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The Case for Gridlock

by Marcus E. Ethridge

Executive Summary

In the wake of the 2010 elections, President Obama declared that voters did not give a mandate to gridlock. His statement reflects over a century of Progressive hostility to the inefficient and slow system of government created by the American Framers. Convinced that the government created by the Constitution frustrates their goals, Progressives have long sought ways around its checks and balances. Perhaps the most important of their methods is delegating power to administrative agencies, an arrangement that greatly transformed U.S. government during and after the New Deal. For generations, Progressives have supported the false premise that administrative action in the hands of experts will realize the public interest more effectively than the constitutional system and its multiple vetoes over policy changes. The political effect of empowering the administrative state has been quite different: it fosters policies that reflect the interests of those with well-organized power. A large and growing body of evidence makes it clear that the public interest is most secure when governmental institutions are inefficient decisionmakers. An arrangement that brings diverse interests into a complex, sluggish decisionmaking process is generally unattractive to special interests. Gridlock also neutralizes some political benefits that producer groups and other well-heeled interests inherently enjoy. By fostering gridlock, the U.S. Constitution increases the likelihood that policies will reflect broad, unorganized interests instead of the interests of narrow, organized groups.

Marcus E. Ethridge is professor of political science at the University of Wisconsin–Milwaukee and the author of The Case for Gridlock: Democracy, Organized Power, and the Legal Foundations of American Government *(Lanham: Lexington Books, 2010).*

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Introduction

It has been clear for some time now that the second half of President Obama's first term will be marked by deep gridlock. Given the composition of the 112th Congress, passing major legislation will be very difficult. However, while the congressional-presidential system is in gridlock, a great deal of energetic lawmaking will take place *outside* the constitutional system. By continuing—and expanding—the delegation of legislative power to "unicameral" executive agencies, the Obama administration and its allies in Congress will use a highly efficient way to make policy. The contrast between these two processes for producing legislation will give us an excellent opportunity to appreciate the virtues of the protracted, frustrating institutional arrangement set forth by the Framers.

According to one expert, the Dodd-Frank Financial Reform Act will lead to at least 243 separate instances of administrative rulemaking, involving nine different agencies and commissions.[1] The Obama administration has already used administrative "legislation" to make policy on off-shore oil drilling, stem-cell research, and a variety of environmental issues. And the Department of Health and Human Services has granted more than 200 waivers from key provisions of the new health care reform. In deeply important ways, non-elected officials are making the public's policies.

Ever since the time of Woodrow Wilson, Progressives have argued that policymaking by expert executive agencies is far superior to the "antique" legislative process crafted by the Constitution's Framers. Just as they argued a century ago, modern Progressives contend that moving legislative authority outside the congressional-presidential system will lead to more efficient and informed policymaking. But they also argue that, by circumventing the gridlock-prone institutional arrangement, policies that advance social equality and progress will no longer be obstructed by commercial interests. Reducing the role of gridlock-prone institutions will thus lead to a more just and progressive society.

However, the Progressive vision is profoundly wrong. Decades of experience and research on interest groups and the workings of administrative policymaking clearly demonstrate that the more efficiently responsive the government is, the greater the influence of interests that enjoy the political advantages of superior organization. A return to the frustrating, sluggish, gridlock-prone system of legislation set forth in the Constitution will actually enhance representation of broad, unorganized, public interests.

Progressivism and Gridlock

In 2006, Nobel laureate Paul Krugman spoke for many politicians and academics, including several who would become influential members of the Obama administration, when he offered this assessment of contemporary U.S. inequality: "It is not hard to foresee, in the current state of our political and economic scene, the outline of a transformation into a permanently unequal society—one that locks in and perpetuates the drastic economic polarization that is already dangerously far advanced."[2] Krugman's complaint was remarkably consistent with the views of Progressive commentators from previous generations.[3] Theodore Roosevelt argued that big business was a special interest that enjoyed disproportionate power.[4] A quarter-century later, Franklin Roosevelt remarked: "For too many of us the political equality we once had was meaningless in the face of economic inequality."

Equality, depending on the way it is measured, has varied considerably over the last century. But the Progressive argument that (a) inequality has reached intolerable levels, and (b) the political power of wealthy interests obstructs efforts to reduce it, has remained unchanged for generations.

The persistence of the Progressive complaint about social and economic equality is perplexing in light of the policies and programs that were adopted between the time of Teddy Roosevelt and Paul Krugman. In the decades between 1910 and today, U.S. society experienced the imposition of and massive expansion of the income tax, extensive government regulation of the private sector, and a series of entitlement programs enacted during the New Deal and the Great Society eras that now account for most of a very large government budget. If a time machine could bring TR to the present, he would doubtlessly be stunned to find contemporary commentators writing bitterly about "savage inequalities" and a "permanent lower class" after the successful adoption of so many landmark Progressive initiatives.

How can such inequalities persist after so many Progressive programs were implemented? The answer is not simply that Progressive policies have unintended consequences or that they are based on flawed ideas about economics (although such criticisms are frequently on target). The deeper problem is that the institutional changes made to craft and implement these policies increased the political power of the well organized. Moving much of the legislative process to executive branch agencies certainly made lawmaking more efficient, but it also had political consequences that undermined Progressive goals. Contrary to heated statements from Progressives from TR to Krugman, the case for gridlock is the case for equality and the representation of broad interests.

A 1984 Supreme Court decision, astonishing in its frankness, provides a compelling illustration of the power of organized interests in efficiently responsive institutional settings. In *Block v. Community Nutrition Institute*, a group advocating for the interests of the poor challenged an Agriculture Department "milk-market order." For decades, agricultural interests had persuaded the department to use the statutory authority granted by Congress to raise milk prices, enriching them at the expense of consumers. The community group wanted the Department to consider the effect of its action on consumers, especially the poor. Justice Sandra Day O'Connor rejected their claims as she wrote for a unanimous court:

> Congress intended that judicial review of market orders ordinarily be confined to suits by [dairy] handlers. . . . Allowing consumers to sue the Secretary would severely disrupt the Act's complex and delicate administrative scheme . . . [T]he congressional intent to preclude consumer suits is "fairly discernible" in the detail of the legislative scheme. *The Act contemplates a cooperative venture among the Secretary, producers, and handlers; consumer participation is not provided for or desired under that scheme*.[5]

This case not only reveals that interest-group power can influence policy, but it shows how it does so most effectively *in an efficient institutional context*. The Agriculture Department adopted its milk-market orders in a setting without bicameralism, without interinstitutional competition, and with the participation of a clearly targeted interest. Progressives strongly supported the expansion of the Agriculture Department's powers during the New Deal. But the efficient responsiveness that their reforms created frequently undercut Progressive policy goals.

A generation of research on the way organized interests influence government amply demonstrates that the gridlock-prone constitutional system obstructs "rent seeking" and other forms of influence by privileged political organizations far more than it obstructs influence by the unorganized.[6] The tragedy of Progressivism is that, in its frustration with the existence of social and political inequality, it demands the establishment of institutions that amplify the political advantages of superior organization.

The gridlock-prone constitutional system obstructs "rent seeking" far more than it obstructs influence by the unorganized.

Progressivism's Claim that Institutional Efficiency Advances Social Equality

The idea that the Constitution's gridlock-prone institutions worsen social equality is a bedrock Progressive principle, made explicit in James Allen Smith's *The Spirit of American Government* in 1906. For Smith, Charles Beard, and other Progressives of their time, the constitutional arrangement of government institutions was a critical obstacle to progress.[7] Later Progressives developed the idea. Following mid-century pluralists like David Truman, they accepted the idea that nearly all interests—including the poor, labor, consumers, and even taxpayers—can be represented by effective political organizations.[8] Consequently, if the political system fails to achieve social equality, there must be something in the design of governmental institutions that stands in the way of progress. Progressive thinkers attributed this failure to the gridlock-prone institutional arrangement that the Framers left us. Thus, most Progressives believe that it is not necessary to have a thoroughgoing revolution as Marxists and other radicals claimed—circumventing gridlock would naturally produce a more progressive and just society.

Some of the most cited political scientists of the century agreed. James MacGregor Burns's *The Deadlock of Democracy* (1963) expressed frustration with a system that had to be forcibly attacked by activist presidents to produce results: "Even the strongest and ablest presidents have been, in the end, more the victims of the Madisonian system than the masters of it."[9] His criticism of institutional gridlock clearly embodied the Progressive view that, if only the archaic checks and balances were removed (or circumvented), majority interests would flourish. Similarly, in what became a mid-century classic of political science, Robert Dahl argued that "Madison's nicely contrived system of constitutional checks" prevented the poor from having "anything like equal control over government policy."[10]

New Dealer James Landis argued that the frustrations and delays produced by the Madisonian system could be circumvented, an approach far easier than explicit constitutional change. In 1938, he wrote *The Administrative Process*, a book that legitimized much of what FDR had done, while laying the foundation for continued support for the Progressive way of thinking for subsequent generations:

> So much in the way of hope for the realization of claims to a better livelihood has, since the turn of the century, been made to rest upon the administrative process. To arm it with the means to effectuate those hopes is but to preserve the current of American living. . . . The administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems. . . . [O]ur age must tolerate much more lightly the inefficiencies in the art of government.[11]

Following this logic, Progressives worked successfully to change American institutions dramatically during the last century. The vast majority of laws are now made in unicameral administrative bodies, as Congress delegates many difficult decisions to agencies, and courts evolved a strong doctrine of deference to administrative judgments. The Progressive vision succeeded dramatically in creating a system in which government policymaking could be more efficient than the antique system designed by the Framers.

The Obama administration and its allies in Congress have fully embraced the Progressive approach. Even with strong Democratic majorities, it was difficult to enact the President's major legislative accomplishments (health care reform and the Dodd-Frank Financial Reform Act). If the bills had included provisions that explicitly decided virtually all the major policy choices involved, their passage would not have been possible. Consequently, all of Obama's significant legislative successes provided for the *delegation* of legislative authority to a

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variety of executive branch commissions and agencies, side-stepping some of the difficult political decisions. Moving some important legislative tasks outside the gridlock-prone constitutional system made it possible to pass these landmark bills.

With a breathtaking disregard for the Constitution's first section ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives"), members of Congress were put on notice that if they failed to pass the administration's favored climate-change legislation, the Environmental Protection Agency would resolve the issue by using its power to restrict carbon-dioxide emissions as a "pollutant."[12] It is a stunning demonstration of Progressivism's hold that so few citizens or commentators found this explicit assault on basic constitutional provisions noteworthy.

But Progressives have long contended that undermining or ignoring the legislative vesting clause is necessary in order to achieve progress and social equality. In large measure, the failure of Progressivism to achieve its goals is a function of Progressive delusions regarding how organized interests attempt to influence government. James Madison understood the problem quite well, and research by political scientists and economists has confirmed that his view remains more useful than the opposing arguments set out by Smith, Landis, and Krugman.

Why Progressive Institutions Fail: The Interest Group System Can Not Be Representative

In 1965, Mancur Olson Jr. wrote a landmark book (*The Logic of Collective Action*) that provided a theoretical explanation for what many citizens and political insiders had long appreciated: some interests are far more capable than others of producing effective organizations to advance their goals, and these fortunate interests are never the largest ones (they are not consumers, taxpayers, or the poor).[13] If Olson is correct, the Progressive devotion to the administrative state cannot be reconciled with their concern for equality.

Olson argued that individuals will not normally contribute to a collective effort to advance their interests, even if those interests are important to them. Since a single contributor's effort and resources will have no real impact on the chances that the collective effort will be successful, and since noncontributors will receive benefits from any collective effort that is successful, the rational individual will not contribute. The most important implication of this idea (still largely unappreciated by Olson's numerous critics), is that there is no necessary correspondence between the array of political interests in society and the array of organized political forces working to influence government.

Several analysts have argued that the existence of organized political forces not anticipated by Olson undercuts his basic idea. The Sierra Club, the NAACP, and NOW are important political actors, even though they depend on voluntary collective action.[14] While the mere founding of some of these organizations seems inconsistent with Olson's logic, such a criticism ignores the crucial point. When evaluating the distributive impact of institutional change, it is the relative political influence of competing interests that becomes critical. Even if we can identify a wide variety of political organizations that have somehow managed to exist and to set up lobbying operations in Washington, the free-rider problem suggests that groups will vary dramatically with respect to how much collective effort they get from those who share their collective interests: "More than 50 million Americans . . . value a wholesome environment, but in a typical year probably fewer than one in a hundred pays dues to any organization whose main activity is lobbying for a better environment. The proportion of physicians in the American Medical Association, or automobile workers in the United Automobile Workers union, or farmers in the Farm

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Bureau, or manufacturers in trade associations is incomparably greater."[15] Olson's insight suggests that the array of organized lobbies active at any given time will *not* mirror the array of interests in society.

The critical issue for evaluating the Progressive position on the Constitution's lawmaking process is the extent to which the forces of organized political life, taken together, are democratically representative. Even if analysts are able to identify political organizations whose *existence* seems to challenge the validity of the free-rider problem, the conclusion that the *balance* of organized forces will not mirror the balance of political interests is unavoidable.[16]

The efficient institutional arrangement Progressivism gave us produced disturbing instances of special interest influence on agency policy decisions.

Three Failed Progressive Reform Efforts

Given the inherent organizational advantages that certain interests enjoy, it was inevitable that the efficient institutional arrangement that Progressivism gave us would produce disturbing instances of special interest influence on agency policy decisions. Progressives advocated reforms intended to bring a broader range of interests into agency decisionmaking, hoping that the efficient system they created to circumvent gridlock could be preserved. Although each of these reforms has failed, the fact that they were (and are) advocated by Progressives reveals that their understanding of political life remains inferior to that of the Framers.

Citizen Participation. Prompted by the increasing importance of administrative decisions, Progressives have long advocated procedures providing for citizen participation in agency rulemaking. It is difficult to argue that procedures designed to ensure openness and accountability are valueless. However, those observing the workings of citizen involvement in administrative hearings have consistently found that the procedures that provide for these inputs are generally helpful only to those who already enjoy the political advantages of superior organization. For example, over 30 years ago, studies of citizen participation in environmental policy hearings concluded that the most typical participants were officials from other agencies or representatives of political organizations that already enjoyed on-going access.[17] More recent research indicates that things are little changed. McKay and Yackee analyzed data from several agencies, measuring the extent to which policy change was associated with the level of organized interest involvement. Their conclusions are striking:

> We find strong evidence that federal bureaucrats listen to interest groups and tend to favor the more dominant side. . . . [W]hen federal agency officials receive strong, loud, and united messages from interest groups, they are responsive.[18]

Agency officials *are* responsive—they are not always aloof technocrats making decisions only on the basis of professional standards and technical calculations. However, the responsiveness produced by required procedures for open hearings and other reforms is not responsiveness to broad interests. There are exceptions, of course, but decades of experience confirm that the public hearing requirement creates only the appearance of "participatory democracy."[19]

A 2008 report, "Transparency and Public Participation in the Rulemaking Process," was hopeful regarding the prospects for public involvement in agency decisionmaking, but it found that the familiar problems do exist. A group of 13 leading scholars found that agencies are insufficiently transparent when they begin the rulemaking process, that "agencies too often fail to reach out to all interest groups in an even-handed manner," and that they frequently do not create a process in which "dialogue and interaction" take place. The task force recommended that agencies take steps to ensure that "all interests are represented in the rulemaking process" and that they should maintain "'open-door' policies."[20]

Some expected the expansion of e-rulemaking, in which citizens can submit their views electronically, would promote broader

representation in agency decisions. However, the initial reports are not favorable. Recent studies concluded that e-rulemaking has made public participation neither more representative nor more persuasive.[21] Similarly, Cary Coglianese completed an extensive empirical analysis of e-rulemaking, leading to his stark assessment that "regulatory agencies continue to garner only the most modest, if not trivial, level of involvement by ordinary citizens. . . . The chief barriers to citizen participation in rulemakings are not technological."[22]

The Legislative Veto. Although it first appeared in the 1930s, the legislative veto became an increasingly popular statutory provision during the 1960s and 1970s. Legislative veto provisions took several different forms, including the power to veto administrative decisions by one house or even one committee. Even when legislative veto provisions required a joint House-Senate resolution, presentment to the president was not required. Thus, the characteristic element of the legislative veto was the use of legislative power to reverse or block an administrative decision without having to enact a statute. The Supreme Court held in 1983 that the legislative veto was unconstitutional because it allowed Congress to act without observing the principles of bicameralism and presentment to the president.[23]

Proponents of the legislative veto argued that the mechanism is an effective method through which legislators can supervise administrators more effectively. They contended that the device helped to restore a balance of power between agencies and the legislature, because agencies, unlike legislatures, can make decisions quickly and quietly. When these choices are contrary to legislative intent or in excess of legislative authority, a legislature that can only block agency actions through statutory revision will be unable to "correct" many such choices (or even to threaten to do so). The ostensible political rationale for the legislative veto was that it was an efficient mechanism for "reining in" lawless or overzealous administrative officials.[24] In general terms, the increasing popularity of legislative veto provisions was consistent with the same emerging anti-bureaucratic mood that was apparent in court cases like *Office of Communication of the United Church of Christ v. FCC* (a 1966 case that required the FCC to allow public interest groups to "intervene" in licensing hearings) and *Citizens to Preserve Overton Park v. Volpe* in 1971 (which forced the Secretary of Transportation to explain how his approval of a state freeway plan was consistent with federal law).[25]

However, it would be simplistic and incomplete to see the legislative veto entirely as a result of legislative frustration with imperialistic bureaucrats. As in the case of procedural complexity, administrators and their academic advocates would come to support the legislative veto and, more important, organized interests would come to profit from its existence. In an era of weakened faith in bureaucratic independence, the presence of a legislative veto provision in a statute containing a grant of power to an agency or commission apparently made Congress more comfortable with the idea of delegation. Since administrative actions would typically be presented to Congress (in the form of proposed rules) so that one house or committee could scrutinize, and potentially veto, any actions deemed unwise or inappropriate, the legislative veto made administrative power seem more benign.

Thus, while the legislative veto was advocated as a means of checking specific applications of administrative discretion, it is likely that by lowering the perceived costs of delegation, the veto led Congress to delegate more. Among administrators, the conventional wisdom about the legislative veto was fervently expressed in a critical essay in the *Public Administration Review* by Louis Fisher, who argued that the legislative veto was an important and valuable tool that created necessary flexibility for both legislators and administrators.[26] Even as early as 1938, James Landis recognized that the existence of legislative veto powers could actually

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strengthen the scope of authority granted to administrators.[27] While it doubtlessly appeared threatening to agency autonomy in some contexts, the professional administrative community came to support the legislative veto device because, like procedural complexity, it made legislative grants of administrative power more palatable.

There are good reasons to suppose that the legislative veto enhanced the political position of organized interests. Veto provisions proliferated in statutes during the same period in which interest groups became more numerous and diverse. Why would this be the case? Inevitably, meaningful competition among diverse organized interests produced situations in which groups that had been previously unopposed in their "subsystem" relationships with administrative agencies encountered occasionally effective resistance. Contrary to the typical situations in the "iron triangles" of an earlier period, a single organized interest rarely enjoys exclusive dominance in contemporary "issue networks." Existing rent-producing restrictions were sometimes challenged, while in other cases groups demanded regulations which would actually promote more meaningful competition.

Rent seekers finding themselves in opposition to these policy changes and unwelcome requirements sometimes lobby Congress to reverse them. In a few cases, such groups were notably successful in obtaining reversals of agency actions through legislation.[28] However, moving Congress to reverse agency policies is difficult and expensive.[29] A rent-seeking interest that has increasingly encountered sporadic administrative decisions made in response to the demands of organized opponents will find favor in a selectively applied tool such as the legislative veto. Just as such interests benefit from efficiently responsive institutional authority when seeking profitable applications of government power; they can best preserve beneficial policies by having a specifically targeted, relatively flexible mechanism available to check particular administrative actions. The mechanism enabled legislators to respond efficiently to influential interests disturbed by the occasionally unwanted regulatory initiative. It also served the interests of legislators: it allowed them to benefit politically by enacting broad regulatory powers and by reserving a response option to be selectively applied when effectively demanded.[30]

The legislative veto was the subject of several empirical studies during the 1970s and 1980s, and it is striking that virtually all of them assessed its political impact as adverse to broad public interests.[31] The efficient decisionmaking made possible by the mechanism was especially useful to opponents of public-interest-group positions because public-interest groups tend to exhaust their resources in initial agency hearings (leaving them outgunned in subsequent proceedings), and because congressional committee hearings are even more exclusively accessible to insiders than agency hearings. Another observer reached the same conclusion some years later:

> Powerful, well-organized special interests, confident of their ability to maintain an effective, well-financed political coalition, will place a high premium on a legislative veto because such groups will expect to be able to control future Congresses or congressional committees. . . . Without the legislative veto, special interest legislation will be less attractive to powerful special interest groups.[32]

"Hard Look" Judicial Review. As the representational problems created by Progressive institutional reform became increasingly apparent, some argued that the courts could correct errant administrative decisions—reversing or modifying decisions that agencies made as a result of interest-group pressure. But Progressives would find that courts have not been consistent in their approach to deference, and sometimes their application of deference (or their withholding of it) has had policy impacts Pro-

gressives view as unhelpful to social equality.

It is very unlikely that judicial review will shape public policy in any consistent direction. Two important administrative deference cases, *NLRB v. Hearst* (1944) and *Chevron v. Natural Resources Defense Council* (1984), illustrate the problem.[33] In both cases, the courts deferred to the judgments of agency officials. In the earlier case, Progressives lauded judicial affirmation of the National Labor Relations Board's desire to extend its jurisdiction.[34] However, Progressives decried Chevron's judicial deference to the EPA's decisions because they implemented the Reagan administration's agenda regarding environmental policy.[35] There are other cases that illustrate that judicial review of administrative choices has politically inconsistent policy impacts.[36]

Progressives have thus been frustrated by judicial decisions regarding agency policymaking—they want courts to defer to administrative decisions when those decisions advance Progressive goals and to reverse or obstruct agency decisions they oppose. The problem is that courts, at least some of the time, operate under the dictates of principle, and thus we have both *Hearst* and *Chevron*. The decisions are consistent at the level of principle, but only one of them satisfies Progressives. Decades of experience have demonstrated that courts will not, and cannot, use their power to move agency decisions consistently in a particular direction, or to force agencies to act on broadly representative influences. Making judicial review more thorough and searching will not, therefore, correct the systematic advantages enjoyed by powerfully organized interests.

The Progressive assault on the Constitution's intentionally difficult system of policymaking is based on the idea that a more efficient process would remove opportunities for obstruction. Believing that the forces of obstruction are naturally against social equality, Progressives have long believed that a process less prone to gridlock must therefore produce efficiency *and* equality. Sufficient evidence has accumulated to demonstrate that Progressives are profoundly wrong: interests that enjoy the political advantages of superior organization become more influential when government can be more efficiently moved to action, and those interests are not often the ones demanding greater social equality.

Thus, a century of Progressive success in transferring legislative power outside the Madisonian system has left the proponents of social equality severely disappointed. Failed efforts to increase the representation of broad, unorganized interests in agency decisionmaking (citizen participation, the legislative veto, and "hard look" judicial review) are themselves indications of the weakness in the Progressive case for efficient decisionmaking. Frustrated with the choices made by their efficient, expert agencies, and disappointed by the failures of their reforms, some modern Progressives finally resorted to patently unrealistic approaches to judicial review. One scholar suggested that judges can encourage more acceptable agency policymaking by reviewing agency decisions on the basis of "good governance."[37] Cass Sunstein, currently administrator of the White House Office of Information and Regulatory Affairs, wrote that judges should force agencies to enhance the role of "deliberation" in their decisionmaking.[38] The Constitution's system of gridlock-prone institutions is a more realistic approach to the problem of managing factional interests.

The Case for Gridlock

The Constitution's most important innovation—the separation of legislative and executive powers—was based on the Framers' understanding of how political interests behave. This understanding is sufficiently basic to term it the Constitutional Principle: *The public interest is most secure when governmental institutions are inefficient decisionmakers*. When public policies are made with great specificity and efficiency, broad public

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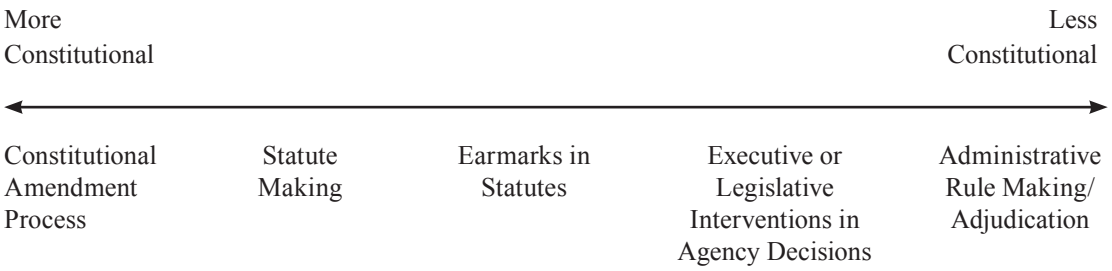
Figure 1
The Constitutional Character of Government Decisionmaking



interests are undermined and rent seeking is encouraged. In contrast, an arrangement that brings diverse interests into a complex, sluggish decisionmaking process is generally unattractive to rent seekers. The gridlock that Progressives abhor neutralizes some of the political benefits that producer groups and other well-heeled interests inherently enjoy.[39]

It has long been argued, at least since the Federalist Papers, that the cumbersome lawmaking process prescribed in the Constitution prevents the adoption of ill-considered legislation. Erecting barriers to legislation creates more opportunities to block poorly conceived proposals. The case for gridlock amplifies this notion by showing how basic ideas drawn from interest-group theory lead to predictions regarding the political effect of a deliberative, divided decisionmaking process. It is not simply that the Madisonian design makes it more difficult to enact legislation. The case for gridlock shows how special interests devote fewer resources to rent seeking under such an arrangement, because it is less likely to be profitable and more expensive. Thus, gridlock-prone institutions counteract a major source of social inequality.

Geoffrey Brennan and Nobel Laureate James M. Buchanan captured the essence of the Constitutional Principle in their distinction between decisions among rules and decisions within rules.[40] Consider the extremes depicted in Figure 1. When the constitutional amendment process is underway, deliberations are highly visible, the decision takes a very long time, it involves a diverse array of participants, and everyone knows that a successfully passed amendment will remain in effect for years. In contrast, when the Environmental Protection Agency makes rules regarding the size of allowable debris fields generated by transporting logs through public waterways, few people know about the issue, fewer still participate, the process is relatively fast, and the outcome is easily adjusted.

Interest groups have substantial concerns about decisions made in both kinds of settings. However, the pursuit of self-interest will lead a group to adopt different political objectives when the decisional setting is more constitutional. We do not need to discover some way to get rent seekers to abandon their self-interests in order to minimize their impact on society and policy. Institutional changes within the realm of administrative and constitutional law can alter the decisional context in ways that make it tend toward the politics of making "decisions among rules," in which, as we will see below, rent seeking is less likely to occur. Derived from a large body of theoretical work and empirical experience, the Constitutional Principle is based on this difference.

Gridlock-prone institutions counteract a major source of social inequality.

Why Gridlock Inhibits Rent Seeking

The assumption that people will seek to maximize their wealth has served political and economic theory well, and we have no reason to disturb it. However, this motivation does not produce the same behavior in all institutional settings. Students of interest-group politics have often noted

that special-interest influence is less dominant in enduring, broad policy choices: "the influence of interest groups on the content of the U.S. Constitution was less than the influence of such groups on the content of ordinary, day-to-day legislation."[41]

The same contrast holds when we leave the realm of actual constitutional choices and consider different varieties of subconstitutional policy decisions. Comparing assorted acts of Congress, federal judge Frank Easterbrook pointed out that interest-group influence was greater in highly specific statutes than in general statutes.[42] In a quantitative analysis from the 1980s, two political scientists found that group influence in Congress is likely to be strongest when the group's goals are narrow and when they do not generate much visibility.[43] A few years later, one of these scholars simply concluded that "organizations can ordinarily have greater influence on single, discrete amendments to bills than on entire pieces of legislation."[44]

Why would this be the case? On first impression, one would assume that interest-group energies would be more ardently applied to constitutional decisionmaking than to in-period politics, since constitutional decisions involve larger stakes. Yet, the facts suggest that broad, enduring political choices are less dominated by organized group influence. This often-observed pattern is a function of three related political consequences of fashioning institutions in accordance with the Constitutional Principle. When government actions are enacted in a slow-moving decisional context in which official acts are broad in scope and likely to be relatively permanent:

- political actors are less certain that the coercive restrictions they seek will be profitable to them;
- the lobbying costs of acquiring coercive redistributions are higher; and
- the participation of unorganized citizens becomes more significant and effective.

The decisional context that perfectly embodies the Constitutional Principle is, of course, the process for amending the Constitution itself. This process is so prone to gridlock that it has only been successful on a bit more than two dozen occasions since the Founding (and ten of these occurred at one time). However, decisional settings that have no formal constitutional status may be more, or less, constitutional in the sense in which the term is employed here.

Uncertainty. A simple example (adapted from James Buchanan) is helpful in illustrating the way in which constitutional and in-period political choices differ with respect to the level of certainty particular actors can have regarding their profitability.[45] Two persons, A_1 and A_2, both have apples to sell to 10 persons, B_1, B_2 . . . B_{10} each of whom is able to pay for apples with some other good valued by the As, such as bananas. After accumulating some market experience, A_1 and A_2 will happen upon the idea of limiting their trading rights, such that A_1 sells apples only to B_1 through B_5, and A_2 sells only to B_6 through B_{10}. If this restriction is enacted, each of the As would thus have a local monopoly, giving both of them substantial rents and thus greater wealth than they would have if buyers could contract with either seller.

However, behind the "veil of ignorance" (here meaning that one does not know whether he or she will be an A or a B when the market begins operating), no one would rationally support the establishment of the agreement that the As made. Without knowledge of one's future status, self-interest would oppose such a restriction. The rule—resulting in the social costs of monopoly and the wasted resources devoted to creating and defending it—would be attractive to the As only if they could be certain of its redistributive effect on them.

Certainty is diminished when the veil obscures one's future status, but, by a similar logic, it is also diminished when decisions are made at a more general level with more participants and creating rules of greater

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durability. As Buchanan noted, "the more general rules are and the longer the period over which they are expected to be in effect, the less certain people can be about the particular ways in which alternative rules will affect them. They will therefore be induced to adopt a more impartial perspective and, consequently, they will be more likely to reach agreement."[46] The relationship between the durability or generality of decisions and the degree of certainty regarding their impact is an important issue in constitutional politics.

Framing political choice at a constitutional level would transform rent seekers into zealous defenders of consumerism.

As set out above, the fully informed decision by the As to engage in a system of market restrictions was an in-period political choice. They altered no rules that would apply to other actors or situations. The As knew the reach of their agreement, and they were therefore reasonably confident that they could predict its full impact on them. However, if the decisional setting were such that the establishment of their desired agreement would be part of a broader enactment, or if it would be difficult to alter, the As would be far less certain that the policy that gave them the desired restriction would produce a net gain, even if they could somehow see through the veil enough to know that they would continue to be apple sellers. It could even result in a net loss for them, by facilitating retaliation by the Bs or by restricting their future choices in unwanted ways.

Consider a somewhat more complicated world, populated not only by As and Bs, but also by Cs, Ds, Es, Fs, and Gs, producing and selling carrots, doughnuts, eggs, frankfurters, and grapes, respectively. If the As could pursue an agreement only applying to restrictions on apple selling, they would support it, as it would help them monopolize and enjoy monopoly rents. If, however, such a restriction could only be enacted as part of a general law authorizing officially sanctioned and governmentally enforced trade restraints, the As would realize that their expected gains from monopoly sales of apples would be more than offset by the disadvantages of having to buy from six other monopolists. Framing the political choice at a constitutional level would transform the As, who were rent seekers when the decisional context made narrowly targeted restrictions possible, into zealous defenders of consumerism, although they would still be motivated only by self-interest.

A less abstract example may be useful here. Imagine the position of used car dealers' associations on a proposal submitted to a "Used Car Dealers Board" regarding the enactment of more stringent licensing requirements for sellers of used cars. Since the proposed standards would by assumption be requirements already met by the members of the group (or requirements they could satisfy with little cost), the association would support the proposal, anticipating increased profits as a consequence of restrictions on their present and future competitors. The dealers' group would devote considerable energy and, if necessary, significant shares of their productive resources to promoting the proposal because it would help protect them from competitors, and because, as enacted by this institution, the coercive power of government would be precisely targeted and fully subject to their influence as future needs change.

Now, consider this same organization's approach to a proposal that would enact the same restrictions, but in this case its proposal is merely one part of a much more general legislative package. Framed more constitutionally, the proposed policy choice would be an action by a broader official body (the legislature, or perhaps a regulatory commission with a comprehensive jurisdiction) that would produce an omnibus empowerment to establish cartelizing restrictions. While the organization could be relatively certain about the effect of a specific rule on its interests, it is profoundly uncertain regarding the net profitability of having achieved the same set of restrictions as but one part of a constitutional decision.

The dealers would recognize that while they would profit from governmental restriction of future competitors in the used

car market, they could be injured by cartelization of their suppliers and by cartelization of the dozens of industries producing goods and services that they consume.[47] Moreover, they might consider whether a cartelizing restriction that would be helpful now would be damaging later (perhaps it would obstruct expansion plans or the use of profitable emerging technologies), and, if the restriction were enacted by a unit with broader jurisdiction governmental unit, it would be much more difficult to adjust.[48] The changed decisional context produces a different political demand out of the same rational self-interest. As one observer noted, "groups that enjoy the protection of an anti-competitive regulatory environment for their own industries are harmed by the higher air fares that result from the regulation of airlines. . . . Even special-interest groups that might benefit from some specific, discrete legislative wealth transfers are likely to object to general constitutional provisions that facilitate rent seeking."[49] Thus, particular economic interests would not consider a general cartelization action as valuable to them as the highly focused decisions made and implemented by functionally specific boards, and, ceteris paribus, they would expend fewer resources in support of the enactment of such a broad policy choice.

The breadth and durability of the decisional context alters the interest group's political posture because of the divergence between its immediate, particular interests and its preferences regarding more general, enduring policy choices. The in-period and constitutional interests of the group are in conflict, and it is this conflict that makes the Constitutional Principle a potential solution to the problems of rent seeking and other maladies of interest-group politics. A more constitutional institutional context, one that frames government choices in more general terms, leaves special interests with less certainty regarding the net profitability of the coercive measure that would (among other effects) facilitate the taking of the particular rents each such interest seeks. Broader decisional contexts "thicken" the "veil of ignorance," so to speak, making the political actor more doubtful about the overall profitability of turning to government as an approach to wealth maximization.[50] As one observer concluded, interests "behind the veil do not know if they will be on the paying or the receiving end of transfers and thus have an incentive to choose constitutional rules restricting government's power to transfer wealth."[51]

Moreover, beyond the uncertainty created by the breadth and relative permanence of policy choices in more constitutional decisional settings, congressional lobbying efforts are usually more uncertain than the outcome of an effort to influence an administrative agency because of the impact of national partisan politics on the former. Partisan shifts in Congress, or shifts in presidential-congressional relations, can create uncertainty regarding the actions that may be taken regarding virtually all policies, including those most important to rent seekers. When this political uncertainty is greatest, organized interests have an additional reason to prefer more insular, administrative forums. Hence, the Progressive innovation of independent administrative power provides a solution to two kinds of uncertainty that would otherwise dampen the ardor of rent-seeking interests: such power takes policymaking away from the political vicissitudes of partisan conflict in the electoral branches, and it facilitates the enactment of decisions that, by virtue of their specificity and ease of adjustment, are more certain to be profitable.

It is thus too simple to think of rent seeking and excessive special-interest influence as problems caused by agencies becoming "captured," or by the establishment of "iron triangles" or rigid issue networks.[52] Rent-seeking interest groups want regular access to government officials, but they also want a larger degree of certainty that their political influence will bear fruit. This is why the institutional arrangement favored by Progressives encourages special interests to invest

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The rent seeker's political advantages are decisive when a policy is made in selective settings with narrow impacts.

substantial resources in political efforts to obtain economic advantages through government action. An institutional setting designed in accordance with the Constitutional Principle would produce governmental policy choices less certain to be profitable to specific economic interests, and would therefore not entice them to expend as many of their resources on rent seeking.

Lobbying Costs. An institutional setting in which decisions are made at a more constitutional level also raises lobbying costs. Such costs rise with the constitutional character of the institutional context for two reasons. First, decisions made at a broader level of generality involve a wider range of decisionmakers, requiring that more officials and government units be influenced. In such decisions, it is thus more likely that divergent and incompatible interests and institutions will have to be accommodated, making the lobbying effort more difficult and expensive. Second, constitutional decisions are often characterized by the existence of multiple clearances and substantive constraints that must be overcome or circumvented, increasing lobbying costs still further.

As a leading scholar of institutions and economics explained, under the conventional regulatory arrangement established by Progressive thinking, economic minorities seeking regulatory policies harmful to majority interests need only influence a small commission and not the complex system of dispersed lawmaking power that distinguishes the constitutionally derived system.[53] If decisions on these matters had to be made in a broader institutional setting, the "political cost of redistribution" would be significantly higher, thus reducing redistribution's profitability.[54] When institutional arrangements are less constitutional, rent seekers thus receive a doubled enticement: the enactments they seek become more certainly profitable and cheaper to obtain.

Public Involvement. Rent seekers are also encouraged by less constitutional decisionmaking venues because there is normally less involvement by the general public in them. Rent seekers lose their commanding access when decisions become more basic and general in scope because citizens are much more likely to become involved in such decisions. This involvement, to the extent it actually occurs, should make rent-seeking initiatives less attractive.[55]

Consider the interests of a member of the general public in, say, regulations restricting the production of oranges. Despite the fact that consumption of oranges is widespread, and that Agriculture Department regulations on orange growing cost the average consumer some $15–25 annually while benefitting only a few persons and corporations, the typical consumer will not find it rational to spend much time or effort to oppose the regulations. He or she will probably not make a voting decision on the basis of such a small issue, even if completely aware of it. However, it would take little imagination to envision the generalized political energies that would be unleashed as a result of a proposal to adopt, as a constitutional policy choice, the extensive array of restrictive agricultural and professional licensing regulations that are currently in effect. Consumer watchdogs would calculate the total consumer cost of such a sweeping enactment, generating substantial opposition. Such a decision would be also be much more visible in terms of media coverage. The rent seeker's political advantages are decisive when a policy is made in more selective settings with narrower impacts, and thus, such actors are more likely to devote scarce resources to political action in them than in broader institutional contexts.

The late Jack Walker, one of the leading political scientists of the last century, came to the following conclusion following his extensive empirical study of interest-group behavior and influence in Washington:

> Once the president and congressional leaders become directly involved in debate over an issue, the controversy naturally attracts the attention

> of larger numbers of people. The mass media begin to transmit information about the policy questions and personalities involved, and members of the public are tempted to make their preferences known to their elected representatives. In Schattschneider's terms, possibilities increase for a widening of the scope of conflict to include groups and citizens outside subgovernments and outside Washington itself.[56]

This widened conflict reduces the political advantages enjoyed by rent seekers, thus discouraging them from devoting their resources to lobbying.

The Constitutional Principle simply holds that the institutional setting in which important policy decisions are made should be sufficiently broad to create a noteworthy increase in lobbying costs and uncertainty encountered by rent seekers and "distributional coalitions." Because their costs are lower where the decisionmaking setting is less visible and when it involves a less diverse range of participants, an institutional shift toward the Constitutional Principle should thus reduce rent-seeking behavior.[57] It is not surprising that rent seekers have rarely felt threatened by the prospect of public participation in hearings in which the decisions they demand are considered. But they did adamantly oppose Congressional forays into regulatory policy, not only because they objected to the particular policy choices made, but because the commissions and agencies they had worked with would have less independent authority over future policy changes.[58]

Taken together, these three consequences of increasing the constitutional character of decisional settings suggest that institutional factors affect the amount of special-interest influence over public policy—rent seeking is not simply a function of the extent to which interest groups have achieved effective organization. A Progressive institutional setting encourages rent seeking by (a) facilitating the enactment of highly specific, easily adjusted coercive government actions, which makes special interests more certain about the net profitability of the particular policies they seek; (b) decreasing the costs of lobbying for such actions; and (c) minimizing the participation of unorganized interests. An institutional setting more prone to gridlock creates a more constitutional decisional context that dampens the negative effects of self-interested political action.

Conclusion

We can thus begin to understand why a contemporary Progressive like Paul Krugman found himself parroting Theodore Roosevelt's 1912 assessment of political and economic inequality in the United States. The epoch-defining expansion of the role of government that occurred during the century between their statements may or may not have had positive impacts, but it surely encouraged the formation of rent-seeking interests and amplified their power. Some public programs have been great successes, but the Progressive's insistence on an institutional arrangement that facilitates rent seeking has kept the Progressive goal of greater social equality from being realized. In 1982, Olson reflected on a lifetime of research on economic policy:

> A very large part of the activities of governments, even in the developed democracies, is of no special help to the poor and many of these activities actually harm them. In the United States there are subsidies to the owners of private airplanes and yachts, most of whom are not poor. The intervention of the professions and the government in the medical care system . . . mainly helps physicians and other providers, most of whom are well heeled. . . . The reason that government and other institutions that intervene in markets are not in general any less inegalitarian than

An institutional setting prone to gridlock creates a constitutional decisional context that dampens the negative effects of self-interested political action.

Social equality has not emerged from the efficiently responsive kind of government that Progressives favor.

competitive markets is that . . . *there is greater inequality . . . in the opportunity to create distributional coalitions than there is in the inherent productive abilities of people*.[59]

The institutional arrangements Progressives have sought would only work if all interests had influence proportionate to their respective memberships, or if citizens were somehow freed from their self interests. It is time to reach a general conclusion about Progressivism's approach to institutions: social equality has not, and cannot, emerge from the efficiently responsive kind of government that Progressives favor and that the Founders rejected.

Gridlock, so often derided by politicians, the press, scholars, and citizens, is naturally frustrating. But an institutional arrangement that is *not* frustrating and protracted will be dominated by interests with superior organizations and political skills. The question Progressives should be asking is "under what kind of institutional arrangement is the public interest less likely to be undermined?" The failure of Progressive institutions to advance the Progressive goal of social equality is, in large part, a consequence of Progressivism's success in circumventing gridlock.

Notes

1. These figures are from a note sent by Davis, Polk, and Wardwell to its clients, as reported in "The Uncertainty Principle," *Wall Street Journal*, July 14, 2010.

2. Paul Krugman, "The Great Wealth Transfer," *Rolling Stone*, December 22, 2006, http://www.informationclearinghouse.info/article15923.htm.

3. Will Wilkinson, "Thinking Clearly about Economic Inequality," Cato Institute Policy Analysis no. 640, June 14, 2009, http://www.cato.org/pubs/pas/pa640.pdf. Wilkinson thoroughly explains why the relevant economic facts do not support Krugman's conclusion that contemporary America has entered a new "gilded age" with the least prosperous suffering brutal poverty.

4. Theodore Roosevelt made these remarks during the 1912 presidential election.

5. *Block v. Community Nutrition Institute*, 467 U. S. 340 (1984): 348–52.

6. "Rent seeking" is the effort to expand wealth by devoting resources to establish governmental or other restrictions that make it possible to reap profits higher than would be obtained in a more competitive environment. Thus, all economic actors face a choice between investing in production (e.g., more efficient manufacturing or distribution techniques) and investing in efforts to obtain government regulations that reduce competition. Rent seeking leads to a significant loss of national wealth, although the magnitude of this loss is a matter of some debate. However, when the nature and size of government makes it easier to obtain the restrictions rent seekers want, firms and producer interest groups are encouraged to devote more of their resources to rent seeking. The foundational works are Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies, and Theft," *Western Economic Journal* 5 (1967): 224–32; and Anne Krueger, "The Political Economy of the Rent-Seeking Society," *American Economic Review* 64 (1967): 291–303.

7. James Allen Smith, *The Spirit of American Government* (New York: Macmillan, 1907), pp. 207, 293. See also Charles Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913).

8. David Truman, *The Governmental Process* (New York: Knopf, 1951).

9. James M. Burns, *The Deadlock of Democracy* (Englewood Cliffs, NJ: Prentice-Hall, 1967), p. 7.

10. Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), p. 81.

11. James Landis, *The Administrative Process* (New Haven, CT: Yale University Press, 1938), pp. 1, 46, 122.

12. EPA Administrator Lisa Jackson was quoted in the *Washington Post* (December 8, 2009) as saying that EPA regulation is not the "preferred outcome," and that her agency and other administration officials would still prefer that Congress acted before they did. Amazingly, congressional reluctance to pass a bill carries little weight in terms of administrative policy choices.

13. Mancur Olson Jr., *The Logic of Collective Action* (Cambridge: Harvard University Press, 1965).

14. See, for example, James Q. Wilson, *Political Organizations* (New York: Basic Books, 1973); and John M. Hansen, "The Political Economy of Group Membership," *American Political Science*

Review 79 (1985): 79–96.

15. Olson, *The Rise and Decline of Nations* (New Haven, CT: Yale University Press, 1982), pp. 34–35n, emphasis added).

16. Those analysts who argue that the simple existence of political organizations disproves Olson's theory attack what has come to be known as the "strong" free-rider hypothesis—the idea that no collective action can be produced without coercion or substantial selective incentives. The "weak" free-rider hypothesis predicts that while many kinds of groups may form, those forming without coercion or selective incentives will be very small (relative to the size of their potential memberships) while those organizations fortunate enough to have access to some method of coercion will succeed in getting most or nearly all of those for whom they act to join the collective effort. See Gerald Marwell and Ruth E. Ames, "Experiments on the Provision of Public Goods I: Resources, Interest, Group Size, and the Free-Rider Problem," *American Journal of Sociology* 84 (1979): 1335–60. In other words, the "weak" free-rider hypothesis suggests that the impact of free riding is revealed by comparing the *ratio* of actual contributors to potential contributors in different collective efforts. To continue with Olson's example, this ratio would be < .01 for environmental organizations, but it would be much higher, nearly 1.0, for U.S. steel workers. The "weak" free-rider hypothesis simply explains this enormous discrepancy among groups with respect to their collective political energies, and thus, it leads to the conclusion that the political influence exerted by the array of active political organizations will not even roughly approximate the array of interests in society. The empirical evidence universally confirms this hypothesis.

17. See Walter A. Rosenbaum, "The Paradoxes of Public Participation," *Administration and Society* 8 (1976): 355–83; and D. Stephen Cupps, "Emerging Problems of Citizen Participation," *Public Administration Review* 37 (1976): 478–87.

18. Amy McKay and Susan Webb Yackee, "Interest Group Competition on Federal Agency Rules," *American Politics Research* 35 (2007): 349–50.

19. David Fontana, "Reforming the Administrative Procedure Act: Democracy Index Rulemaking," *Fordham Law Review* 74 (2005): 125.

20. Coglianese, Cary, Heather Kilmartin, and Evan Mendelson, "Transparency and Public Participation in the Rulemaking Process," Report of a Nonpartisan Presidential Task Force, University of Pennsylvania, 2008, www.hks.harvard.edu/hepg/Papers/transparencyReport.pdf.

21. See Steven J. Balla and Benjamin M. Daniels, "Information Technology and Public Agency Regulation," *Regulation and Governance* 1 (2007): 46–67; and Beth Simone Noveck, "The Electronic Revolution in Rule-Making," *Emory Law Journal* 53 (2004): 433–522.

22. Cary Coglianese, "Citizen Participation in Rulemaking: Past, Present, and Future," *Duke Law Journal* 55 (2006): 964–65.

23. *INS v. Chadha*, 462 U.S. 919, 1983. However, according to one observer's count, Congress added 200 new legislative veto provisions between *Chadha* and the end of 1990. See Louis Fisher, *Constitutional Conflicts between Congress and the President*, 3rd ed. (Lawrence, KS: University Press of Kansas, 1991), p. 150.

24. One of the strongest advocates for the legislative veto was former Congressman Elliott Levitas (D-GA). The idea that the legislative veto was simply a way to restrain over-zealous agencies was the theme of a cover story in *Industry Week* prominently featuring Levitas. See John H. Sheridan, "Can Congress Control the Regulators?" *Industry Week* 181 (March 29, 1976): 20–27.

25. *Office of Communication of United Church of Christ v. FCC*, 359 F. 2d 994 (1966), and *Citizens to Preserve Overton Park, Inc., v. Volpe*, 335 F. Supp. 873 (1971).

26. Louis Fisher, "Judicial Misjudgments about the Lawmaking Process: The Legislative Veto Case," *Public Administration Review* 45 (1985): 705–11.

27. See Landis, *The Administrative Process*, p. 77: "In English administrative law two techniques have been developed which might be adapted to our needs. Both require proposed regulations to be laid before Parliament. The first requires that a regulation becomes effective within a given period of time, unless prior thereto Parliament shall, by resolution, have disapproved it. The second provides that a regulation shall not become effective until Parliament by resolution approves it."

28. For a discussion of several important court decisions and cases surrounding these issues, see Cass R. Sunstein, "Deregulation and the Hard Look Doctrine," *Supreme Court Review* (1983): 177–213; and Richard J. Pierce, Jr., Sidney A. Shapiro, and Paul R. Verkuil, *Administrative Law and Process*, 4th ed. (New York: Foundation Press, 2004), ch. 7.

29. See Marcus Ethridge, "Minority Power and Madisonianism," *American Journal of Political Sci-*

ence 35 (1991): 335–56, for a formal analysis and a few examples.

30. Mathew McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science* 28 (1984): 165–79.

31. This author observed an instructive instance of the legislative veto at the state level in Tennessee during the 1970s. In an unusual pro-consumer move, the state's Alcoholic Beverage Commission voted to rescind its decades-long restriction on advertising the retail price of liquor. Before the rescission could go into effect, the retailers' association succeeded in getting a friendly legislative committee to use a legislative veto to overturn the agency. Similar patterns have been observed at the federal level. See Barbara H. Craig, *The Legislative Veto* (Boulder: Westview Press, 1983; Harold Bruff and Ernest Gellhorn, "Congressional Control of Administrative Regulation: A Case Study of Legislative Vetoes," *Harvard Law Review* 90 (1977): 1369–1440; John R. Bolton, *The Legislative Veto: Un-Separating the Powers* (Washington: American Enterprise Institute, 1977); and Robert S. Gilmour, "The Congressional Veto: Shifting the Balance of Administrative Control," *Journal of Policy Analysis and Management* 2 (1982): 13–25.

32. Jonathan R. Macey, "Separated Powers and Positive Political Theory—The Tug of War Over Administrative Agencies," *Georgetown Law Journal* 80 (1992): 694–97.

33. 322 U.S. 111 (1944), and 467 U.S. 837 (1984).

34. *Hearst*, p. 131.

35. *Chevron*, pp. 842–43.

36. See, for example, *Citizens to Preserve Overton Park, Inc., v. Volpe*, 335 F. Supp. 873 (1971); *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Insurance Company, et al.*, 463 U.S. 29 (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991); and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

37. Christopher Edley, *Administrative Law* (New Haven, CT: Yale University Press, 1990).

38. Cass Sunstein, "Factions, Self-Interest, and the APA: Four Lessons since 1946," *Virginia Law Review* 62 (1986): 271–96.

39. For an interesting formal analysis of the tendency for gridlock created by the institutional arrangement set forth in the Constitution, see Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998).

40. This definition is adapted from Geoffrey Brennan and James M. Buchanan, *The Reason of Rules* (Cambridge, UK: Cambridge University Press, 1985).

41. Jonathan R. Macey, "Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model," *Columbia Law Review* 86 (1986): 249–50.

42. Frank H. Easterbrook. "Foreword: The Court and the Economic System," *Harvard Law Review* 98 (1984): 4–60.

43. Kay Lehman Schlozman and John T. Tierney, *Organized Interests and American Democracy* (New York: Harper and Row, 1986), p. 317.

44. John T. Tierney, "Organized Interests and the Nation's Capitol," in *The Politics of Interests*, ed. Mark P. Petracca (Boulder: Westview Press, 1992), p. 217.

45. James M. Buchanan, *The Economics and the Ethics of Constitutional Order* (Ann Arbor: University of Michigan Press, 1991), pp. 127–28.

46. Ibid., p. 56. Also see Buchanan, "The Constitution of Economic Policy," *American Economic Review* 77 (1987): 243–50.

47. Of course, when the government enacts such policies, driven perhaps by ideological or partisanship reasons (as in the case of the National Industrial Recovery Act in the 1930s), such interests would be expected to demand their cartelizing restrictions anyway: other industries would cartelize whatever the choice of an individual economic interest.

48. Administrative rulemaking can be very slow, sometimes much slower than congressional policymaking, but administrative agencies can usually be much more efficient in making specific policy changes than the Madisonian lawmaking system can be.

49. Jonathan R. Macey, "Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model," *Columbia Law Review* 86 (1986): 246–67.

50. An important theoretical work on the social costs of monopoly amplifies the point. Hillman and Katz (1984) demonstrated that rent seekers will spend resources in rent seeking up to the amount of the value of the rent sought only when they are risk-neutral. See Arye L. Hillman and Eliakim Katz, "Risk-Averse Rent-Seekers and

the Social Cost of Monopoly Power," *Economic Journal* 94 (1984): 104–10. If they are risk averse, rent seekers spend less on acquiring rents than is suggested by the most pessimistic predictions in the literature. See Keith Cowling and Dennis C. Mueller, "The Social Costs of Monopoly Power," *Economic Journal* 88 (1978): 727–48, for a particularly stark estimate. While the degree of a given political actor's risk averseness is a function of his or her preferences and interests, a constitutional arrangement makes it more difficult for political actors to estimate the probability of success. Expending scarce resources on rent seeking becomes a riskier investment strategy as institutional design decreases certainty regarding the net profitability of rent-seeking efforts. Investment in productive activity becomes correspondingly more valuable.

51. Daniel Sutter, "Durable Constitutional Rules and Rent-Seeking," *Public Finance Review* 31 (2003): 425.

52. Two classic works on "capture" are Marver Bernstein, *Regulating Business by Independent Commission* (Princeton, NJ: Princeton University Press, 1955), and J. Leiper Freeman, *The Political Process*, rev. ed. (New York: Random House, 1965). The term "issue networks" was coined by Hugh Heclo to indicate the more fluid, open, but still patterned relationships between interest groups and governmental institutions (see Heclo, "Issue Networks and the Executive Establishment," in *The New American Political System*, ed. Anthony King (Washington: American Enterprise Institute, 1978): 87–124.

53. Lance E. Davis and Douglass C. North, *Institutional Change and American Economic Growth* (New York: Cambridge University Press, 1971), p. 260.

54. Ibid., p. 30.

55. Robert E. McCormick and Robert D. Tollison, *Politicians, Legislation, and the Economy* (Boston: Martinus Nijhoff, 1981), p. 127.

56. Jack L. Walker Jr., *Mobilizing Interest Groups in America* (Ann Arbor, MI: University of Michigan Press, 1991), pp. 127–28.

57. In an interesting study of the differences among electoral systems, two economists concluded that rent seeking is most prevalent when the institutional arrangement makes it difficult for voters to determine which elected leaders are to blame for wasteful actions. See Torsten Persson and Guido Tabellini, "Constitutions and Economic Policy," *Journal of Economic Perspectives* 18 (2004): 75–98.

58. One legal analyst makes the point this way: "by simultaneously dividing power among the three branches and institutionalizing methods that allow each branch to check the others, the Constitution reduces the likelihood that one faction or interest group that has managed to obtain control of one branch will be able to implement its agenda in contravention of the wisdom of the public." See Martin H. Redish, *The Constitution as Political Structure* (New York: Oxford University Press, 1995), p. 4. Thus, the Constitutional Principle achieves broadened involvement not by energizing masses of citizens into a social movement, but by denying any one part of the institutional system exclusive control over decisionmaking. This produces a genuinely broader involvement than requirements for public hearings when a unicameral agency makes rules.

59. Olson, *The Rise and Decline of Nations*, pp. 174–75, emphasis added.

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