POSITIVE THEORY AS NORMATIVE CRITIQUE

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I. INTRODUCTION

Positive theory—the application of economic methodology to political institutions—is a burgeoning area of political science. Positive political theory ("PPT") may tell us important things about how political institutions actually work.¹ But does PPT tell us how they should work? Does positive theory carry any normative force?

At first blush, PPT does seem to have an implicit normative message, and a nasty one at that. One branch of PPT, interest group theory, seems to say that democracy is little more than a facade for exploitation of the public by special interests. The other branch of PPT, social choice theory, seems to say that majority rule is incapable of producing coherent results of any kind. For those who care about democracy—and for those who think the legal system should be founded on respect for democracy—these are bitter pills indeed.

A great deal has been written in response to these concerns (some of it by me).² Nevertheless, the responses to date seem somewhat unsatisfying. None of the responses go to the heart of the matter. Instead, they attempt to smother the basic dilemma in various empirical reservations, theoretical exceptions, and normative complications. Although they are not unsuccessful on their own terms, they leave one with a feeling that something basic has been missed.

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¹ Part II of this Article provides an introduction to some basic themes of PPT. For general treatments of PPT, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); PETER ORDESHOOK, GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION (1986); Daniel B. Rodriguez, The Positive Political Dimensions of Regulatory Reform, 72 WASH. U. L.Q. 1 (1994).

This Article attempts to supply another perspective on the dilemma. My thesis, briefly, is that both interest group theory and Arrow's Theorem have been misunderstood as institution-based. In important ways, however, both treat institutions as black boxes. Both tell us potentially important things about how the inputs (individual preferences) relate to the outputs (collective decisions or societal preferences). Because of the black box nature of the models, they are not specifically addressed to democracies as opposed to other forms of government, or to legislatures as opposed to other decisionmakers. Instead, they give us insight into some very general issues in designing human institutions. In one sense, this interpretation of these models diminishes their normative bite, in that they are no longer seen as providing a critique of a specific institutional arrangement. In another sense, understanding the greater generality of these results makes them all the more significant.

Part II of this Article provides background for the later discussion. It begins by introducing PPT and the legal response to PPT. It then sketches interest group theory and Arrow's Theorem. Part III considers the normative implications of interest group theory, while Part IV undertakes the same task for Arrow's Theorem. Part V closes with some general thoughts about the normative implications of PPT, and particularly how it may undermine pluralism as a normative theory. The focus throughout is on the core features of PPT rather than on the considerable body of literature that has grown up around them.

II. POSITIVE POLITICAL THEORY IN A NUTSHELL

For some readers, PPT is familiar ground, while for others, it is unexplored territory. This section is intended primarily for the latter group, though nonspecialists with some knowledge of PPT may also find some useful information.

A. WHAT IS PPT, AND WHY DOES IT MATTER?

Several years ago, Phil Frickey and I conducted a survey of PPT writers to determine just how they interpreted the term "positive political theory." It turned out that there was something less than a

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3. Arrow's Theorem is at the heart of social choice theory. For an explanation of the theorem, see part II.C, infra.
complete consensus; indeed, several quite divergent views were ex-
tant. This semantic issue is not very significant for present purposes. For the outsider, what is most striking about PPT is its similarity to economics. As in economics, the basic assumption is that individuals act rationally and strategically, selecting the most effective means to achieve their goals. Also as in economics, the project of working out the consequences of this basic assumption lends itself to a high degree of mathematical rigor, and to a corresponding degree of technical difficulty.

The initial response by many legal scholars to PPT was exempli-

fied by Judge Abner Mikva, then one of the nation’s leading appellate judges and now White House Counsel. He had been invited to write the introduction to a law review symposium on what is now called PPT, an invitation that turned out to be somewhat ironic in light of his attitude toward the subject. Essentially, Judge Mikva seemed to be unable to find anything of value in the entire literature. Part of the problem was one of intellectual style: Like many lawyers, Judge Mikva seemed to have a visceral distrust for mathematics. More funda-

damentally, however, he was repelled by what he saw as the cynicism of PPT. He described his view, in contrast with PPT, as a belief “that politics is on the square, that majorities in effect make policy in this country, and that out of the clash of partisan debate and frequent elections ‘good’ public policy decisions emerge.” Even five terms in the notoriously venal Illinois legislature, he added, had not prepared him for PPT’s squalid vision of politics.

Although Judge Mikva’s views were in some respects a caricature of PPT, it is true that many scholars have found in PPT grounds for distrust of democratic institutions. The same symposium contained an article by the late William Riker, one of the founders of PPT, and Barry Weingast, a leading contemporary theorist. Their observations about democratic politics were not inspiring, to say the least. The legis-

lator, they said, is “a placeholder opportunistically building up an ad hoc majority for the next election.” Moreover, they added, there is a

7. Id. at 176-77.
8. Id. at 167.
“fundamental and inescapable arbitrariness to majority rule.” Rather than reflecting anything that can reasonably be called the will of the people, legislative decisions are mostly the products of the agenda set by their leaders, who can manipulate outcomes to suit their wishes.

Although Riker and Weingast may not have intended their remarks to cast doubt on democracy as a form of government, their remarks were hardly calculated to inspire deference toward democratic institutions. Although the terminology and methods of PPT are far removed from law, its conclusions may have great relevance for lawyers and judges. Much of public law revolves around the extent to which judges should defer to other institutions, most notably legislatures, but also executive agencies. The strongest arguments for deference are based on the simple observation that both the executive and legislative branches are more democratic than the judiciary. To the extent that democracy loses credibility as a method for making decisions, the argument for judicial deference also loses force.

As we will see, the “democracy bashing” overtones of PPT have found a receptive audience among some judges and legal scholars, who have argued for important changes in the direction of public law based on their reading of PPT. More radically, some scholars, such as Richard Epstein, have sought to dismantle the New Deal on the basis of their understanding of PPT. In turn, these proposals have given rise to what is now a substantial body of literature critical of PPT, as well as works attempting to mediate between PPT and its critics.

The subject of this Article is this broad confrontation between PPT and traditional democratic creeds. Before exploring that question in depth, however, a brief introduction to some of the major themes of PPT is in order. We will begin with the economic theory of legislation developed primarily at the University of Chicago, and then

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10. Id. at 374.
11. Id. at 386, 395.
13. See infra text accompanying notes 43-44.
14. See Richard Epstein, Takings: Private Property and the Power of Eminent Domain (1985). I would like to take this occasion to note that Professor Epstein's provocative work was initially responsible for sparking my own interest in PPT. I am sure that confrontations with his ideas have had similarly fruitful effects on others who, like myself, do not share them.
turn to the social choice literature growing out of the seminal work of Kenneth Arrow.

B. Interest Group Theory

Interest group theory is really a special case of a general economic perspective on the dynamics of collective action. The basic insight is that someone who contributes to a group effort helps everyone in the group, but only receives a small direct benefit from his or her own action. For example, someone who voluntarily installs pollution controls contributes to clean air for everyone, which may well be worth far more than the cost of the equipment. But one's own personal action may have only a negligible effect in cleaning up the air for any one individual—including oneself. It is only cumulatively that the benefits are significant. An individual would benefit, of course, if everyone else in the group chose to install pollution control equipment, but the most rational strategy is to free ride, allowing others to make the investment while the individual receives the benefits of their efforts. Hence, a person who is a rational maximizer of his or her own utility will not install the equipment. Assuming that everyone else in the group is also economically rational, they will all make the same decision, so the investments will not be made even if there would be a large collective net benefit to the group. Thus, the potential for free riding may fatally undermine collective action.

The central insight of the economic theory of legislation is that political participation is much like pollution control. It is costly (if only in terms of time and effort), and the vast share of the benefits flows to the public at large rather than to any individual citizen. Hence, individual citizens will underinvest in political participation, just as they will underinvest in catalytic converters.

As Ronald Coase pointed out, it is theoretically possible to avoid this dilemma of underinvestment if the individuals involved can feasibly bargain with each other.\(^{15}\) In the pollution example, this is impossible. There are thousands or millions of car owners, so that contacting each of them would be expensive, let alone persuading each one to join a pact to use pollution controls. The situation would be much different if there were only a handful of polluters, each with a large potential benefit from pollution control. Such a small group would obviously be far easier to organize effectively. The result is a

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built-in skew in group dynamics: Small, concentrated groups tend to dominate large, diffuse groups, all other things being equal, because of their inherent organizational advantages. In the political sphere, this means that it is relatively hard to organize taxpayers as a group, but easier to organize firms in a particular industry.

As Dan Rodriguez points out in a useful, recent survey of PPT, interest groups have a large collection of tools they can use to influence governmental actions. They may be able to capture administrative agencies through control over the selection of agency staff or over the flow of information to the agency. Interest groups may influence not only the substance of legislation, but also the procedural mechanisms used for enforcement, which may be designed to favor their interests. More crudely: "They may deliver votes, campaign contributions, or outright bribes. They may extract rents from legislators who would receive value from having information which the groups exclusively possess. Additionally, they may threaten to support a legislator's opponent in the next election." All things being equal, small concentrated groups will better be able to mobilize the resources to exploit these tools.

The credit for applying this insight to politics goes to Mancur Olson. He observed that government action generally benefits large groups. For example, everyone presumably benefits from improved national security. But any single person's efforts to protect national security normally can have only an infinitesimal effect. Hence, a rational person will try to free ride on the efforts of others, contributing nothing to the national defense while benefiting from other people's actions. This free rider problem suggests that it should be nearly impossible to organize large groups of individuals to seek broadly dispersed public goods. Instead, political activity should be dominated

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16. As Edward Rubin explains, PPT suggests that legislators can create a facade of responding to popular concerns while still favoring special interests:
Legislators allow the general public its apparent triumphs such as pro-environmental and pro-consumer legislation, but since they respond ultimately to the electoral power—special interest groups—they eviscerate this legislation at the implementation stage. By issuing vague delegations to administrative agencies, and then influencing those agencies through general oversight, casework, and similar devices, the legislators can quietly satisfy narrow economic interests while appearing to act in favor of the general public.

17. Rodriguez, supra note 1, at 29 (footnotes omitted).

by small groups of individuals seeking to benefit themselves, usually at the public expense. The easiest group to organize would presumably consist of a few individuals or firms seeking government benefits for themselves, financed by the general public. Thus, if Olson is correct, politics should be dominated by “rent-seeking” special interests.

Dairy subsidies provide a classic example (one not popular in my class of midwestern law students). The government pays a substantial amount of money every year to keep economically inefficient midwestern dairy farmers in business. The consumer pays for this program in the form of higher milk prices (some of which are absorbed by the taxpayers via food stamp and school lunch programs). Indeed, many citizens suffer additional costs because the additional herds supported by the program are also environmentally harmful. There seems to be little question that the national benefits of this program are smaller than the costly distortions of milk production and consumption. Yet the average consumer pays only a small additional amount for milk, and has no incentive to become informed about the program, let alone to lobby against it. Dairy farmers understandably care passionately about the program and are highly active politically, with a potent political action committee.


24. See West Lynn Creamery, 114 S. Ct. at 2215 n.18 (observing that the two cent per quart cost of dairy income support through over-order pricing under state law was unlikely to stir substantial consumer opposition); cf. Scotti Kilman, Why the Price of Milk Depends on the Distance From Eau Claire, Wisconsin, WALL ST. J., May 20, 1991, at A1 (“Milk is sort of like the international gold system . . . . Only a handful of people claim to understand it, and most of them are lying.”).
Tariffs provide another classic example. On balance, according to economic theory, free trade is more beneficial to a nation than protection, even if other countries follow protectionist policies. But the beneficiaries of free trade are consumers, a diffuse group with small individual stakes. The beneficiaries of protectionism are concentrated industries and their (often unionized) employees, who wield considerable political clout. The result is a political tendency toward protectionism, despite its economic flaws.25

The logic of interest group theory seems compelling, but its empirical validity is somewhat unclear. As the protectionism example shows, the interest group story is at least incomplete. Despite the political pressures toward protectionism, which have indeed triumphed at times, the current tendency is to head in the other direction. A striking illustration is the recent success of the Uruguay Round in liberalizing trade and creating the World Trade Organization.26 On the other hand, as the dairy example shows—and no doubt other examples will come to the reader’s mind—there does seem to be something to the interest group theory. After a fairly complete survey of the empirical literature several years ago, Phil Frickey and I concluded:

Our best picture of the political process, then, is a mixed model in which constituent interest, special interest groups, and ideology all help determine legislative conduct. Even in purely economic matters, ideology plays some role, while economics may have some impact even on social issues.... Although a few writers have offered some suggestions about how the relative influence of interest groups may vary, the empirical evidence so far is spotty at best.27

A more recent assessment of the empirical evidence was even less favorable regarding the ability of interest group theory to account for many aspects of politics, most notably individual voting behavior.28

Nevertheless, it is difficult to believe that the interest group theory is completely fallacious. All other things being equal, organizing a group would clearly seem to become more difficult the larger the group and the smaller the individual stakes relative to the marginal cost of group participation. Thus, although other factors undoubtedly

26. Id. at 1429-30.
27. FABER & FRICKEY, supra note 1, at 33.
play a role in politics, the interest group theory seems likely to have some validity.\textsuperscript{29}

Perhaps to a somewhat greater extent than the empirical evidence would warrant, this jaundiced view of politics has garnered some enthusiastic followers. For example, a classic article by William Landes and Richard Posner propounds the theory that legislation is supplied to groups that outbid rival seekers of favorable legislation. Payments, in the form of campaign contributions or actual bribes, determine the decisions of utility-maximizing legislators in their model. Not surprisingly, in their view, any correspondence between the outcome and anything that might be called the public interest is purely coincidental.\textsuperscript{30}

In Part III, I will explore the debate over the legal implications of this view of politics. Before doing so, however, we need to consider another aspect of PPT derived from Arrow’s Theorem.

\section*{C. Social Choice Theory}

If Mancur Olson is the godfather of interest group theory, Kenneth Arrow is undoubtedly the paterfamilias of social choice theory. As explained in more detail below, Arrow proved the existence of unavoidable flaws in any method of combining individual preference rankings. In particular, no method of voting can satisfy certain seemingly modest and plausible requirements. Arrow’s Theorem is the foundation for what is now a huge body of literature on mechanisms of social choice. For present purposes, however, a relatively superficial introduction to the field will suffice.

Discussion of Arrow’s Theorem in the public choice literature tends either to begin directly with his postulates and results, or to begin with an illustration of some problematic voting situations. It may be helpful first, however, to understand how Arrow came to address the social choice problem. His primary concern was not with voting, but with the seemingly quite different question of how to assess the level of social welfare.\textsuperscript{31} Economists were traditionally utilitarians. Hence, their approach to social welfare was simply to add up the level

\textsuperscript{29} Even Green and Shapiro concede that Olson’s theory “clearly has the potential to explain certain forms of behavior.” \textit{Id.} at 97.


of welfare (or utility) of each individual in society. Doing so obviously requires that each person's welfare be assigned a numerical level, so that we can say, for example, that Sally's level of personal welfare is twice as high as Tom's. By the middle of the twentieth century, however, economists were increasingly skeptical about the feasibility of assigning such a numerical level. Rather than attaching a number to an individual's level of satisfaction in a particular situation (a "cardinal" approach), they found that economic theory could be based on information ranking an individual's preferences as to various situations. This "ordinal" approach requires no effort to determine the degree of relative satisfaction, because we need only know the order rather than the magnitude of preferences. While the ordinal approach works quite well for almost all purposes in economic theory, it eliminates the utilitarian approach to social welfare, because we no longer have any numerical index of individual welfare to add up.

The question Arrow raised was essentially whether an ordinal approach to assessing social welfare could be constructed. That is, given only individual rankings of outcomes, is it possible to derive a ranking of those outcomes that is best for society as a whole? Arrow placed very modest restrictions on any technique used for ranking social welfare. Essentially, beyond some technical requirements necessary to set up the problem, he added only two requirements for a technique to qualify as a social welfare measure. First, the technique had to be nondictatorial. It would obviously be easy to construct a societal ranking by simply picking one individual as dictator and using that person's ranking as the measure for social welfare. Whatever one might think of this as a form of government, it clearly does not qualify as a measure of social welfare. Hence, Arrow required that no one person's preferences be decisive. This is a very minimal form of egalitarianism indeed. But this requirement is not enough to connect the resulting social preference ranking with social welfare. To provide such a link, Arrow also required that the technique satisfy the Pareto standard. That is, if at least one person in society prefers outcome A over outcome B, and no one else has the opposite preference, then society as a whole prefers outcome A. This too is a very weak requirement. For example, it says nothing about what happens when 240 million people prefer outcome A and only one person slightly prefers B.

Arrow's specifications amount to the barest possible requirements for an ordinal social welfare function. Quite remarkably—and
well worth a Nobel Prize in itself—he proved that even these minimal qualifications were too much. Combined with the technical requirements needed to define an ordinal ranking technique, the qualifications were impossible to meet. Or, as one scholar put it, "social choice seems destined to be inconsistent or unrepresentative, even in the most liberal and democratic of communities."  

More precisely, Arrow proved that no method of combining individual preferences can satisfy the following requirements:

Minimum rationality. If society prefers outcome A to outcome B, and outcome B to outcome C, then society prefers A over C.

Independence of irrelevant alternatives. If C is not on the agenda, whether A is preferred to B should not depend on how either choice would compare with C. (This is really a disguised guarantee of ordinalism.)

Universal applicability. The method has to work for any possible combination of preferences, not just a particular situation.

Nondictatorship. Society's preferences are not simply dictated by one person's desires.

The Pareto standard. If one person prefers A over B and no one else cares, then society prefers A over B.

One of the remarkable features of Arrow's proof is the way it connects the problem of social welfare functions with the seemingly quite different problem of voting theory. The easiest way to see the connection is to consider the following example. Imagine three Minnesota couples, the Johnsons, the Olsons, and the Petersons, with the following preferences about how they should spend the evening as a group:

1. The Johnsons are Philistines: They prefer hockey, then square dancing, and least of all opera.

2. The Olsons are musical: They prefer square dancing, then opera, and then hockey.

34. For a fuller discussion of Arrow's Theorem, see Mueller, supra note 5, at 384-99. For a survey of later developments in social choice theory by a leading participant, see Amartya Sen, Rationality and Social Choice, 85 Am. Econ. Rev. 1 (1995). Note Sen's discussion of the possibility of modifying ordinalism by allowing ordinal interpersonal comparisons, which leads to a Rawlsian approach to social choice. In this Article, I will use "ordinalism" to refer to the conventional approach used by economists, which precludes such interpersonal comparisons.
3. The Petersons love drama: They prefer opera, then hockey (just as violent though less poetic), and then square dancing. In this situation, as Condorcet pointed out in the eighteenth century (probably with a different example), majority voting is indeterminate. Hockey will beat square dancing by a 2 to 1 vote (Johnsons and Peterssons versus Olsons); square dancing will beat opera (Johnsons and Olsons versus Petersons); and—this is the critical part—opera in turn will beat hockey (Olsons and Peterssons versus Johnsons). In short, the outcomes cycle under majority voting; any decision can always be overturned in favor of another. Arrow’s Theorem can be read as showing that there is essentially no escape from this indeterminacy except dictatorship.

Although the Condorcet voting paradox seems far removed from the problem of defining a social welfare function, the connection is actually obvious (once someone like Arrow points it out, of course!). Imagine the three couples as a small society and ask how we would determine their collective welfare with respect to the evening’s entertainment. Ordinarily, we would try to determine the strengths of their preferences, but the decision to take an ordinal approach to social welfare prevents us from doing so. And yet, without some measure of the intensity of preferences, the situation is completely symmetrical. Each outcome is in first place once, second place once, and third place once. The only difference among outcomes is which couple has which preference, and this seems irrelevant in measuring social welfare, because everyone’s welfare should count equally. Hence, no acceptable method of collective choice exists.35

However important this result might be to welfare economists, its practical significance for political scientists is less obvious. True, Arrow did confirm that majority voting has inherent limits as a method for making social decisions. These limits have been known since Condorcet, and no one ever seemed to get very excited. Indeed, Arrow’s result might well have remained something of a curiosity for political scientists. There is nothing about the proof that tells us how often voting will lead to cycles. Conceivably, cycles require an exactly even

35. To this extent, understanding Arrow’s Theorem is quite straightforward. What makes the actual proof tricky is that Arrow assumed only that no one couple could be dictator, but he did not assume away the possibility that a voting procedure might treat them differently in some other respect. The key to the proof is showing that no middle ground is possible—unless the couples are all treated identically (which prevents any determinate outcome), one of them must act as dictator.
split among three options—a situation not likely to arise very often in
a large legislature, let alone in the country as a whole.

Unfortunately, later work showed that cycling is ubiquitous. Given more than two choices, unless special assumptions are made about the distribution of preferences, majority voting cycles tend to include the entire universe of possible choices. As Dan Rodriguez puts it, the dolorous conclusion seems to be that "in all forms of decisionmaking in which votes are aggregated, including legislatures, outcomes will be arbitrary and hence the process chaotic."\footnote{Rodriguez, supra note 1, at 57.}

In practice, cycling is not a conspicuous feature of legislatures. Much of the later work in PPT has been devoted to explaining the apparent stability of legislative decisionmaking.\footnote{Rodriguez, supra note 1, at 60-69 (surveying the PPT literature).} While this work is extremely important, it cannot change the inexorable command of Arrow's Theorem. Whatever institutions and strategies are deployed within the legislature, in the absence of dictatorship, cycling must remain as an inherent possibility. This seems to make it questionable to say that any particular outcome reflects the preferences of the legislators. Given some other agenda and different procedural rules, legislators could have been led to adopt any other outcome instead. There is an inescapable chaos to collective decisionmaking—\textit{vox populi}, it would seem, cannot carry a tune.

III. DEMOCRACY DISTRUSTED: THE RENT-SEEKING CRITIQUE

With this background in mind, we turn to the main focus of the Article, to evaluate PPT as a critique of democracy. We begin with the interest group model and its seemingly pessimistic view of democratic politics.

A. LEGAL IMPLICATIONS OF THE RENT-SEEKING MODEL

The degree of the challenge posed by interest group theory to democratic legitimacy can best be seen in the dismayed comments of those who reject the theory. Ed Rubin views interest group theory as "more pessimistic" than Arrow's Theorem.\footnote{Rubin, supra note 16, at 9-10.} "Simply put," he explains, "the theory holds that small bodies, groups of powerful or
wealthy people, organized around some common interest, will exercise disproportionate influence on the political process.\textsuperscript{39} Einer Elhauge, who opposes arguments to expand judicial review in light of interest group theory, interprets the theory to hold that "fundamental distortions in the political process may lead to systematic divergences from the public interest."\textsuperscript{40} The political process, in short, is inherently rigged in favor of special interests. Hence, legislation can enjoy no presumption of alignment with the public interest. Rather, as Bill Eskridge has explained, interest group theory indicates that "the legislature will produce too few laws that serve truly public ends, and too many laws that serve private ends."\textsuperscript{41} "This[,]" he adds, "is a Madisonian nightmare."\textsuperscript{42}

As Elhauge's survey of the literature shows, this model of politics has led a wide range of scholars to propose substantial revisions in legal doctrine:

Not surprisingly, the critique of the democratic political system offered by interest group theory has been used by many legal scholars to argue for more intrusive judicial review. One camp of prominent scholars employs interest group theory to justify heightened constitutional scrutiny. Erwin Chemerinsky argues that the susceptibility of the politically accountable branches to interest group pressure undermines the case for deferential constitutional review. Richard Epstein advocates far-reaching substantive judicial review under the Takings and Contract Clauses to curb rent seeking. Jerry Mashaw uses interest group theory to support his argument that the Supreme Court should invalidate some "private-regarding" legislation. Martin Shapiro argues that, at least in the First Amendment area, the Court should not defer to a political process driven by interest group politics but rather should advance the cause of the groups the political process underrepresents. Bernard Siegan believes that interest group theory helps justify a return to \textit{Lochner}-era substantive due process review of economic regulation. Finally, Cass Sunstein argues that more rigorous constitutional scrutiny is needed to invalidate the legislation that rewards the raw political power of interest groups.\textsuperscript{43}

\textsuperscript{39} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Elhauge, \textit{supra} note 40, at 44 (footnotes omitted).
As Elhauge points out, such proposals for legal change are not limited to constitutional law. For example, John Wiley, Frank Easterbrook, and others argue for revisions in the "state action" defense in antitrust law. Frank Easterbrook, Jonathan Macey, Cass Sunstein, and William Eskridge have all argued for changes in judicial techniques of statutory interpretation on the same basis.44

B. REPLIES TO INTEREST GROUP THEORY

One line of response to interest group theory is empirical. This response is pursued in my own work with Phil Frickey45 and more recently by others.46 Eschewing this line of argument, Einer Elhauge has argued that even if the interest group theory is true, it would not warrant more intrusive judicial review of legislation. He makes two basic claims.

The first claim is that interest group theory has no normative bite. Unless we have some independent substantive basis for objecting to a particular statute, he says, knowledge that it was passed at the behest of a concentrated group provides no independent basis for objection.47 This would be a valid argument against a rule that invalidated statutes purely on the basis of their special interest origins. Elhauge's argument falls short, however, of demonstrating that special interest origin should play no part in the legal analysis whatsoever. Judicial review is not normally so categorical as Elhauge assumes. It usually proceeds through "levels of scrutiny," in which a greater burden of justification is placed on certain statutes than on others. It seems entirely reasonable to suggest that, in determining whether a statute meets a certain level of scrutiny in setting this burden of justification, the special interest aspects of a statute should be taken into account.48 Determining whether the burden has been met involves both factual inquiries and substantive ones, such as what counts as a valid public purpose or whether the statute has a "rational basis" beyond rent-

44. Id. at 45-46.
45. See Farber & Frickey, supra note 1, at 28-33.
46. For a survey of recent research, see Green & Shapiro, supra note 28, at 72-97.
47. Elhauge, supra note 40, at 47-49, 59.
48. Presumably, deference is based on the perception that the voters or their representatives have determined that a statute is in the public interest. Because of their built-in political advantage, special interests may be able to obtain favorable legislation without such a demonstration of the public interest. Hence, the presumption that a statute is based on a perceived public interest is weaker for "special interest" laws.
seeking. Interest group theory cannot address those issues, but it may be relevant in establishing the burden of proof.

Elhauge's other major claim is that the judicial system is equally prone to interest group influence. Hence, he argues, transferring major social decisions to judges will do nothing to cure the problem of interest group influence.\footnote{Elhauge, \textit{supra} note 40, at 66-86. Elhauge is clearly correct in thinking that these are the right issues to raise. It is less clear that his conclusions are empirically correct. Because no one has any real empirical data to bring to bear, we must all rely on our "fireside inductions" based on largely anecdotal evidence. That evidence is mixed, however, because courts and legislatures have both at various times been captured by special interests and at other times championed the public interest instead.} He rejects arguments that the litigation process should be favored because it is better insulated from politics, because the class action mechanism helps overcome free rider problems, or because the adversary process helps to ensure the representation of opposing viewpoints.

Elhauge's effort at comparative institutional analysis clearly raises the right kinds of questions about the interest group theory's legal implications. His analysis suffers, however, from being too narrowly directed at the judiciary as an institution. The next subsection suggests that his point can actually be generalized, so that it applies equally to courts, legislators, agencies, popular referenda, and constitutional conventions, as well as to nondemocratic systems of government. The real question is not whether courts offer an escape from interest group politics, but whether any political institution can do so.

C. RENT-SEEKING AND THE BLACK BOX OF GOVERNMENT

A useful starting point for this broader analysis is provided by Dan Rodríguez' observation about interest group theory:

While the interest group theory, often called the "Chicago School" theory of regulation, purports to account for both the demand and supply sides of regulatory decisionmaking, fundamentally, the theory speaks to the demand side. To be sure, the theory, taken on its own terms, explains why political decisionmakers would trade with interest groups. . . . However, the political machinery that is implemented to set the structure and rules for this political auction is opaque in the Chicago School account. In interest group theories, public policy is an output in a process that is driven by the mechanisms of interest group control and influence.\footnote{Rodríguez, \textit{supra} note 1, at 29-30 (footnotes omitted).}
Rodriguez' point seems well taken. There is nothing apparent about legislators as opposed to other political actors that would seem to make them inherently more prone to interest group influence. Indeed, so far as I am aware, there is no reason to believe that government officials in nondemocratic societies are immune to interest group influence, and the prevalence of corruption in many of those countries clearly suggests the contrary.

With these observations in mind, it may be useful again to consider the logic of interest group theory. The basic finding relates to the ability of groups to mobilize resources to influence government action; specifically, the finding is that concentrated groups with high individual stakes will be more successful in mobilizing resources than large groups with equal collective interests. Assessing the impact of this differential on political outputs does not require any knowledge of the internal workings of a government institution, which we may consider to be a "black box" for purposes of the analysis. Instead, we need only some information about the relationship between the inputs and outputs of the black box. For this imbalance in resource mobilization to result in a skew in public policy, two conditions must be met:

Resource responsiveness. All things being equal, the institution must have a tendency to favor groups that can mobilize the greatest political resources.

Nonpopulism. The institution must not have a built-in tendency to favor large diffuse groups over smaller groups with more intense interests (or at least, this tendency must be outweighed by resource responsiveness).

If these conditions are met, the conclusions of interest group theory will follow, whether the institution in question is the United States Congress, a federal court, or the Holy Roman Empire.

What makes comparative institution analysis complex is that almost any kind of institution can exhibit these traits, or fail to exhibit them, under some set of circumstances. Legislatures are clearly resource responsive, but politics also has an ideological dimension, and populist impulses may figure heavily in legislatures at some points in time. Similarly, courts have sometimes seemed captive to special interests (such as railroads in the nineteenth century), and at other times have consciously tried to champion a populist agenda (the Warren Court's antitrust and regulatory decisions). Even the experiences of authoritarian regimes have ranged from complete corruption to
claims of representing broad popular interests (and indeed, sometimes
even to implementing Chicago School economics).

Whether, on average, some particular institutional arrangement is
less likely than others to be prone to special interest group influence is
a tricky empirical judgment. In particular historical circumstances,
more intrusive judicial review may be part of the solution, while at
other times it may be part of the problem. Elegant theoretical or em-
pirical conclusions about this issue are likely to be sparse. This type of
messy mixture of empirical and normative judgments is familiar fare
for lawyers, much as it may dissatisfy social scientists.

IV. DEMOCRACY DECONSTRUCTED: THE
INCOHERENCE CRITIQUE

A. The Specter of Chaos

In Part II, we considered Arrow's Theorem and its offshoots. A
number of prominent scholars have argued that Arrow's Theorem
leaves the legitimacy of democratic decisionmaking in doubt. In Lib-
eralism Against Populism, Professor William Riker argued that vot-
ing is so susceptible to cycling and strategic behavior that outcomes
cannot be meaningfully connected with the voters' values. Hence,
"the meaning of social choices is quite obscure" because those choices
may reflect either the voters' true values, the results of manipulation,
or the accidental interplay of both factors. In a thoughtful survey of
the literature, Jerry Mashaw concluded that no stable relationship be-
tween individual preferences and collective choice can exist except in
special, probably unattractive circumstances. At its most extreme,
he continued, PPT predicts that political outcomes are completely for-
tuitous. According to Mashaw, this prediction can be given a cynical
"spin" by stressing the ability of legislative players to manipulate the

51. WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN
critique of Riker's thesis, see Jules Coleman & John Ferejohn, Democracy and Social Choice, 97
ETHICS 6 (1986).

52. Riker, supra note 51, at 167. See also id. at 192 (discussing the fragility of equilibria
due to strategic voting or other alternatives). Similarly, Judge Frank Easterbrook has suggested
that although the preferences of individual legislators can be listed, because of PPT "it turns out
to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice."
Hence, even with complete knowledge of the preferences of the legislators, a court could not say
how the body would have addressed an issue it did not actually face, such as a gap or ambiguity

53. Jerry L. Mashaw, The Economics of Politics and the Understanding of Public Law, 65
process. Alternatively, he added, it can be given a more agnostic interpretation: "[C]ollective decisions are probably meaningless because it is impossible to be certain that they are not simply an artifact of the decision process that has been used."54

Perhaps one might optimistically characterize these conclusions à la Forrest Gump to mean only that collective choice is "like a box of chocolates."55 On the whole, however, it is not a picture of government that inspires much confidence in the democratic process.

There has been no dearth of suggestions about how courts should respond to this crisis of confidence. A number of writers have suggested, with varying degrees of fervor, that Arrow's Theorem ought to open the door to more extensive judicial review of legislative decisions. According to Lynn Stout, for example, Arrow's Theorem has countered the argument that judicial review of legislative judgments should be eschewed because it is antidemocratic.56 Arrow's Theorem has also served as a justification for changes in methods of judicial interpretation of statutes, generally in the direction of abandoning any effort to enforce legislative intent.57

B. DEFENDING DEMOCRACY FROM ARROW

Given Arrow's model and his assumptions, there is logically no escape from his conclusion. There are three possible responses to Arrow: to reject the model itself, to challenge one or more assumptions, or to argue that the conclusion is normatively acceptable.

Arrow's model envisions social choice as taking individual preferences as inputs and delivering a collective decision as the output. Republicans such as Cass Sunstein argue that preferences are endogenous to the political process, and become modified in the course of debate.58 Hence, for Sunstein, Arrow's model of collective choice is

54. Id.
55. FORREST GUMP (Paramount Pictures 1994) (stating "you never know what you're going to get").
irrelevant to politics. Although this is an appealing concept, and probably has some degree of truth, it seems unlikely, at least in the short run, that preferences are radically transformed in the political process. Whatever deliberation does take place seems to leave enormous room for unresolved differences in preference orderings.

A related way to limit the range of allowable preferences is to rely on judicial review as a constraint on outcomes. At the extreme, judicial review might be so severe as to leave almost no alternatives open to the legislature, thus obviating the problem. Unfortunately, we then seem to have thrown out the democratic baby along with the Arrovian bath water. Less extreme forms of judicial review seem likely to leave too much room for decisionmaking to help avoid Arrow's conclusion.

One might question whether the model's assumptions are truly applicable to the democratic process. The nondictatorship requirement seems nonnegotiable if we are to give the concept of democracy any meaning. This leaves two major assumptions available for modification: independence of irrelevant alternatives and minimum rationality.

The independence assumption seems at first blush utterly innocuous. If some alternative is not on the political agenda, why should the choice between other alternatives depend on the purely hypothetical question of how they compare with the absent alternative? In reality, however, the assumption is far from vacuous. It is essentially a guarantee of ordinalism, because it blocks any mechanism from assessing the intensity of preferences. For purposes of the theorem, a person's preference for A over B counts the same whether B is the next best choice for that person after A, or whether there are a million other alternatives between A and B.

One might contest the ordinalist assumption by arguing along with Herbert Hovenkamp that the legislative process actually does reflect the intensity of preferences. One possible mechanism for doing so is logrolling, which allows legislators to exhibit the strength of their desire for a bill in terms of the political price they are willing to pay for passage. At the electoral level, there are some interesting models in which the degree of voter support for a given candidate is reflected

POSITIVE THEORY AS NORMATIVE CRITIQUE

in a probabilistic model of voting behavior.\(^6\) Once we reject ordinalism, Arrow's Theorem no longer holds.

Cardinalism seems a more attractive approach, however, with respect to constructing a social welfare function than with respect to democratic choice. After all, economists began as utilitarians, and most people (including economists) do feel quite comfortable in making judgments about preference intensity in ordinary life. Without going into the matter in detail, it seems that the current attachment of economics to ordinalism is as much a matter of philosophical prejudice as valid social science. But cardinalism is a less attractive alternative for rescuing the political process from Arrow.\(^6\) It is true that the political system does have various mechanisms that may at least on occasion reflect preference intensities, but these mechanisms are incidental to the core structure of the system. The ultimate social technology of voting is resolutely ordinalist. It is a bit dissatisfying to rescue democracy from the charge of incoherence only to make voting a subordinate part of the decisionmaking mechanism.

The other major Arrovian assumption is minimum rationality, or to put it another way, transitivity. For a social welfare function, transitivity seems critical. It seems more than just a little bizarre to say that society is better off in state \(A\) than state \(B\), better off in \(B\) than in \(C\), but also better off in \(C\) than in \(A\). In contrast, if the electorate votes for \(A\) over \(B\), the fact that it might have voted for \(B\) over \(C\) and \(C\) over \(A\) does not necessarily prove that the \(A\) versus \(B\) vote was in some sense defective. Perhaps good arguments exist that would lead society to make each of these choices, so that the choices viewed separately could be considered rational even though there is a hypothetical cycle. In this sense, a social decision could be considered "rational" without regard to Arrow's postulates.\(^6\) The problem with this as a normative argument is that it seems to leave the majority vote with no normative status. There may be good arguments for adopting \(A\) over \(B\), but the fact that a majority happened to vote that way seems not to provide any additional grounds of legitimacy. Indeed, because we know that the majority would also have found equally good arguments for choosing \(B\) over \(C\) and \(C\) over \(A\), it is hard to see how the actual

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\(^6\) See Mueller, supra note 5, at 196-202.

\(^6\) See Sen, supra note 34, at 8-9.

\(^6\) This is the central argument of Richard H. Pildes & Elizabeth S. Anderson, Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Colum. L. Rev. 2121 (1990). As I read the argument, Pildes and Anderson reject the conception of rationality that underlies not only PPT but also modern economics.
choice of A has any particular claim to represent society's overall judgment about the contesting arguments.63

Finally, one might concede the validity of Arrow's Theorem but argue against its practical relevance.64 In many respects, it may not be very important if a political system satisfies Arrow's basic requirements provided that in various respects it delivers good government. Post-Arrow developments in PPT suggest that the political system can in fact achieve a good measure of stability and responsiveness to changes in preferences, even though it can never escape the potential for cycling. If we are willing to add some degree of republican deliberation and a modest capacity to reflect the intensity of preferences, one may very well conclude that the system is "good enough for government work." This is essentially the position Phil Frickey and I have taken in previous work.65

Pragmatically, whether a social institution satisfies norms such as transitivity is far less important than whether it produces a better society. PPT may be quite helpful in understanding how particular institutions can advance or retard this goal. Nevertheless, there is something a bit dissatisfying about all of these responses to Arrow's Theorem. The theorem itself seems to make a good point about the

63. This point may have less force in the context of judicial decisionmaking. See Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. Rev. 41, 75-81 (1994) (arguing that common law legal reasoning is based on similarity judgments, which need not be transitive).

64. Joshua Cohen has suggested an alternative approach to collective choice, in which the legislature is seen as being like a jury—that is, as making a decision about what is most likely true (that is, a decision about the social good) rather than what is most preferred. See Joshua Cohen, *An Epistemic Conception of Democracy*, 9 ETHECS 26 (1986). This is an intriguing approach, and fits nicely with the republican approach to deliberation. On the other hand, when we get down to the actual voting, we are likely to find the same kinds of cycles whether we consider that people are voting on the basis of their preferences or their assessments of social good. The cycles seem to cast doubt on the validity of the social judgment, however it is portrayed.

65. FARBER & FRICKLEY, supra note 1, at 58-59. See also Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 TEX. L. Rev. 1541 (1993). Grofman's discussion of Arrow is entitled, "If We Shoot an Arrow's Theorem into the Body Politic, Does It Actually Hit Anything?"; a subsection is entitled, "Who's Afraid of the Big Bad Cycle?" Grofman cogently concludes:

The single most important fact to understand about democratic politics is that it is "messy." It also is incomplete in that none of its answers are final, and it can be expected to be inefficient, at least as economists use that term. But none of these problems is fatal. They are part of the price we pay for living in a democracy and for being human. We ought not expand the role of judges because of alleged flaws in the way that majority rule or representative democracy functions, especially when many of those flaws are greatly exaggerated, and judicial decisionmaking has comparable problems of its own.

*Id.* at 1586 (footnotes omitted).
possibilities for collective choice. None of the responses seem to confront the issue on an equally fundamental level. For that reason, the responses assuage—but fail to extinguish—the gnawing doubts about democracy raised by Arrow's work. The next subsection explores another possible approach to the issue.

C. The Normative Impotence of Arrow's Theorem

These defenses of democracy against the supposed implications of Arrow's Theorem, including my own previous remarks on the subject, seem basically well-founded but also slightly obtuse. I would like to try, somewhat tentatively, to address the issue at a more basic level, by following up on some comments in the existing literature. It is not uncommon for discussions of Arrow's Theorem to observe in passing that the theorem applies not only to majority rule but to other human institutions such as the market, as indeed Arrow himself observed.\(^66\) Similarly, defenders of democracy against judicial dominance have pointed out that courts too are subject to Arrow's Theorem.\(^67\) In short, Arrow's Theorem is not specifically "about" majority rule, although the proof was inspired by the Condorcet paradox. This is not a novel observation (indeed, I have made it before myself\(^68\)), but what I think has been missed is just how deeply it cuts.

It seems to me that the whole idea that Arrow's Theorem provides a fundamental normative criticism of democracy may well be radically wrong—that it may be what philosophers call a category mistake, just like attributing normative consequences to the Pythagorean Theorem. Unlike the so-called Coase Theorem, which is really a heuristic observation about human conduct, Arrow's result is a true theorem, a formal result that is true in all possible worlds, and indeed in all possible institutional arrangements. In a sense, the very power of the theorem deprives it of any ability to assist us in making normative comparisons between possible worlds, since it is true in all of them.

It may help illuminate this point to consider a quite different mathematical result. With the reader's indulgence, I would like to take a few moments to explain a result from computer science. The problem is as follows: There are a number of situations in which it

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67. See FABER & Frickey, supra note 1, at 55; Stearns, supra note 57, at 1228.
68. See Farber, Plastic Trees, supra note 66, at 354. See also Bonner, supra note 33, at 71 (noting that Arrow's Theorem applies to schemes for evaluating work by students).

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would be useful to combine various lists into a master list. For example, a computer network may need to allocate time between various users. As one step in doing so, it might list the tasks in order of the time they will take to complete, the urgency of the task, or the priority level of the user. It would be useful to have an algorithm for combining these lists into a master list that would prioritize the tasks. The question of how to design such an algorithm is an interesting mathematical problem.

To formalize the problem, let us begin with a couple of definitions. Let’s say that a list is a finite ordered set of objects. A “list processor” is an algorithm whose input is a finite set of lists, all of which are the same length and contain the same objects (but possibly in different orders), and whose output is a single list containing the same objects. If the input lists have N objects, we will say that the list processor is of “order N.” Thus, a list processor of order N is a procedure that takes any arbitrary collection of lists of N objects and produces another list of those objects.

Because we want our list processor to combine lists in a sensible way for multitasking, we add three additional requirements for what we will call a “priority lister”:

Nondegeneracy. The algorithm cannot simply be designed to use one of the input lists as its output—we want to combine lists, not use one and ignore the others.

Nonperverseness. Unless an object is lower than a second object on at least one input list, it must be higher on the output list.

Rearrangement invariance. If one objects ranks higher than another in the output list, this should not be affected by rearrangements of other objects in the input lists. Otherwise, we could have bizarre situations where dropping one item to last place on all the input lists causes two other items to reverse their relative priorities on the output list.

Ideally, of course, one would prefer the priority lister to be more discriminating than this, but at least these requirements are a starting point.

The question, then, is how to design a priority lister. Sadly for computer scientists, the following result can be proved:

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69. For technical reasons, we require that there be an odd number of lists.

70. If this were a trial, there would surely be an objection of irrelevance by this point, to which I can only reply with a promise to “connect it up” shortly.
Farber's Theorem. No priority lister of order N exists for N>2.\(^71\)

This is, in my view, a result that might be of moderate interest to computer scientists. It might even surprise them, if they did not already know about it, since the idea of a priority lister seems rather modest and, one would think, easy to implement. It seems highly doubtful, however, that anyone would think that Farber's Theorem casts any doubt on the viability of democracy, theocracy, or any other form of government. It does imply that groups of human beings are just as incapable of being priority listers as are individual human beings or computers, but of course the theorem says nothing in particular about any specific human group or institutional arrangement. In short, Farber's Theorem is about as devoid of normative content as it is possible to be.

The kicker, of course, is that this is just as true of Arrow's Theorem—and for good reason, since the two theorems are identical. As many readers undoubtedly figured out for themselves, what I have self-indulgently called Farber's Theorem is simply a restatement of Arrow's Theorem, dropping the language of preferences in favor of the language of lists. The technical requirements of Arrow's Theorem are built into the definitions of lists and list processing, while nondegeneracy, nonperverseness, and rearrangement invariance are our old friends: nondictatorship, the Pareto criterion, and independence of irrelevant alternatives. Basically, both versions convey the same truth about the nonexistence of certain kinds of functions that map a collection of ordered sets to a single ordered set. In this respect, they are analogous to theorems relating to mappings from the surface of a sphere onto a plane, which preclude preserving distances, angles, and areas in the same mappings, and thereby tell us that any map of the world will include distortions. This provides no basis for rejecting any particular mapping technique.

This does not mean that Arrow's Theorem is an insignificant result. Far from it. But it is not a result about forms of government, or about social welfare for that matter. Instead, it is a result that tells us something important about how to think about these issues. That "something important" is that our normative theories had better not require either the government or our measure of social welfare to have the properties of a Farberian priority lister—for the same reason that our normative theories should not depend on the existence of

\(^{71}\) The proof is left as an exercise for the reader. Hint: See supra text accompanying note 34. For N=2, majority rule produces a priority lister.
unicorns or square circles. But the failure to qualify as a Farberian priority lister is something that all forms of government, social welfare functions, and computer programs have in common. Hence, it cannot be a basis for making invidious distinctions among them. What Arrow's insight can do is to help us clarify our thinking about these issues. To that extent, it may be viewed as being as much a contribution to political philosophy as to the empirical study of politics.

V. PLURALISM VERSUS DEMOCRACY

Thus far, this Article has been devoted to defanging PPT as a source of fundamental normative insights. This does not mean, obviously, that PPT has nothing to contribute to institutional design. To the extent PPT tells us how institutions will behave in various circumstances, we can obviously use this information, together with our own substantive norms, in deciding how to design those institutions. But this analysis will take place on the micro-level, linked to the details of various PPT models, their empirical soundness, and their specific behavioral predictions. This kind of work is likely to prove highly valuable, but lacking in grandeur. Has PPT nothing to tell us at a more general level about political philosophy?

In my view, PPT does have significant import for political philosophy, but the most crucial conclusion is a negative one. That is, while PPT may not provide a strong basis for constructing a political philosophy of democracy, it does provide some powerful arguments against a widely accepted normative view, democratic pluralism. In that respect, PPT advances the normative debate in a significant way.

Pluralism emerged in the 1950s as a commonly accepted vision of politics. Under this interpretation of democratic politics, legislative outcomes simply mirror the equilibrium of competing group pressures:

The legislature referees the group struggle, ratifies the victories of the successful coalitions, and records the terms of the surrenders, compromises, and conquests in the form of statutes. Every statute tends to represent compromise because the process of accommodating conflicts of group interest is one of deliberation and consent. The legislative vote on any issue tends to represent the composition of strength, i.e., the balance of power, among the contending groups

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72. For a particularly sophisticated and thoughtful recent effort, see William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law As Equilibrium, 108 HARV. L. REV. 26 (1994); id. at 29 (invoking PPT as the basis for their project).
at the moment of voting. What may be called public policy is the equilibrium reached in this struggle at any given moment, and it represents a balance which the contending factions of groups constantly strive to weight in their favor.\textsuperscript{73}

This model received important support from Robert Dahl's famous study of New Haven politics, in which he found a pluralistic dispersion of power among groups, which promoted stability and orderly change in response to the political preferences of the community.\textsuperscript{74} As Theodore Lowi explained:

Since the days of Madison the pluralist view has been that there is nothing to fear from government so long as many factions compete for its favor. Modern pluralism turned the Madisonian position from negative to positive; that is, government is good because many factions do compete for its favor.\textsuperscript{75}

My present concern is not with the descriptive accuracy of this picture but with its normative attraction.\textsuperscript{76} PPT substantially undermines the appeal of pluralism as a normative theory. To begin with, interest group theory makes the pluralist competitive struggle between groups seem less benign. If interest group theory is right, that struggle inherently favors special interests against the interests of the general public. Rather than the wise accommodation of conflicting needs envisioned by pluralism, interest group theory suggests that the dominant theme will be "belly up to the trough."\textsuperscript{77}

Arrow's Theorem may pose an even more fundamental challenge to pluralism. As a normative theory, pluralism envisions the public interest as being the sum of the vectors of the particular interests of groups within society. If we accept Arrow's ordinalist approach, however, it turns out that there is no way to add up the vectors in a coherent way—that is the fundamental import of the theorem. Thus, the idea of the public interest as simply defined by the balance between

\begin{footnotes}
\item[73.] Earl Latham, The Group Basis of Politics 35-36 (1952) (footnote omitted).
\item[75.] Theodore J. Lowi, The End of Liberalism 35 (2d ed. 1979). One suspects that, even today, this is the dominant conception of politics among most legal scholars, not to mention the general public.
\item[77.] This theme is developed with particular verve in Richard L. Doernberg & Fred S. McClesney, On the Accelerating and Decreasing Durability of Tax Reform, 71 MINN. L. REV. 913-62 (1987) (explaining seemingly public interest tax legislation as reflecting the most squalid of motives).
\end{footnotes}
group interests seems incoherent. In short, it follows from Arrow's Theorem that a pluralist definition of the public interest is impossible if we also accept ordinalism. Given the practical difficulties of measuring the intensity of individual preferences (even if we believe that intersubjective comparisons are valid), as well as the essentially ordinal character of democratic institutions, this horn of the dilemma is not easily evaded.\textsuperscript{78}

In short, to the extent that pluralism may have seemed like a promising approach to the normative problem of justifying democracy, PPT seems quite damaging to its claims. Under an ordinalist approach, pluralism gives us no normative shelter from Arrow's Theorem. Under a cardinalist approach, pluralism offers us at most a contingent linkage between pluralist politics and normatively appealing results, and interest group theory makes contingent linkage suspect. Thus, while PPT may not cast any real doubt on democratic institutions, it does cast very real doubt on one important effort to conceptualize the normative appeal of democracy. This conclusion may provide support for legal scholars who have been exploring alternatives to pluralism.\textsuperscript{79}

Superficially, at least, some basic claims of PPT seem to have dire implications for democracy as a form of government. Interest group theory implies that democracy is merely a playground for special interests, while social choice theory suggests that majority rule is essentially incoherent. In a sense, the thesis of this Article is not that these arguments are wrong but that they are miscast. Because PPT scholars are primarily interested in studying democratic institutions, their core theories are often understood as having particular relevance to those institutions. But this is incorrect. Interest group theory relies upon how an institution responds to outside pressures, rather than upon the

\textsuperscript{78} If we do try to escape from this result by embracing cardinalism, other problems emerge. Cardinalism here seems to be reduced to utilitarianism, but once we have adopted utilitarianism, pluralism seems to add little to the normative analysis. Once we adopt cardinalism, it would seem, we end up with a strong definition of the public interest, since for the utilitarian the public interest is fully definable without any reference to the political process. (I am putting off to the side the considerable philosophical dispute about the tenability of utilitarianism as a moral philosophy.) On the other hand, for the utilitarian, any connection between the public interest and the results of pluralist politics is purely contingent, and interest group theory casts considerable doubt on the linkage. In any event, we seem to have lost any possibility of defining the public interest as the sum of the vectors of group interests; the best we can hope to do is to maintain that pluralist mechanisms under some circumstances will turn out to produce the results that can be independently identified as serving the public interest.

\textsuperscript{79} Schachter, \textit{supra} note 76, carefully delineates the critiques of pluralism and the efforts to create post-pluralist theories by legal scholars.
internal workings of the institution, and there is no reason to think that democratic legislatures are unique in this respect. Arrow's Theorem is even more general, and applies to any set of institutions whatsoever, so long as the institution takes ordinal preferences as inputs and delivers a collective decision as an output.

To escape from the possibility of interest group capture, and the certainty of Arrow's Theorem, we need not redesign human institutions, but rather we would need to learn to live without institutions altogether or arrange to be governed by an infallibly benevolent dictator. This seems to be the unarticulated fantasy of some who would use PPT as an argument for radical restrictions on government. But a remark of Madison's provides the answer to these fantasies—government (and other human institutions) can be flawless only if they are run by angels, but there seems to be an intractable shortage of the necessary personnel. 80

In conclusion, the core results of PPT have important morals but not ones specific to the governmental institutions of western democracies in the late twentieth century. Instead, to the extent the theories are valid, they say something about the permanent limits on designing human institutions. They are, to that extent, a contribution to our ongoing quest to understand the human condition.

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80. As Madison said in Federalist No. 51, "But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." Daniel A. Farber & Suzanna Sherry, A History of the American Constitution 211 (1990).