. The technology for an interest group transfer is inefficient, from the interest group's standpoint, if it involves deadweight social loss instead of pure transfer, and if the transfer must be shared with persons who are not members of the interest group. See *id.*

⁴⁷³ See *id.* at 19.

⁴⁷⁴ See, e.g., AMERICAN BUSINESS, *supra* note 210, at 147-48 (observing that protectionism was weaker in the 1950s than the 1930s due in part to tariffs' loss of intellectual credibility and the replacement of isolationism by an internationalist, anti-Communist ideology).

rapidly becomes clear that the study of ideas themselves, not just interest groups, has much to tell us about politics.

Again, the problem with thinking about the role of ideas is that they cannot readily be modeled or predicted,⁴⁷⁵ whereas public choice writers, influenced by a perhaps outdated notion of science, crave "usable" theories with predictive power.⁴⁷⁶ Modern chaos theory reveals, however, that complex interactive systems (of which the legislative process is an example) are unpredictable in detail even if one possesses an immense amount of information.⁴⁷⁷ Yet even if understanding of ideas' causation and effect remains elusive, one can posit some broad generalizations. First, in a political environment like Washington—perhaps in any environment (including, say, academia) where people hope to gain from their association with novel ideas—there is a tendency towards faddishness. As an interviewee told one researcher:

In Washington the world of ideas is like the world of fashion. Ideas don't last for more than four or five years. They catch on, they become very popular, and because of that, they burn themselves out in a burst of growth, and others take their place. It's like a hula hoop craze.⁴⁷⁸

Second, ideas often appeal to people for reasons of emotional convenience that resemble but are not quite identical to conventional self-interest. Farmers and oil company executives easily convince themselves that they should receive subsidies for the good of America. Economists and social scientists naturally believe that their rational analysis leads to policies superior to those resulting from messy and venal politics.⁴⁷⁹ Third, intellectual and academic elites can powerfully influence political agendas,⁴⁸⁰ although perhaps not quite so powerfully as the members of these elites would prefer. Fourth, when intellectual ideas are "sold" to a mass public, they tend to get simplified and distorted in the translation—as happened with tax reform.⁴⁸¹

⁴⁷⁵ See J. KINGDON, *supra* note 26, at 110.

⁴⁷⁶ See, e.g., Posner, *supra* note 16, at 341-43 (detailing the use of various theories by political scientists to predict interest groups' impact on the legislative process and criticizing the usefulness of these theories).

⁴⁷⁷ See, e.g., J. GLEICK, CHAOS: MAKING A NEW SCIENCE 3-8 (1987) (arguing that chaos theory explains that which science cannot explain).

⁴⁷⁸ J. KINGDON, *supra* note 26, at 110.

⁴⁷⁹ See D. STONE, *supra* note 450, at 305.

⁴⁸⁰ See J. KINGDON, *supra* note 26, at 57-61.

⁴⁸¹ See TAXING CHOICES, *supra* note 11, at 244-46.

6. Political Rules and Structures

Public choice theory often is too grandly abstract to pay close attention to the role played by legal rules or the structure of political institutions. If one believes that the theory is an inevitable application of the iron laws of markets and human nature, these may seem to be mere minutiae. Yet legal rules and political institutions can have an enormous effect on the role played by and success of interest groups. Campaign financing laws are an obvious example. Unless they are a nullity, they must be relevant to the claim that legislation is for sale to the highest bidder. Political science literature has identified two additional factors that enormously affect interest group politics: the power of congressional leaders and the power of political parties. The following is a brief discussion of these three factors.

a. *Campaign Financing Laws*

Federal election law establishes dollar ceilings on campaign contributions, in the amounts of \$1,000 for individuals and \$5,000 for PACs per candidate per campaign.⁴⁸² While in various ways these limitations can be stretched or avoided,⁴⁸³ they undoubtedly have some constraining effect. They thus reduce the descriptive accuracy of public choice theory. Members would be far more likely to "sell" legislation if they could simply charge what the market would bear without any fear of legal sanction or, for that matter, public scandal. Under the existing regime, even if each member of Congress had her price (that is, she was explicitly willing to sacrifice all other political objectives for a sufficient cash payment), and that price was less than the value to interest groups of the member's support, it nonetheless might have to go unmet.

It is well known in the economics literature that, when price competition is constrained, nonprice competition replaces it. For example, when, due to regulation, airlines could not undercut each others' fares, they competed for customers by offering frills such as

⁴⁸² See Federal Election Campaign Act of 1971, 2 U.S.C. § 441a(a)(1)(A)-(2)(A) (1982).

⁴⁸³ See e.g., *Accelerating Rate*, *supra* note 21, at 938-39 (noting that a PAC may avoid the \$5,000 limit payable to the candidate by requesting that each of its members make checks directly or by forming multiple PACs, each of which may contribute \$5,000 per candidate).

movies, free drinks, and high levels of service.⁴⁸⁴ In politics, even assuming that everyone would sell out for the right cash price, the legal regime causes a shift from price to nonprice competition between competing policies.⁴⁸⁵ The importance of nonprice competition in our political system is underscored by Gordon Tullock's observation that American politicians, unlike, say, presidents of Mexico, generally do not retire as vastly wealthy individuals.⁴⁸⁶

b. *Power of Congressional Leaders*

As previously noted, Congressional leaders, including both party leaders and committee chairpersons, face stronger prestige and ideological incentives than rank and file members (and often are more secure from electoral challenge), with the result that leaders tend to be less subject to interest group influence.⁴⁸⁷ Thus, an important variable affecting the role of interest groups, largely ignored by public choice writers, is the extent to which the leaders control the legislative process.⁴⁸⁸

The great change in recent congressional history took place in the mid-1970s, when House Democrats sharply reduced the power of committee chairpersons and the adherence to the seniority system through numerous rule changes.⁴⁸⁹ While the changes increased the authority of the Speaker of the House, their net result, at least in the short term, was significant decentralization of

⁴⁸⁴ See G. TULLOCK, *supra* note 22, at 13.

⁴⁸⁵ As we have seen, this nonprice competition takes place in the political arena when politicians accumulate prestige, seek ideological satisfaction, and are influenced by factors apart from fundraising that promote reelection. See *supra* text accompanying notes 362-407.

⁴⁸⁶ See G. TULLOCK, *supra* note 22, at 12.

⁴⁸⁷ See, e.g., M. DERTHICK & P. QUIRK, *supra* note 380, at 103 (discussing the "distinctive pressures, opportunities, and responsibilities" that congressional leaders face).

⁴⁸⁸ Doernberg and McChesney note the connection between structural changes in the House of Representatives in the mid-1970s and the frequency of tax legislation, but they fail to see any implications for the prevalence of interest group politics. See *Accelerating Rate*, *supra* note 21, at 950-52.

⁴⁸⁹ In particular, House Democrats removed three senior members of their chairmanships, enlarged key committees such as Ways and Means, stripped Ways and Means of its power over committee assignments, and shifted power to subcommittees. See, e.g., A. MAASS, CONGRESS AND THE COMMON GOOD 56-63 (1983) (describing the reorganization measures adopted by Congress in the 1970s); Uslander, *supra* note 439, at 105-10 (1978) (noting the impact of the new power structure on legislative procedure).

legislative authority.⁴⁹⁰ Not surprisingly, this decentralization led to increased interest group influence, particularly in the Ways and Means Committee.⁴⁹¹ Tax reformers who had long been frustrated by Wilbur Mills's apparent sympathy for interest group tax preferences learned to their surprise that he had been a restraining influence.⁴⁹² More recently, however, several aggressive committee chairpersons and party leaders have developed techniques that enable them to expand their power and partially negate the 1974 changes. Even before the 1986 Act, this renewed centralization helped produce the largely anti-special interest tax legislation of 1982 and 1984.⁴⁹³

c. *Power of Political Parties*

The power of interest groups is often asserted to be inversely proportional to the organizational power of the Democratic and Republican parties. Interest groups are strong in American politics, under this view, because the parties are weak.⁴⁹⁴ Individual members of Congress would resist interest group pressures if political parties dominated campaign financing and intra-Washington advancement, and if the political parties themselves were large enough to play a brokering role and pay relatively little attention to any one interest group.⁴⁹⁵ Thus, interest group influence should fluctuate with the parties' organizational strength, much as it does with the power of the congressional leadership.

Unfortunately, the claim about the parties' effect on interest group power is not as strong—either theoretically or empirically—as

⁴⁹⁰ See, e.g., H. SMITH, *supra* note 25, at 24-26 (noting several legislators' dismay at the gross excess of decentralization); Dodd & Oppenheimer, *The House in Transition: Partisanship and Opposition*, in CONGRESS RECONSIDERED, *supra* note 26, at 48-49 (noting the immense power of subcommittees and their chairpersons over legislation).

⁴⁹¹ See, e.g., J. WITTE, *supra* note 10, at 240-41 (noting this increased power); Rudder, *supra* note 104, at 214, 221 (noting the Ways and Means Committee members' vulnerability to interest group pressures).

⁴⁹² See J. WITTE, *supra* note 10, at 242. Mills resigned his chairmanship and congressional seat shortly after the 1974 revolt, largely due to personal problems and a related public scandal.

⁴⁹³ See Rudder, *supra* note 104, at 221.

⁴⁹⁴ See, e.g., E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 196 (1942) (discussing inability of party to discipline its members). As evidence of the parties' political weakness, they neither command strong voter loyalties nor control most political fundraising. See D. MAYHEW, *supra* note 25, at 25-26; H. SMITH, *supra* note 25, at 674-77.

⁴⁹⁵ See E. SCHATTSCHEIDER, *supra* note 494, at 31-32.

the claim about congressional leadership. On the interest group side, many groups are sufficiently loyal to one party (such as big business and the Republicans or labor and the Democrats) to reinforce, rather than compete against, party power.⁴⁹⁶ On the party side, absent strong ideological motives, a party is more likely to be exclusively concerned with winning elections than an individual member, since the goal of gaining prestige may be weaker at the institutional than the personal level. This observation suggests that the parties may care more about fundraising than do the members, which raises the possibility of an even stronger tendency to provide favorable legislation to contributors. The critical question is what strategies parties find optimal for winning elections, and here the evidence is mixed. Sometimes parties try to assemble interest group coalitions through logrolling;⁴⁹⁷ at other times, they appeal to broad public interests.⁴⁹⁸ The aggregate effect of political parties on interest group power is unclear; but at a minimum they raise a complication that is not currently acknowledged.

7. Implications of the Factors Apart From Interest Group Influence

For the reasons described above, members of Congress in enacting legislation both have considerable leeway and are subject to significant constraints apart from interest group influence. Specifically, members of Congress seek reelection, power, prestige, and ideological goals in a world where ill-informed voters are subject to symbolic responses and where the media can exercise great and often populist influence. Beyond these broad generalizations, the details of legislative behavior are inherently unpredictable. In particular, the incentives for policy entrepreneurship can stimulate any number of responses. An example is taxation, in which one may gain either by being a reformer who opposes interest groups or by championing tax instrumentalism.

⁴⁹⁶ See Green & Guth, *Big Bucks and Petty Cash: Party and Interest Group Activists in American Politics*, in INTEREST GROUP POLITICS, *supra* note 325, at 100-02.

⁴⁹⁷ See, e.g., J. BIRNBAUM & A. MURRAY, *supra* note 11, at 36 (noting the importance of logrolling to the Mondale political campaign of 1984); M. HAYES, *supra* note 160, at 145 (pointing out the importance of logrolling to any successful political campaign).

⁴⁹⁸ Fundraising as well as votes can be obtained by appealing to broad public interests if one has an effective system of mass fundraising by mail. See R. RIPLEY, *supra* note 26, at 79-80.

The choice of how to seek success as a policy entrepreneur is controlled by the individual legislator. Members of Congress may seek the approbation of their colleagues, the media, the Washington political establishment, or the voters in any number of ways. No abstract model, whether narrowly economic or otherwise, can predict in detail either what proposals will be made at any time or which ones will succeed. Fortuity and the choices made by a small number of idiosyncratic individuals simply play too large a role here.

The choices made by policy entrepreneurs are heavily influenced by and responsive to the media, but this link does not necessarily increase predictability. In tax, for example, the media can choose to emphasize any of a wide range of stories, since all can probably be found anecdotally at any time. Possible stories include such disparate possibilities as (1) big-money lobbying by special interests seeking tax breaks, (2) greedy revenue-raising by congressional tax-and-spenders, (3) abusive tax planning by the big corporations and wealthy individuals, (4) unfair and anti-competitive burdens placed on American business by the tax laws, (5) IRS abuses at the expense of the average taxpayer, and (6) widespread cheating by the average taxpayer. Some of these story types are directly opposite to others in their policy implications, and whichever ones the press emphasizes can be expected to inspire a response from congressional policy entrepreneurs anxious for professional advancement. How the media will choose is hard to say, but presumably its choices will reflect some combination of what reporters think is important or representative at the time and what they think their audience wants to hear.

An interesting analogy can be made between the political-legislative world of Washington and the movie-making world of Hollywood. Decision-makers in the two worlds have a similar range of motives. In Hollywood, one may seek money (the equivalent of reelection), intra-Hollywood (or broader public) power and prestige, or commitment to an artistic ideal (the equivalent of ideology). Self-evidently, economic theory cannot predict in specific detail what movies people will make or which movies will become popular. (It may, however, tell us something about what types of movies and publicity campaigns will generally be made and succeed.) Commercially successful movie-making, like electorally successful politics, is an art as well as a science, and cannot be modeled in a crudely deterministic fashion.

While the content of legislation is difficult to predict, the likelihood that there will be a lot of it seems clear. In particular, the sheer number of different persons and institutions seeking legislative influence, yet bearing little political accountability for the real effects of their actions, promotes a dangerous lack of restraint and discipline. As compared with the opposite extreme of a centralized parliamentary system, the current system may tend to yield *more* aggregate legislation, rather than less (as one might think from the need for more extended bargaining), because so many different "players" must get to do something. The resulting legislation may be less unified and coherent than under a centralized parliamentary system, and thus likely to be less harmful in the worst case, but its expected social costs (as opposed to the worst case social costs) might conceivably be higher.

D. Application of the Broader Model to Tax Legislation

By now, we have seen not only what is wrong with public choice theory, but how the 1986 Act won enactment. The public was known to be dissatisfied with the income tax system, largely due to increased real tax burdens (because of bracket creep), growing discontent with government performance, and widely publicized instances of tax avoidance by wealthy individuals and large corporations. The political benefits of responding to this dissatisfaction and the intellectual appeal of tax reform, attracted policy entrepreneurs in Congress and then (more fortuitously) in the Reagan Administration. Once Reagan had made tax reform a cornerstone of his second term, additional forces went to work. Congressional leaders such as Rostenkowski and Packwood found that as leaders in the public spotlight, they had powerful incentives to support tax reform vigorously. The media's populist reporting of the issue pressured committee members to fall in line. Thus, initial defeats for tax reform in the committees boomeranged into dramatic victories—in the case of the Senate Finance Committee, far exceeding anyone's expectations (including Packwood's). The incentives of the Democratic and Republican parties first to claim credit for enacting tax reform and then to avoid the blame for killing it

contributed to approval by both houses,⁴⁹⁹ and also helped ensure the success of an acrimonious House-Senate conference.

Fitting this analysis into the model of congressional behavior that we have developed, we find that the goals of enhancing reelection, prestige, and ideology all played a role. First, *reelection* is not just a matter of fundraising (which was helped by the mere consideration of tax reform, at least for members of both tax committees). Reelection depends as well on accumulating goodwill and avoiding illwill. To many in Congress, this fact suggested paying close attention to how the media portrayed tax reform, notwithstanding the lack of strong public support for any actual reform proposal. Given the public's relative inattention, a member could be harmed by a story portraying her as a venal hack even if the public agreed with her position. Reelection motives may also have contributed to members' concern over the allotment of credit and blame to their political parties.

The role of *prestige* is fairly obvious, especially at the leadership level and among tax reform's original promoters. Moreover, while the leaders probably could not have prevailed against interest group pressures absent support from either the public or the media, they were hardly powerless to advance their objectives. They could both adapt the legislation to meet other members' demands⁵⁰⁰ and use promises and threats relating to future congressional business to win broader support.

Finally, *ideology* contributed positively to enactment. Tax reform proved to have strong intellectual appeal at a time when the excesses of 1981 (increasing the deficit and encouraging highly visible tax avoidance without providing the promised saving and investment payoff) had temporarily discredited tax instrumentalism. Further strengthening the chance for tax reform was its appeal both to liberals and conservatives—liberals on grounds of equity, or making everyone pay a "fair share," and conservatives on grounds

⁴⁹⁹ See TAXING CHOICES, *supra* note 11, at 238-39. A considerable element of luck also existed; for example, if the Iran-contra scandal had become public knowledge in April 1986 (while the Senate Finance Committee was floundering) rather than November 1986, the 1986 Act might not have passed.

⁵⁰⁰ Credit-claiming by a member in relation to an interest group may be enhanced more by personally obtaining a favorable change in what remains, on balance, hostile legislation, than by being only one of many members who helps to ensure that there is no legislation at all. See, e.g., D. MAYHEW, *supra* note 25, at 53 (noting that the emphasis is on personal accomplishment rather than party or government accomplishment: "[I]t becomes necessary for each Congressman to try to peel off pieces of governmental accomplishment for which he can believably generate a sense of responsibility.").

of efficiency or getting government out of economic planning. (Of course, tax instrumentalism, when fashionable, can likewise appeal to both camps, since liberals often like economic planning and conservatives often like tax relief for business and the wealthy.)

If one likes the 1986 Act, at least relative to prior law, one may be tempted to derive from it the lesson that "the system works." In support of such a conclusion, the enactment of tax reform is only one of many recent occasions on which the public interest arguably was advanced by legislation, unmistakably at the expense of the most well-organized affected interests, through the mechanism of policy entrepreneurship. Other events with strong political resemblances to tax reform include the passage of environmental legislation and various deregulations.⁵⁰¹ Purely within tax law, the 1982 and 1984 Acts are somewhat less dramatic examples of legislation arguably advancing the public interest at the expense of organized interest groups. Motivated by some mixture of a desire to play a leadership role and policy concern about the deficit and the excesses of 1981, congressional leaders raised revenue chiefly through loophole-closing at the expense of interest groups that were ostensibly their allies.

The lesson that "the system works," while not entirely false, seems too optimistic. Aside from the way the political process successively distorted tax reform, changing it at each stage to substitute selective limitations for direct base-broadening, consider the 1981 Act. In 1981, the same basic congressional incentives (reelection, prestige, and ideology) led many of the same individuals to enact what most supporters of tax reform would agree was almost pathologically bad special interest legislation. Public choice alone did not produce the 1981 Act. The bidding war between the Democrats and Reagan resulted from each side's determination, founded on both prestige and electoral self-interest, to ensure that its tax cuts, not the other side's largely identical tax cuts, would be enacted. The 1981 Act reflected as well the intellectual appeal of tax instrumentalism, with its promise of "doing something" about economic malaise—a promise so seductive that it overcame the powerful evidence that the saving and investment incentives being considered would not work. Today, the appeal of tax instrumentalism is once again being felt. Although one could easily find interest group backing for restoring the IRA deduction and capital

⁵⁰¹ See TAXING CHOICES, *supra* note 11, at 255.

gains preference, it would be foolish to assert that the high-profile politicking over these issues is directed primarily at interest groups rather than the public.

Clearly, the correlation between tax reform's intellectual merit and its political appeal was far from inevitable.⁵⁰² For anecdotal evidence of the frequency with which merit and political appeal fail to correlate, consider McCarthyism, or the decision in the late 1960s to have both the Vietnam War and expensive domestic programs without tax increases, or the Bush Administration's waging of a highly theatrical yet often ineffective "drug war."⁵⁰³

To be more than anecdotal about how well the "political marketplace of ideas" works is difficult. Frequent and systematic failure is inevitable, however, in a huge and complex society where, as Murray Edelman observed:

[M]ass publics respond to currently conspicuous political symbols: not to "facts," and not to moral codes embedded in the character or soul, but to the gestures and speeches that make up the drama of the state.

The mass public does not study and analyze detailed data about secondary boycotts, provisions for stock ownership and control in a proposed space communications corporation, or missile installations in Cuba. It ignores these things until political actions and the speeches make them symbolically threatening or reassuring, and it then responds to the cues furnished by the actions and speeches, not to direct knowledge of the facts.⁵⁰⁴

In taxation, there is reason to believe that the "political market" works particularly badly and erratically. Two opposing theories, tax reform and tax instrumentalism, both have persistent appeal, which leads to faddish alternation between them. People have internally inconsistent views about tax preferences, and misunderstand preferences' effect both on ostensible social and economic objectives and on individual shares of the true costs of government expenditure.

⁵⁰² Indeed, one important element of the 1986 Act, its shift of tax burdens from individuals to corporations, may have been popular largely on the dubious grounds that, since the incidence of the corporate income tax is hidden, people can entertain the illusion that it is paid by nobody.

⁵⁰³ See, e.g., McNulty, *Bush Anti-Drug Fight Offers Good Politics, Good Theater*, Chi. Tribune, Feb. 18, 1990, § 1, at 6, col. 1 (discussing the political capital Bush accrues from waging a popular though ineffective and perhaps irrational war on drugs); see also Massing, *The Two William Bennetts*, N.Y. REV. BOOKS, Mar. 1, 1990, at 29-30 (discussing Bennett's imperviousness to any empirical evidence contradicting his public stance and preconceptions).

⁵⁰⁴ M. EDELMAN, *supra* note 25, at 172 (footnote omitted).

There is a strong systemic bias in favor of disguised incidence and fiscal illusion, although the preferred tools vary over time (for instance, inflation in the 1970s and budget deficits in the 1980s).

Certainly the future of tax legislation does not look very bright. The policy entrepreneurs who brought us tax reform largely have moved on or will (barring any new upheavals to bring them back). Now that tax reform has officially been "done," there is little left to be gained from it politically.⁵⁰⁵ Yet taxation—unlike, say, trucking deregulation and many environmental issues—inevitably remains on the legislative agenda, and there are already strong rumblings about reversing reform, as through the capital gains and IRA proposals. New tax preferences are being blocked at present, not by changed public thinking about taxation, but by the budget deficit and Chairman Rostenkowski, who regards the 1986 Act as his personal monument and is thus hostile to dismantling it.⁵⁰⁶ Yet the deficit may not be with us forever—high inflation once seemed permanent—and while it continues, it may not block capital gains tax reductions (a possible short-term revenue-gainer), or even clearly revenue-losing preferences that can be paid for through low-visibility taxes.⁵⁰⁷ Rostenkowski's personal investment in tax reform also may not last, and is unlikely to be inherited by his successor.

One major reason for the cyclical tax policies of the 1980s was taxation's prominence on the national political agenda. This prominence will not necessarily continue because bracket creep has been eliminated,⁵⁰⁸ because the anti-government public sentiment of the Reagan years has somewhat subsided, and because the 1986 Act has largely eliminated overt tax avoidance by the wealthy and large corporations. Assuming that there are no major political, social, or economic upheavals in the 1990s (such as a deep recession, renewed high inflation, or a sharp leftward turn in national politics), reduced public attention invites a return to tax instrumentalism on classic

⁵⁰⁵ See TAXING CHOICES, *supra* note 11, at 258-59.

⁵⁰⁶ See, e.g., Povich, *Rostenkowski Rallies Around Tax Code—As Is*, Chicago Tribune, Feb. 7, 1990, § 3, at 1, col. 5 (noting Rostenkowski's personal commitment to the existing tax structure).

⁵⁰⁷ Revenue demands can be detrimental to tax policy as well as a beneficial constraint. The 1986 Act contained several unprincipled "revenue grabs," such as the 2 percent floor on certain for-profit deductions. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 132(a), 100 Stat. 2085, 2113 (codified at 26 U.S.C. § 67 (1989)). Revenue concerns currently are impeding what is arguably a rationalization of the two-level tax on corporate income. See Vickrey, *supra* note 278, at 456.

⁵⁰⁸ See 26 U.S.C. § 1(f)-(g) (1988).

public choice-type grounds: without a larger audience, politicians' broader motives become less operative. Only if Congress shoots holes in its own tools for preventing tax avoidance (chiefly, the minimum tax and passive loss rules) is renewed public outrage likely. Congress may well do this in the long run, since the immediate political costs of doing so are probably low and since members can always claim credit for once again fixing the problems they have once again created.

V. SOME BROADER IMPLICATIONS OF GOING BEYOND PUBLIC INTEREST THEORY AND PUBLIC CHOICE THEORY

Public choice theory is widely recognized as not just an isolated account of legislative behavior, but a theory with broad and important implications for contemporary legal thinking.⁵⁰⁹ The multi-faceted account in this Article, with its emphasis on the power and prestige motives of politicians and on voters' taste for symbolic legislation, should also have broad implications. This section briefly and preliminarily sketches some of the ways in which my account is relevant to broader legal issues and concerns.

A. Electoral and Other Systemic Reform

An obvious question that arises when one criticizes the legislative process is how to improve it. Institutional and procedural tinkering is a hoary American tradition, dating back to Madison's explanation in *The Federalist* of how representation, separation of powers, and enlarging the polity could control the evils of fac-

⁵⁰⁹ See e.g., DeBow & Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993 (1988) (defending the use of public choice theories in public law analysis); Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14-18 (1984) (arguing that "[o]ne of the implications of modern economic thought is that many laws are designed to serve private rather than public interests"); Farber & Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEX. L. REV. 1013, 1014 (1988) (noting that the influence of public choice theories on legal analysis has continued to increase); Farber & Frickey, *supra* note 23, at 875-83 (discussing "the impact of public choice literature on contemporary thought about public law"); Hovenkamp, *supra* note 23, at 85-89 (noting "the sizeable body of literature suggesting that various interest groups, rather than the electorate themselves, determine policy in a Republican system"); *Statutory Interpretation*, *supra* note 21, at 223 (asserting that the political process predominantly benefits special interest groups instead of the "broader public interests" it was designed to serve).

tion.⁵¹⁰ We often give such tinkering (in common with a type of tax policy) the name of "reform," and count on it, at times naively, to ameliorate problems that a less optimistic tradition might regard as either universal or rooted deep in one's social and political culture.

This is not to deny that reforms can be salutary, only that they are not panaceas. To bring fundamental, not just marginal, improvement, there really is no substitute for the unlikely prospect of the voting population becoming significantly better educated, better informed, more public-spirited, and more interested in politics. Still, since law generally aims at the margin, it is worth considering a few possibilities.

1. Campaign Financing and Expenditure Reform

The understanding that legislation is not in a simple sense "for sale," and that campaign financing is only one of many potentially distorting pressures, does not contradict the need for limiting campaign financing or expenditures. Interest group monetary power remains a serious problem, which plainly can contribute to bad legislation (as in the tax area). Limiting interest group power may improve the legislative process on balance despite the alternative pathologies that may thereby attain greater scope.

It is worth remembering, however, that the presence of interest groups offering money is not all that impedes good government, or even all that influences reelection. Campaign reform must be undertaken with an eye to what will be the new balance of political forces. Campaign financing reform in the 1970s provides a classic cautionary example. Designed to limit interest group power, it instead launched the modern era of the PAC.⁵¹¹ This development resulted, in part, from the campaign finance laws' more favorable treatment of PACs than individuals, but even if all campaign financing were restricted (which would raise serious constitutional problems⁵¹²), there would still be the problem of nonmonetary advantages—for example, endorsements by celebrities, control over voluntary labor inputs into campaigns, and incumbents' "brand name" advantages and free perks from the government.⁵¹³

⁵¹⁰ See *The Federalist* Nos. 10, 57 (J. Madison).

⁵¹¹ See, e.g., H. SMITH, *supra* note 25, at 31-32 (noting, in particular, the growth in corporate PACs); Jacobson, *supra* note 409, at 131 (presenting PACs as a new force in post-finance-law-reform federal elections).

⁵¹² See *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁵¹³ See Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 YALE L.J. 1633,

More fundamental is the nagging question of what we are trying to maximize. For example, is it control of members by their constituents (a standard reform concern), or instead a Madisonian independence of the representative from the constituency? In taxation, at least, either has its dangers. While interest group politics, insulated from constituent oversight, has done much to deform the tax code,⁵¹⁴ so has the goal of providing salient tax benefits to one's constituents.⁵¹⁵

It may well be that public financing of all campaigns for federal office,⁵¹⁶ at a high enough dollar level to dilute incumbents' advantages and induce most candidates to renounce private financing,⁵¹⁷ would improve the legislative process. The analysis in this Article suggests, however, that such a reform might change the process less than many people expect.

2. Power of Congressional Leadership and Parties

A second direction for reform would address the allocation of power within Congress. In taxation, it seems clear that the collapse of the Wilbur Mills hegemony (albeit a hegemony based on "followership") increased the power of interest groups and the scope of tax preferences, while the success of policy entrepreneurship in 1986 required strong and skillful efforts by the leadership in both houses. To enhance the power of the congressional leadership, on the theory that such a change will at least marginally improve the legislative process, John Witte has suggested reversing the 1974 congressional reforms, and in particular increasing the chairperson's power, reducing the size of key committees, re-instituting and extending closed rules (barring floor amendments) to the Senate, and restricting open committee sessions (where the public, which usually just means lobbyists, can observe the proceedings) to the early stages of legislation under consideration.⁵¹⁸ These

1643-44 (1988).

⁵¹⁴ See, e.g., Surrey, *supra* note 254, at 1153 (pointing out inequities in the tax code that arise, in part, from interest group pressures).

⁵¹⁵ See J. WITTE, *supra* note 10, at 381.

⁵¹⁶ For primary elections, one presumably would need some test of whether a candidate was sufficiently "serious" to qualify for public financing.

⁵¹⁷ This would solve the constitutional problem, see *supra* note 512 and accompanying text, other than with regard to spending by persons at least ostensibly independent of the candidates' campaigns.

⁵¹⁸ See J. WITTE, *supra* note 10, at 381-82.

proposals are supported by the analysis in this Article, despite the unpredictability of how leaders will exercise power.

A related type of reform would seek to increase the power exercised over members of Congress by their political parties by, for example, directing public financing to the parties or moving towards a parliamentary system. The benefits of such a reform are less clear (given, for example, our uncertainty about the relationship between parties and interest groups), but it might at least promote political accountability. Good or bad conditions in a broad subject area, such as the economy or the environment, can more plausibly and more reliably be attributed by voters to a party commanding a congressional majority than to an individual member. Thus, the members' incentives to consider empirical effects might increase slightly, and the comparative political advantage of particularized over-broad legislation as a subject for plausible credit-claiming might be reduced.

Both increasing the power of the congressional leadership and strengthening the parties would tend to centralize the exercise of legislative authority, and to remove some practical checks and balances that are Madisonian in principle although not constitutionally mandated.⁵¹⁹ The logical endpoint of moving in this direction would be to reject even the constitutionally mandated separation of powers and adopt a parliamentary system of party government. Whether or not preferable on balance, such a system might well have important advantages over the present one, such as reducing the number of independent "players" in the political process who seek to build statutory monuments to themselves, and increasing the political accountability of the "players" who remain.

3. Depoliticizing Particular Decisional Areas

A third direction for reform, also suggested by John Witte, reflects greater despair about the legislative process. Witte proposes that authority over the tax system be insulated from politics through delegation to administrative bodies or executive agencies. He notes that tariff law was similarly depoliticized in the 1930s through legislation empowering the President to negotiate tariff changes that could then be implemented through executive order.⁵²⁰ This proposal may raise concerns about elitism versus

⁵¹⁹ For Madison's views about checks and balances such as the constitutional separation of powers, see *THE FEDERALIST* NO. 48 (J. Madison).

⁵²⁰ See *id.* at 382-83. Of course, executive control is not the same thing as

popular government as well as the danger that interest groups will "capture" the new decision-makers. If limited to areas where legislative parochialism seems particularly acute (for example, control over the placement of military bases), and if insulated from direct presidential control, it might, however, be beneficial.

For taxation, this delegation model is already followed interstitially. Congress often grants the Treasury extensive authority to prescribe regulations giving flesh to a vague and conceptual provision.⁵²¹ Broader reliance on delegation seems unlikely. Since an agency would not necessarily be good at making political decisions, such as what types of income should be tax-favored, delegation would require a prior political consensus to bar such decisions and restrict the agency's power over implementation, for example, of an economic definition of income subject to specified administrative constraints. The 1986 Act probably stretched the outer limits of any such consensus.

B. *Statutory Interpretation*

To the extent that courts, when interpreting statutes, ought either to function as agents of the enacting legislature or to use their own judgment about increasing social welfare, theories about legislative behavior may affect the question of what broad interpretive principles the courts should follow.⁵²² For this reason, public choice writers have not been shy about drawing inferences from their theories of statutory interpretation. Judge Frank Easterbrook argues that courts should interpret "private-interest statutes" as contractual "deals" between the interest groups that purchased the statutes, thus faithfully implementing legislative intent and keeping

depoliticization, given the President's political interests. Witte argues, however, that even political control by the President generally would be less insidious in taxation than legislative control, because Presidents do not have the same incentive to focus on particularistic benefits. *See id.* at 384.

⁵²¹ *See, e.g.*, 26 U.S.C. § 469(f) (1988) (providing the Secretary with such prescriptive authority regarding passive activity losses).

⁵²² Questions such as whether courts should function purely as agents of the legislature and what constitutional principles constrain statutory interpretation are beyond the scope of this Article, and I take no position on them. *See* Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407 (1989) (arguing that legislative intent should *not* be the sole touchstone of statutory interpretation). Application of several additional factors suggested by Sunstein, such as the structure of the regulatory state or concern for minorities, would not be affected by the analysis in this Article to the same degree as application of a legislative intent standard.

bad laws narrow in scope.⁵²³ The equally public-choice-driven Jonathan Macey replies that courts should refuse to recognize a "deal" as such unless it is explicit; by taking seriously the statutes' insincere public interest rationalizations, courts can raise the costs of contracting.⁵²⁴ Both Easterbrook and Macey concede that there are also true "public-interest" statutes, on the interpretation of which public choice theory sheds no light.⁵²⁵

It would seem that both Easterbrook and Macey overstate the extent to which statutes can be divided into discrete "private interest" and "public interest" categories.⁵²⁶ Legislators' motives are complex and often mixed. Interest groups' incomplete power over the legislative process means, not that they by turns dominate and disappear, but that their degree of influence varies over a continuum. Thus, while the goal or effect of benefiting a particular interest group conceivably may, for any given statute, be relevant either to faithful interpretation or to deciding whether the court should strike it down,⁵²⁷ the absence of a clear dichotomy (under which interest groups are either all-controlling or absent) reduces the usefulness and persuasiveness of both of their views.

An alternative view of statutory interpretation arguably fares somewhat better (to the extent that one cares about intent) under the account of legislative behavior presented in this Article. In the well-known formulation of Henry Hart and Albert Sacks, courts generally "should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."⁵²⁸ As a subjective description of legislators, this characterization does not seem quite accurate: they are often pleasing interest groups, playing to the Washington or home-state gallery, legislating for the sake of legislating, and so forth. Yet the multiplicity of motives and the suggestion that legislators often do not care about a statute's actual effects indicate that subjective motivation is the wrong place to look for the relevant intent. Legislators are playing a public role, and in a loose sense

⁵²³ Easterbrook, *supra* note 509, at 14-18.

⁵²⁴ See *Statutory Interpretation*, *supra* note 21, at 238-40.

⁵²⁵ See Easterbrook, *supra* note 509, at 16; *Statutory Interpretation*, *supra* note 21, at 228.

⁵²⁶ See Farber & Frickey, *supra* note 23, at 908-11.

⁵²⁷ See Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1730-31 (1984).

⁵²⁸ H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1415 (tentative ed. 1958).

purporting to be Hart and Sacks's "reasonable persons." Therefore, to the extent that one regards legislative intent as controlling, one can indulge in the fiction of "institutional intent"⁵²⁹ and treat underlying motivation, to the extent not publicly expressed within the process of enactment, as no more relevant than what the actor playing Hamlet, as opposed to the character Hamlet, is thinking while on stage.⁵³⁰

C. "Republicanism" and Legislative Deliberation

One of the currently popular themes in legal writing is "republicanism," an ostensible revival of classical and eighteenth century American traditions in search of a liberal alternative to the mere pluralist aggregation of selfish interests.⁵³¹ Cass Sunstein finds roots for republicanism in Madison's *Federalist No. 10*, which others have viewed as pluralist.⁵³² Sunstein identifies two principal features in Madison's thought that are central to a reconstructed republicanism. The first is representation, embraced as theoretically preferable to direct democracy and not just practically necessary. Elected officials such as legislators should exercise their best judgment instead of responding blindly to constituent pressures.⁵³³ The second is "deliberation," which means grounding political decisions on extended dialogue and collective reflection to permit the selection of appropriate values, the transformation of existing preferences, and the achievement of universal consensus.⁵³⁴

One possible objection to Sunstein's notion of deliberation, noted by several commentators, involves the questions of what form deliberation should take and how it is to achieve preference

⁵²⁹ See Ferguson, Hickman & Lubick, *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 807 (1989).

⁵³⁰ An important consequence of focusing on institutional intent is that it shows the importance of legislative history, even when written by staff, if (as with tax legislation) it is an integral part of the "package" as perceived by the participants. See *id.* at 807-08.

⁵³¹ See, e.g., Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Michelman, *Supreme Court, 1985 Term-Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); *Interest Groups*, *supra* note 23.

⁵³² See *Interest Groups*, *supra* note 23, at 39; *supra* text accompanying notes 166-74.

⁵³³ See *Interest Groups*, *supra* note 23, at 41-43, 46-47, 52.

⁵³⁴ See Sunstein, *supra* note 531, at 1541, 1545, 1548-51; *Interest Groups*, *supra* note 23, at 31, 45-47.

transformation.⁵³⁵ A subtler objection draws on the tension between deliberation and representation. Sunstein acknowledges that in his republican ideal, it is the legislators who do the deliberating.⁵³⁶ While he wants the public to debate and reason about political values as well,⁵³⁷ they will inevitably engage themselves less in contemplating, expressing, and reexamining these values when they are not charged with deciding outcomes. In short, representative deliberation may to some extent displace broad public deliberation. Even if deliberation transforms the legislators' values, it may fail to affect the public's values.

Neither Sunstein nor Madison is to blame for the reduced public involvement that results from delegating governmental powers to elected representatives. The New England town meeting is dead beyond recall in a complex world irreversibly organized into enormous nation-states. Sunstein's treatment of deliberation as a function principally of legislators seems inevitable whether or not it is desirable, and in the context of his reliance on deliberation, it provides some useful focus. For purposes of American public law, it suggests examining congressional behavior. It is here that the analysis in this Article becomes relevant.

In considering congressional behavior, Sunstein seems to recognize that the public choice view rejects the possibility that the process he advocates can ever take place.⁵³⁸ Legislators are not deliberating when they sell legislation to the interest group that bids the most. He responds by noting that public choice theory is descriptively inadequate, as shown by motives relating to ideology, power, and prestige.⁵³⁹ The conclusion he derives from this premise, however, seems to be a non sequitur:

What emerges is a continuum. At one pole are cases in which interest-group pressures are largely determinative and statutory enactments can be regarded as "deals" among contending interests. At the other pole lie cases where legislators engage in deliberation in which interest-group pressures, conventionally defined, play little or no role. At various points along the continuum a great range of legislative decisions exist where the

⁵³⁵ See Epstein, *supra* note 513, at 1633, 1635-36; Macey, *supra* note 311, at 1679; Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1710-11 (1988).

⁵³⁶ See *Interest Groups*, *supra* note 23, at 46-52.

⁵³⁷ See Sunstein, *supra* note 531, at 1546-47.

⁵³⁸ See *Interest Groups*, *supra* note 23, at 48-49.

⁵³⁹ See *id.* at 48.

outcomes are dependent on an amalgam of pressure, deliberation, and other factors.⁵⁴⁰

One could argue with this characterization of the continuum on several related grounds. First, if pursuing power and prestige within Washington are as important as I have suggested, the dichotomy between deliberative and interest group outcomes is not as clear as Sunstein claims. Selling legislation to the highest bidder and erecting a statutory monument to oneself are equally self-interested, and neither necessarily involves reflection about the public good. Second, why does favoring interest groups fail to qualify as deliberation? Legislators who enact interest group legislation often are not mere ciphers; rather, they have deliberately chosen the course of action that they believe best advances their objectives (whether self-interested or otherwise). Third, why is "deliberation" antagonistic to "pressure"? After all, "pressuring" legislators surely involves making arguments to them, and deliberation ostensibly involves engaging in dialogue and listening to others. The line between threat and reasoned argument (including the argument "my welfare matters, and this legislation hurts me") cannot be drawn easily. Fourth, where within the range of legislative motives is "deliberation" located? Is it a goal competing with reelection? It does not sound like a goal, but if it is merely a process of balancing goals, then how does it independently influence legislative behavior?

Sunstein seems to accept that self-interest is as narrow as the public choice writers say it is (i.e., restricted to wealth maximization). Recognizing that self-interest as they describe it is inadequate as a description of human (or legislative) behavior, he may in effect assume that everything they fail to account for is not self-interest and fits into a black box called deliberation. The contents of this black box receive his commendation but are under-analyzed.

At least without fuller analysis, the black box can be misleading. Consider its implications for the institutional organization of Congress—which seem clear although not addressed by Sunstein. From a deliberative standpoint, it is hard to imagine a more beneficial set of changes than the 1970s congressional reforms. They opened up the legislative process, creating more participants, more public access, as well as increased dialogue, negotiation, and compromise.⁵⁴¹ Unfortunately, however, the reforms apparently in-

⁵⁴⁰ *Id.* at 48-49.

⁵⁴¹ See J. WITTE, *supra* note 10, at 176-219.

creased interest group influence and diminished Congress's capacity to develop stable and internally coherent legislation. The solution, many agree, is a shift away from broad-based deliberation and back towards centralized leadership control.

D. *Governmental Versus Market Solutions*

One of the central claims of public choice theory is that private markets are generally efficient while the political marketplace is pathologically inefficient.⁵⁴² Thus, whenever there is a question of government intervention in the functioning of the economy or in the distribution of resources, the answer is always the same: the government should stay out. Public interest liberals, in contrast, focus on market failure as a ground for substantial government involvement.

It should be clear that the public choice writers have a point, but not as good a point as they think. Government action is frequently misguided, due not only to human error but to fundamental misalignments between political actors' incentives and the public interest. The fact that the pathologies are more complex and varied than the public choice writers recognize does not weaken their point. The systemic problems with government action must be taken into account when one considers whether such action is likely to improve even a concededly distasteful private outcome.

Yet no general conclusion about government action follows from this conclusion. A particular legislative proposal may be desirable despite the problems with other proposals, even if Congress is likely to implement it only imperfectly. Moreover, no matter how much one likes private markets in general, one must concede that they have a range of predictable problems, such as failing to account for externalities or sufficiently providing public goods. Legislation can, therefore, increase social well-being.⁵⁴³ Thus, it is better to examine each case separately than to be trapped by one's rhetoric and policy preferences into idealizing either private markets (the conservatives' mistake) or politics (the liberals' mistake).⁵⁴⁴

⁵⁴² See, e.g., *Statutory Interpretation*, *supra* note 21, at 238 n.74 (stating without qualification that "all market transactions are efficient").

⁵⁴³ For a relatively uncontroversial example, consider environmental legislation, which even private market champion Richard Epstein agrees may improve on private market outcomes. See Epstein, *supra* note 513, at 1647.

⁵⁴⁴ See Shaviro, *supra* note 435, at 834.

E. *Do We Need or Want a Legal-Economic Predictive
"Science" of Legislation?*

Law and economics encompasses public choice theory. Thus, a final issue raised by my suggestion that we replace public choice theory with a more complex understanding of politics—a new conceptual structure that places substantial emphasis on voters' taste for symbolism and politicians' power/prestige motives—is the effect on the whole of law and economics. Sophisticated practitioners of law and economics recognize the tradeoff that they make in treating human behavior as narrowly and rationally wealth-maximizing. They seek enhanced theoretical precision and predictive power in exchange for reduced accuracy and richness.⁵⁴⁵ My approach can be criticized for reversing this tradeoff, enhancing accuracy and richness at the expense of theoretical precision and predictive power. The question presented is which side of the tradeoff weighs more heavily: are my gains, or the public choice writers' gains, more worth the respective losses?

As Robert Ellickson has noted, the economists' radical simplification of human behavior is, in some instances, wise.⁵⁴⁶ Throughout the 1970s, he argues, the theoretical advances made by law and economics across a broad range of issues were well worth the accompanying costs.⁵⁴⁷ While Ellickson thinks law and economics should now move on to more sophisticated models of human behavior,⁵⁴⁸ perhaps in many areas the gains from doing so would be minimal. Thus, for corporate law issues that turn on the functioning of capital markets, it could well be that narrow wealth maximization produces the most powerful (and sufficiently accurate) results. Investors in capital markets may act sufficiently like wealth-maximizers for the simple law and economics model to provide sufficient explanation.

In politics, however, the gains of public choice theory eventually cease to be worth the costs, and beyond a certain point disappear

⁵⁴⁵ See e.g., Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 772-77 (1975) (conceding that economic analysis of law does not capture all relevant legal phenomena, but claiming that nonetheless the field is important because its theoretical foundation has great explanatory power); Posner, *supra* note 30, at 62 (claiming that the simplicity of the economic model of law does not provide sufficient reason to abandon it especially since the alternative models offer "an inferior track record").

⁵⁴⁶ Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI-KENT L. REV. 23, 24-25 (1989).

⁵⁴⁷ See *id.* at 24.

⁵⁴⁸ See *id.* at 25.

entirely. Explaining all of politics through the lens of public choice theory becomes a game of constructing ingenious rationalizations (as for the 1986 Act) that are superficially tautological yet upon close examination false. Legislation that helps any interest group, whether intentionally or fortuitously, becomes ostensible "proof." So does legislation that hurts interest groups.⁵⁴⁹ Legislative action, the reversal of legislative action, and legislative inaction all qualify equally as "proof."⁵⁵⁰

The enriched model that I propose concededly does not advance as strongly as one might like what Judge Richard Posner calls "[t]he object of scientific research . . . [which] is to increase our ability to predict and control our environment"⁵⁵¹ The broad consumption motives that I have emphasized, such as voters' taste for symbolic legislation and politicians' taste for prestige, inherently are harder to model than wealth maximization. Yet public choice theory possesses even less genuine predictive power and generates inaccurate explanations of past events. Moreover, my broader model *can* be used to generate modest short-term predictions for particular subject areas—as I have tried to do for taxation—once one incorporates additional information, such as that about voters' perceptions of tax issues and the dominant opposing ideas about tax policy. It also can be used to explain broader patterns, such as the cyclical nature of tax instrumentalism and tax reform.

Unfortunately, a stronger version of Posner's goal of prediction and control is simply unattainable as applied to politics. Modern science recognizes that complex and interactive systems, ranging from the weather to the functioning of a brain, are inherently unpredictable in detail, even if one possesses almost unlimited empirical information and understands their mechanics perfectly.⁵⁵² Often, the best that one can do is to understand and predict the broader outlines (for example, climate as opposed to weather). The temptation to over-predict and over-simplify may reflect a misguided craving for the intellectual prestige of "hard"

⁵⁴⁹ See McChesney, *supra* note 315, at 101-03.

⁵⁵⁰ See Macey, *supra* note 297, at 266.

⁵⁵¹ Posner, *supra* note 30, at 61.

⁵⁵² See J. GLEICK, *supra* note 477, at 3, 7.

science, more than a rational choice about how best to put science to work for us.⁵⁵³ This craving should not blind us to the intellectual merit and real advantages of developing a more accurate understanding of the climate of legislative politics.

⁵⁵³ See S. GOULD, *WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY* 282-90 (1989).