

CHIEF JUSTICE REHNQUIST, INTEREST GROUP THEORY, AND THE FOUNDERS' DESIGN

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I. INTRODUCTION

To presume to criticize the work of a sitting Chief Justice of the United States Supreme Court, one needs an exceedingly powerful intellect, a great deal of chutzpah, or a rigorous analytical framework. As author of this essay on the jurisprudence of Chief Justice Rehnquist, I am happy to report that I am fully in command of at least one (and perhaps two) of these qualities. Apart from chutzpah, I plan to invoke the analytical framework of interest group theory to criticize Chief Justice Rehnquist's work.

Interest group theory is a useful lens for viewing the Chief Justice's jurisprudence for two reasons. First, and foremost, it constitutes a potent analytical framework for evaluating judicial performance by providing a comprehensive explanation of the process by which politics determines governmental outcomes. The fate of the Republic may come to depend on our collective ability to control that process. Second, it seems clear that the Framers of the Constitution understood and embraced interest group theory. Their conception of the federal judiciary's role within the constitutional scheme was based on the interest group model. Thus, Chief Justice Rehnquist's performance can, and should, be evaluated against the norms provided by that theory.

Clearly, as the writings of my fellow panelists illustrate, the Framers' perspective is not the only one that can be used to evaluate Chief Justice Rehnquist's contributions to the law of the land. One could also evaluate the Chief Justice's writings from the perspectives of Critical Race Theory¹ (whatever that is) or the extent to which the Rehnquist jurisprudence is able "to accommodate certain

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1. Jerome M. Culp, *Understanding the Racial and Economic Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597 (1994).

communitarian moral and civil interests along with libertarian claims for autonomy.”²

Similarly, it would be interesting to evaluate Justice Rehnquist’s opinions to determine the extent to which his decisions are consistent with the principle of economic efficiency, or other broad social goals such as human flourishing, or wealth maximization. In the end, I think that Justice Rehnquist’s opinions will be evaluated on the basis of whether they helped to preserve or to undermine the guiding principles of the Founders of the Republic.

Part II of this essay sketches interest group theory and discusses its jurisprudential implications. Part III demonstrates the influence of interest group theory on the jurisprudential view of the Framers of the United States Constitution. Finally, Part IV briefly describes Justice Rehnquist’s jurisprudence, analyzing it from the perspective of interest group theory.

I hope to show three things in this Essay. First, that the Framers’ jurisprudential perspective was more modern and sophisticated than that of the Chief Justice because, unlike Chief Justice Rehnquist, the Framers had a very profound understanding of the intuitions of modern public choice theory. Second, unlike Chief Justice Rehnquist, the Framers understood the delicate balance between property rights and democratic values. The Framers recognized that failure to maintain this balance had been detrimental to earlier democracies. Unfortunately, Chief Justice Rehnquist has exhibited no appreciation or understanding of the critical need to balance these important values. And finally, I seek to show that the Framers had a more profound understanding of the rule of law than Chief Justice Rehnquist.

At a minimum, I think I can convince an unbiased reader that Chief Justice Rehnquist’s jurisprudential vision is *different* from that of the Framers. I also think I can show that the Framers’ jurisprudential vision was *better*.

II. THE INTEREST GROUP THEORY OF LEGISLATION

Building on economic analysis, the interest group theory of legislation posits that “legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups

2. Harry M. Clor, *Chief Justice Rehnquist and the Balances of Constitutional Democracy*, 25 RUTGERS L.J. 557 (1994).

that derive the greatest value from it, regardless of overall social welfare.”³ According to the theory:

[A]ll citizens are both demanders and suppliers of laws, but certain citizens share legislative goals with highly organized interest groups which provide them with an advantage over other citizens in the procurement of favorable legal rules. The basic thrust of the model is that legislatures use “taxes, subsidies, regulations, and other political instruments . . . to raise the welfare of more influential pressure groups. Groups compete within the context of rules that translate expenditures for political pressures into political influence and access to political resources.”⁴

In other words, the interest group theory of legislation takes the view that individuals and firms can reach their goals through either the competitive market or the legislative arenas. The latter option merely transfers wealth, while the former creates it.⁵ To realize legislative wealth transfers, individuals and firms organize into interest groups and demand favorable legislation. Those who are most successful at organizing into interest groups—sometimes referred to as “distributional coalitions”—will succeed at transferring wealth from less organized individuals and groups to themselves. As Robert Tollison has observed, legislation is supplied by “individuals who do not find it cost effective to resist having their wealth taken away The supply of legislation is, therefore, grounded in the unorganized or relatively less organized members of society.”⁶

While exchanges of wealth resulting from consensual, marketplace transactions increase overall societal wealth, interest groups obtaining transfers in the legislative arena decrease societal wealth by imposing additional costs. These costs include: (1) the costs that the transfer-seeking interest group incurs to obtain the transfer; (2) the costs that

3. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982).

4. Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 45-46 (1988) (citing Gary Becker, *Pressure Groups and Political Behavior*, in CAPITALISM AND DEMOCRACY: SCHUMPETER REVISITED 124 (Richard D. Coe & Charles K. Wilber eds., 1985)).

5. See Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 477-78 (1988).

6. Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 343 (1988).

opposing groups incur trying to either block or pay for the transfer; (3) the costs that arise as losing groups and firms avoid the transfer by diverting resources to less valued, but unregulated uses; and (4) the costs that participants in unregulated markets must incur to remain free of interest group wealth transfers.

In a nutshell, economic actors “expend vast amounts of resources to obtain rent-seeking legislation, to comply with it, to avoid having to comply with it, to adjust to it, and to prevent it from being enacted in the first place.”⁷ The effects extend beyond the individual groups, firms, and markets to the greater society. Mancur Olson has observed that special interest organizations and collusions:

[(1) R]educe efficiency and aggregate income in the societies in which they operate and make political life more divisive; [(2)] slow down a society’s capacity to adopt new technologies and to reallocate resources in response to changing conditions, and thereby reduce the rate of economic growth; [and (3) increase] the complexity of regulation, the role of government, and the complexity of understandings, thereby impeding the economic growth and development of the society as a whole.⁸

The jurisprudential implications of the interest group theory of government seem clear. Those nations able to design jurisprudential systems that can channel and control the destructive tendencies of interest groups will flourish. Those nations unable to control the proclivities of interest groups to demand wealth transfers will ultimately crumble as governments slowly but systematically remove parties’ incentives to create wealth.⁹ The reason that any economic activity exists, in light of the awesome power of government to tax, regulate, and otherwise divert the proceeds of the activity, is because the constitutional system imposes costs on the ability of interest groups to obtain their selfish ends.

7. Macey, *supra* note 5, at 479. Rent-seeking refers to the process by which groups seek to obtain economic “rents,” i.e., payments for the use of an economic asset in excess of the market price, through government intervention in the market. Paradigmatic examples of rent-seeking include efforts by industry to obtain tariffs and quotas on imports, and efforts by labor or industry groups to obtain legally mandated entry barriers in the form of licensing requirements for new entrants. The income above competitive prices earned as a result of obtaining these regulations is known as economic rent.

8. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 74 (1982).

9. Macey, *supra* note 5, at 478-79.

Thus, one way to evaluate the performance of an individual Justice is the extent to which the Justice's judicial philosophy controls the proclivities of interest groups demanding wealth transfers. My thesis, as developed in Part III below, is that Chief Justice Rehnquist largely ignores the problem of coercive wealth transfers by interest groups, and, in doing so, contributes to the increasing social and economic instability of the Republic.

III. THE FRAMERS' JURISPRUDENTIAL VISION

The Framers of the United States Constitution were quite aware of the historical nature of their undertaking. They understood the problem of interest groups both theoretically and historically, and were acutely aware of the importance of controlling interest group activity. For example, from a historical perspective, John Adams's *A Defense of the Constitutions of Government of the United States of America*¹⁰ describes and annotates the operation of the various republics that existed throughout world history. This book provided data to the Framers about the desirability of various constitutional formulations.

Because of their historical perspective, the Framers felt an urgent need to avoid pitfalls that had doomed previous attempts to establish democracies with viable survival characteristics.¹¹ These pitfalls largely consisted of trusting in democracy too much and ignoring the destructive influence posed by interest groups. To deal with the problem of interest groups, the Framers, like Marx, developed a unitary "political theory worthy of a prominent place in the history of Western thought."¹²

The Framers' most important innovation was a realistic appreciation of *Homo Economicus*, economic man. Previous attempts at developing systems of self-governance faltered because of erroneous assumptions that political leaders would be able to ignore their private interests (and those of their constituents) and make decisions based upon the greater good of the whole. Before the Framers' development of a new political

10. JOHN ADAMS, *A Defense of the Constitutions of Government of the United States*, in 4 THE LIFE AND WORKS OF JOHN ADAMS 295 (Charles F. Adams ed., Boston, Little, Brown and Co. 1850-1856).

11. For a broader discussion of this point, see Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50 (1987).

12. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 615 (1969).

theory, a government's success was thought to depend on the virtue of its rulers:

Ancient and medieval thought and practice were said to have failed disastrously by clinging to illusions regarding how men *ought* to be. Instead, the new science would take man as he actually *is*, would accept as primary in his nature the self-interestedness and passion displayed by all men everywhere and, precisely on that basis, would work out decent political solutions.¹³

As Bruce Ackerman cogently observed, the great insight of the Framers was "to recognize that the future of American politics will not be one long, glorious reenactment of the American Revolution."¹⁴ They rejected notions of direct democracy because majority interests trammel minority rights under such a system.¹⁵

Perhaps the most famous expression of the Framers' concern about future political leaders of America is contained in *Federalist No. 10*, where Madison wryly noted that "enlightened statesmen will not always be at the helm" of the new Republic.¹⁶ The Framers assumed they were establishing a constitutional framework to channel and control the private self-interest of government officials.

Stiff penalties and diligent enforcement curtail graft and patently illegal conduct. The greater fear is of elected officials' derogation of their constituents' interests in favor of the goals of special interest groups who supply political support, strategic assistance, and possible future employment. Concerns about self-interest led the Framers to design the Constitution with a view towards impeding interest groups from obtaining economic advantage through the political process. Cass Sunstein described this goal as "the most promising candidate for a unitary theory of the Constitution."¹⁷

13. This passage appears with attribution, but without citation, in Daniel P. Moynihan, *The "New Science of Politics" and the Old Art of Government*, 86 PUB. INTEREST 22, 23 (1987).

14. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1020 (1984).

15. See THE FEDERALIST No. 10, at 59-60 (James Madison) (Paul L. Ford ed., 1898) (in direct democracies "common passion or interest will, in almost every case, be felt by a majority of the whole").

16. *Id.* at 58.

17. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1732 (1984).

The Framers, for the first time in world history, had the teaching of “[t]he new political science, based on such constitutionalists as Locke, Hume, and Montesquieu” at their disposal.¹⁸ They made full use of this new science. In particular, as Walter Berns has observed:

From Locke, “America’s philosopher” as he used to be called, the Framers learned how to channel the passions and energies of men into safe activities [T]he government that secures the right to pursue happiness will be the one that, to the extent possible, leaves men alone to do what they are inclined to do. And, according to Locke, they are naturally and primarily inclined to seek the “conveniences and comforts of Life.”¹⁹

Contrary to present-day thinking, the *laissez faire* perspective of Adam Smith also influenced the Framers. Smith was the “immediate source” of the *Federalist*’s idea that the goal of providing for “[t]he prosperity of commerce is not perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares.”²⁰

The United States Constitution is designed to channel and control self-interest in order to promote stability and prosperity. The federalist system creates competition among various providers of legal rules and causes politicians to suffer citizen exit if they enact inequitable rules.

Evidence of the Framers’ intentions to deal with the problem of interest groups’ rent-seeking can be gleaned from the text of the Constitution itself. The constitutional protections of property, commerce, the privileges and immunities of citizenship, equal protection, and due process are all “united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than to another solely on the ground that those favored have exercised the raw political power to obtain what they want.”²¹

As the Framers recognized, a straightforward implication of interest group theory is the importance of raising the costs to interest groups

18. Harvey C. Mansfield, *Constitutional Government: The Soul of Modern Democracy*, 86 PUB. INTEREST 53, 57 (1987).

19. Walter Berns, *The New Pursuit of Happiness*, 86 PUB. INTEREST 65 (1987).

20. *Id.* at 72 (quoting THE FEDERALIST No. 12, at 73 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

21. See Sunstein, *supra* note 17, at 1689.

trying to effectuate welfare-reducing wealth transfers. The basic mechanism provided by the United States Constitution for raising the costs is the system of checks and balances of which the separation of powers is a part. As I have observed elsewhere:

[T]he very structure of the Constitution itself was designed to block the power of legislatures to transfer wealth to special interest groups. The structural features in the Constitution that protect property rights by reducing the efficacy of interest group activity are as follows: (1) the provision for a bicameral legislature in which the House and the Senate are of different sizes and represent different constituencies; (2) the executive veto; and (3) the provision for an independent judiciary.²²

The bicameral legislature reduces the efficacy of special interest groups by raising the transaction costs of influencing governmental outcomes by raising the costs of collective decisionmaking within government.²³ Likewise, the executive veto raises the costs by raising the level of consensus needed within government before action is taken. An independent judiciary protects against the tyranny of faction by providing a forum in which the complaints of those aggrieved by the legislative process can be heard by an impartial tribunal. It is here, of course, that the role of judges generally and the jurisprudence of Chief Justice Rehnquist in particular become relevant to the political science of the Framers.

Under the American system of separated powers, the federal government would serve as a check on the states; the states, aided by municipal authorities, would serve as a check on each other; and, at the federal level, the legislative, executive, and judicial branches would restrain one another. However, this checking function is only possible if the will to use it exists. The executive and the judicial branches must be willing to use their independence from the legislative branch to control, i.e., to "check" its activities. The next section will demonstrate that the Chief Justice's failure to understand this fact renders his jurisprudence unsatisfying, both from the perspective of political theory, and from the perspective of the Founders' design.

Even without interest group theory, the problem of majority exploitation of minorities would make it important to raise the costs of

22. Jonathan R. Macey, *Thayer, Nagel, and the Founders' Design: A Comment*, 88 NW. U. L. REV. 226, 228 (1993).

23. ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY* 45-57 (1981).

welfare-reducing interest group activity. Clearly, the Framers' strong desire to protect property rights could not be achieved unless some source, independent of democratic processes, could be invoked to curb the proclivities of debtor groups to profit at the expense of creditor groups.

The most obvious way that judges can check legislative excess is through the power of judicial review. For example, as Erwin Chemerinsky has argued, the inclination of the legislature to succumb to interest group pressures has eroded the viability of arguments favoring deference by judges to the legislative will.²⁴ Scholars on the political spectrum as far apart as Richard Epstein²⁵ and Cass Sunstein,²⁶ or even Bernard Siegan²⁷ and Jerry Mashaw,²⁸ argue in favor of active judicial review to combat the interest group problem.

Even those scholars who do not argue that judges should invoke judicial review more readily argue that judges should at least keep the problem of interest group transfers in mind when interpreting statutes. In particular, I have argued that statutory interpretation can be a powerful tool for limiting the efficacy of interest groups.²⁹ Similarly, William Eskridge suggests that judges construing statutes should first analyze whether the statute bears the hallmarks of an interest group bargain by determining whether the benefits of the statute are concentrated while the costs are distributed broadly. If so, Eskridge proposes that the statute be narrowly construed.³⁰

24. Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46-47, 80-81 (1989).

25. Richard Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 705-17 (1984).

26. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

27. BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 265-303 (1980).

28. Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 874-75 (1980); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 141-50 (1989).

29. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 260 (1986); see also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 37 (1991).

30. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 279, 298-99, 303-09, 324-25 (1988). For similar arguments, see Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 51-54 (1984); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471, 486 (1989).

While there are major differences in the jurisprudential approaches of many commentators, the common thread connecting this diverse body of work is an understanding of the problem of interest group distortion of democratic processes. As the following section of this demonstrates, Justice Rehnquist does not share this understanding.

IV. JUSTICE REHNQUIST, THE FRAMERS AND INTEREST GROUP THEORY

The core problem with Justice Rehnquist's jurisprudence can be succinctly described. He has failed to pursue his constitutionally prescribed mandate to check legislative excess.

Examples of this phenomenon abound. In *City of Philadelphia v. New Jersey*,³¹ the Court considered a New Jersey statute prohibiting the importation into New Jersey of virtually all "solid or liquid waste which originated or was collected outside the territorial limits of the state."³² The only exceptions were garbage to be fed to swine in the State of New Jersey, municipal solid waste to be processed at resource recovery facilities, and various other chemical or hazardous wastes destined for licensed New Jersey recycling, reclamation, or treatment facilities.³³ In other words, no out-of-state garbage could be dumped in New Jersey landfills.

This statute was challenged on grounds that it violated the Commerce Clause, which withholds from the States the power to restrict interstate commerce. This clause was designed to combat interest group wealth transfers by preventing in-state groups from effectuating the passage of local legislation giving these groups an unfair advantage over their out-of-state rivals.³⁴

While the majority opinion reflected an awareness that the whole point of Commerce Clause jurisprudence has been to combat interest group efforts to achieve economic isolation and protectionism,³⁵ Justice Rehnquist's dissent does not share those concerns. As the majority

31. 437 U.S. 617 (1978).

32. *Id.* at 618 (quoting 1973 N.J. Laws 1, 962 (repealed 1978) (Statement of Purpose)).

33. *Id.* at 619 n.2 (quoting since-repealed administrative regulations issued pursuant to the New Jersey statute; *see supra* note 32).

34. "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935).

35. *City of Philadelphia*, 437 U.S. at 623.

pointed out, the "crucial inquiry" under the Commerce Clause "must be directed to determining whether [the relevant New Jersey statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."³⁶

The majority had no difficulty finding that New Jersey's effort to solve its local landfill problems by isolating itself from the stream of commerce violated the Commerce Clause.³⁷ Justice Rehnquist, in dissent, took a much different view. Justice Rehnquist ignored the possibility that interest group efforts to solve local problems through protectionism and isolationism could have motivated the statute.³⁸ Instead, he would have given great deference to the New Jersey legislature's stated justifications in passing the statute. This approach to both constitutional cases and cases involving statutory interpretation reflects a naive view of the legislative process. Justice Rehnquist, as a result, abandons his constitutional role as a check on legislative excess.

The statute was ostensibly passed "to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum."³⁹ Justice Rehnquist, however, ignored the fact that as the supply of waste into New Jersey landfills from out-of-state sources was cut off, competitive pressures would cause the cost of disposal to decrease. This, in turn, would lead to more disposal of solid waste (at the new, cheaper prices) by local concerns. Thus, it was by no means clear that the statute would result in a diminution in the disposal of solid waste in New Jersey. The only certainty was that the constricted supply of waste would reduce the price of disposal to in-state producers of waste at the expense of out-of-state producers.

Justice Rehnquist's dissent in *Kassel v. Consolidated Freightways Corp.*⁴⁰ provides another example of his persistent deference to the legislative will, even in the face of rather transparent attempts at interest-group protectionism. In *Kassel*, the Court examined an Iowa statute prohibiting use of sixty-five-foot double trailer trucks within the state.⁴¹

36. *Id.* at 624.

37. *Id.* at 629.

38. *Id.* at 633 (Rehnquist, J., dissenting).

39. *Id.* (quoting *Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 68 N.J. 451, 473, 348 A.2d 505, 516 (1975)).

40. 450 U.S. 662 (1980).

41. *Id.* at 665-66.

The plaintiff, a large national trucking company, wished to use such trucks to carry goods through the state of Iowa.

The majority of the Supreme Court upheld lower court decisions, holding that the statute interfered with the national interest in keeping interstate commerce free from local interests.⁴² The only safety benefit to Iowa was due to the reduction in truck traffic caused by large trucks detouring around the State.⁴³ In addition, a number of loopholes benefited local interests at the expense of interstate traffic. Cities adjoining state lines could adopt the length limitations of the adjoining state; Iowa truck manufacturers could ship trucks as large as seventy feet; and mobile homes could be moved by otherwise impermissible means.⁴⁴ These exceptions were found to weaken the presumption of validity often accorded to state safety regulation.⁴⁵

From an interest group perspective, the Iowa statute reflects a classic manifestation of rent-extraction, a particularly venal form of interest group oriented legislation. Rent extraction involves the imposition of costs on certain groups by political actors solely for the purpose of obtaining political support from those groups.⁴⁶ Out-of-state trucking companies were not an obvious source of campaign contributions or political support for Iowa politicians. However, by passing this statute the politicians could attract support from out-of-state interests in exchange for acquiescence in creating exceptions to or repealing the legislation. Iowa's strategic position on Interstate 80, the principal route to the West Coast from Chicago and New York, and Interstate 35, an important north-south route, put the state in a strong position to engage in rent-extraction.

Justice Rehnquist would have upheld this senseless Iowa legislation on the grounds that courts have only limited authority to review state legislation under the Commerce Clause.⁴⁷ He objected to cost-benefit analysis of the legislation because:

[s]uch an approach would make an empty gesture of the strong presumption of validity accorded state safety measures, particularly those governing highways [This would] arrogate to this Court functions of

42. *Id.* at 667-69.

43. *Id.* at 668.

44. *Id.* at 665-68.

45. *Id.* at 669.

46. Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 102-03 (1987).

forming policy, functions which, in the absence of congressional action, were left by the Framers of the Constitution to state legislatures.⁴⁸

Justice Rehnquist confuses public policy formation with public policy evaluation. It is clear from this dissent that the separation of powers, to Justice Rehnquist, means keeping the judiciary out of the legislature's way rather than the checking and balancing that the Framers intended. Indeed, it is not clear from Justice Rehnquist's jurisprudence why courts are needed at all, other than to perform the purely ministerial function of making sure that the will of the legislature is carried out on all occasions. It would appear certain that the separation of powers is not needed since the Court is unlikely to do anything objectionable to the legislature.

Justice Rehnquist's dissenting opinions illustrate the extent to which his approach is at variance with the other Justices. Likewise, his majority and plurality opinions reflect the same hyper-deference to the political branches, and a complete disregard for the Court's role as a curb against the awesome power of the state to do evil.

A comparison of Chief Justice Rehnquist's opinions in two First Amendment cases, *Hustler Magazine v. Falwell*⁴⁹ and *Texas v. Johnson*,⁵⁰ illustrates this point. In the first case, evangelist Jerry Falwell sued Hustler magazine for libel and intentional infliction of emotional distress because Hustler had published a parody of a Campari Liqueur advertisement entitled "Jerry Falwell talks about his first time."⁵¹ This ad claimed that the Reverend Falwell's "first time" was during an incestuous, drunken rendezvous with his mother in an outhouse. The Court acknowledged that the Hustler magazine parody "portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk."⁵² Nonetheless, the Chief Justice found that First Amendment protection encompasses speech that is patently offensive and intended to inflict emotional injury. A state's interest in protecting public figures from emotional distress⁵³ is outweighed by the constitutional value

47. *Kassel*, 450 U.S. at 687 (Rehnquist, J., dissenting) (quoting *Locomotive Firemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 136 (1968)).

48. *Id.* at 691.

49. 485 U.S. 46 (1988).

50. 491 U.S. 397 (1989).

51. *Falwell*, 485 U.S. at 48.

52. *Id.*

53. *Id.* at 50.

placed on promoting the free flow of ideas and opinions on matters of public interest and concern.⁵⁴ Thus, public figures and public officials may *not* recover under an intentional infliction of emotional distress theory without the additional showing that the publication contains a false statement of fact which was made with "actual malice."⁵⁵

By contrast, *Texas v. Johnson* did not involve abstract principles of constitutional interpretation, but rather the constitutionality of a particular legislative enactment. True to form, Chief Justice Rehnquist allowed his deference to legislative will to trump his allegiance to First Amendment values. During the 1984 convention of the Republican Party in Dallas, Texas, Gregory Lee Johnson participated in a political demonstration. The finale of the demonstration took place at Dallas City Hall, where Johnson unfurled an American flag, doused it with kerosene, and set it on fire while chanting "America, the red, white, and blue, we spit on you."⁵⁶ Johnson was charged with "desecration of a venerated object in violation of Section 42.09(a)(3)(1989) of the Texas Penal Code."⁵⁷

The Court's overturning of the statute reflected a willingness to confront a legislative surrender to the public's capricious sentiments at the expense of constitutional values. As the Court pointed out, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."⁵⁸

As usual, however, Justice Rehnquist sided with the state. In a dissent that reads more like a patriotic address than a legal opinion,⁵⁹ the Chief Justice argues that constitutional values must succumb to the will of the legislature.⁶⁰ He reasons that the forces of dissent in society must give way to popular sentiment as expressed by elected representatives.⁶¹

The only enduring principle that can be gleaned from these two examples of Justice Rehnquist's jurisprudence is that the will of the legislature should trump abstract values such as constitutional values or minority rights. This perspective is expressed in a wide range of Chief Justice Rehnquist's opinions. He upholds state action against constitutional challenge despite precedents to the contrary or special-

54. *Id.*

55. *Id.* at 56.

56. *Johnson*, 491 U.S. at 399.

57. *Id.* at 400.

58. *Id.* at 414.

59. *Id.* at 423-30.

60. *Id.* at 421.

61. *Id.* at 432.

interest influence on the enactment in question.⁶² He even appears immune to basic concerns about the effects of raw emotion and popular sentiment on the legislative process.⁶³ At worst, he remands such action for further fact finding, delaying resolution of the case for years.⁶⁴

A 1989 case, *Martin v. Wilks*,⁶⁵ contains an interesting example of Chief Justice Rehnquist's response to the problems posed by interest group intrusion in the political process. White firefighters employed by the city of Birmingham, Alabama were challenging consent decrees that had been reached between the City and the NAACP. These consent decrees contained goals for hiring and promotion of black firefighters. When the City took action to fulfill their commitments under the consent decrees, white firefighters employed by the City brought an action charging that the City was impermissibly discriminating against them by promoting less qualified black firefighters.

The issue in the case was whether white firefighters could collaterally attack the consent decrees or whether they were bound by them despite not having been joined as a party to the action in which they were issued. Prior to the judicial hearing in United States District Court at which the consent decrees between the NAACP and the City were approved, notice of the hearings was published in two local newspapers. The newspapers contained a reference to the general nature of the decrees. At the hearing, the Birmingham Firefighters Association appeared and filed objections as *amicus curiae*. After the hearing, but before final approval of the decrees, the Firefighters Association moved to intervene on the grounds that the decrees would adversely affect their rights, but the District Court denied these motions for intervention on the grounds that they were untimely.⁶⁶

Subsequently, a new group of white firefighters brought suit alleging that they were being denied promotions on account of their race, and that less qualified blacks were receiving these promotions in their stead. A panel of the United States Court of Appeals for the Eleventh Circuit held that "[b]ecause . . . [the white firefighters] were neither parties nor privies to the consent decrees, . . . their independent

62. See generally *Webster v. Reproductive Health Servs.*, 429 U.S. 490 (1989).

63. See *supra* notes 56-61 and accompanying text.

64. *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 223 (1984) (remanding municipal affirmative action ordinance for further fact finding against challenge on equal protection and privileges and immunities grounds).

65. 409 U.S. 755 (1989).

66. *Id.* at 759.

claims of unlawful discrimination are not precluded.”⁶⁷ The court went on to note that the “strong public policy in favor of voluntary affirmative action plans . . . must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed.”⁶⁸

Interestingly, in affirming the Eleventh Circuit, Chief Justice Rehnquist, writing for a five-to-four majority, stressed that in order to protect interested groups, litigants must be duly summoned to appear in legal proceedings affecting their interests. The Court indicated that the mere right to voluntary intervention would be insufficient.⁶⁹ Justice Rehnquist noted that:

Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. *The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted.* It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.⁷⁰

Thus, Chief Justice Rehnquist, writing for a majority of the Supreme Court, rejected the “impermissible collateral attack doctrine,” which precluded parties which had failed to intervene in prior proceedings from collaterally attacking those proceedings.

Remarkably, it seems that, while Chief Justice Rehnquist blithely disregards the problems posed by interest groups in the legislative process, he appears quite sensitive to the problems posed by interest groups in the judicial process. Clearly, Rehnquist is correct in displaying sensitivity to the problems of interest group capture and domination of the courts.

However, for a number of reasons, it seems clear that the litigation process is less susceptible to interest group influence and domination than the political process.⁷¹ First, unlike the President and members of

67. *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1498 (11th Cir. 1987).

68. *Id.*

69. 490 U.S. at 763 (quoting with approval *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431 (1934)).

70. *Id.* at 765 (emphasis added) (footnotes omitted).

71. *But see* Elhauge, *supra* note 29, at 66-87.

Congress, federal judges are insulated from economic and political pressures that enable interest groups to influence political outcomes in the legislative process. Thus, despite the fact that interest groups are likely to play a large role in the selection process by which judges are determined, it is not at all clear that such groups are able systematically to influence the outcomes later on. Second, federal judges have life tenure, ensuring permanent isolation from the political process once they are confirmed. Thus, while the decisions of Article III judges may not reflect the views of the majority, at least they will not reflect the narrow perspectives of interest groups to the same extent as the outcomes generated in Congress. Next, Article III of the Constitution requires an actual case or controversy between two or more parties before a federal court may exercise jurisdiction over a matter.⁷² Finally, unlike politicians who simply forge their will into law, judges must write opinions justifying the outcomes they reach. Unless these opinions are persuasive and well-reasoned, they will be ignored. Thus, unlike politicians and bureaucrats, who are likely only to be influenced by powerful interest groups because rational ignorance prevents other affected parties from galvanizing into an effective political coalition to present their perspective, judges hear arguments on both sides of the positions they are adjudicating.

The point here is not that interest groups have no influence on the political process. Clearly they do. Interest groups can, for example, hire better lawyers and expert witnesses than their opponents,⁷³ but this advantage has been overstated because judges and their clerks can compensate to some extent by doing work on their own. Rather, the point here is that Chief Justice Rehnquist's deep sensitivity to the problems of interest group domination and control in the litigation context, as exhibited in *Martin v. Wilks*, stands in sharp contradiction to the lack of sensitivity that he displays in the context of reviewing the outcomes generated in the legislative process generally.

Perhaps this strange dichotomy can be explained on the grounds that Chief Justice Rehnquist trusts the political process more than the judicial process because members of Congress are elected, and, therefore, reflect the will of the majority. But, as explained above, this rationale is unappealing in light of the Framers' desire to provide a system of checks and balances that included judicial review in order to mitigate the

72. U.S. CONST. art. III, § 2.

73. Elhauge, *supra* note 29, at 77.

problem of legislative excess. This rationale is also unappealing in light of the fact that the problem of interest group domination and control is far more severe in the legislative context than in the litigation context.

On the other hand, perhaps Chief Justice Rehnquist is aware of the problems of interest group domination and control. If, as seems plausible, that is the case, it stands to reason that the dichotomy between his treatment of judicial outcomes (non-deferential) and his treatment of legislative outcomes (highly deferential) can be explained on the grounds that he *likes* the groups that dominate the legislative process, but does not like the groups that dominate the judicial process. This hypothesis is consistent with the fact that Chief Justice Rehnquist appears to take constitutional claims seriously in those rather rare situations where minorities have gained an advantage over the national majority in the political process.⁷⁴

In addition, not only does he ignore concerns about the domination by interest groups of the legislative process, his lack of appreciation for the flaws in raw majoritarianism leads him to ignore broader separation of powers issues. For example, the congressional power grab in the form of the Ethics in Government Act is of no concern to Chief Justice Rehnquist.⁷⁵ This Act empowers certain members of Congress to request the Attorney General to petition for the appointment of an independent counsel to investigate the actions of executive branch employees. Such separation of powers encroachments undermine the ability of the executive branch to perform its function of checking excesses by the legislative branch. The balance of powers is complex and delicate. Statutes such as the Ethics in Government Act, which was upheld in *Morrison v. Olson*,⁷⁶ threaten to tip the balance irretrievably towards Congress, thereby undermining the Framers' goal of curbing legislative excess.

74. *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 223 (1984).

75. *Morrison v. Olson*, 487 U.S. 654, 659-60 (1988) (holding that the Independent Counsel provisions of the Ethics in Government Act do not violate Article II, § 2, Clause 2 or Article III of the Constitution, nor do they interfere with the President's authority under Article II).

76. *Id.*

V. CONCLUSION

At this point I will emphasize that I do not view the results reached by Chief Justice Rehnquist as always bad.⁷⁷ It is important to stress that the deficiency in Chief Justice Rehnquist's jurisprudence is not that he is mean spirited or bigoted, as some have suggested, but rather that he is not bold enough in protecting individual rights against encroachments in the legislature. However, this is a small qualification.

In my view, Chief Justice Rehnquist's blind faith in the outcomes generated by the legislative process has caused him to abandon his role in the constitutional scheme. When appropriate, he should act to curb interest group activities and protect fundamental rights against legislative excess. Chief Justice Rehnquist simply does not seem to understand the most important lesson of the twentieth century, that the awesome potential of government to do evil must be curbed. This is the lesson to be learned from the failure of communism, the segregation laws in the South, as well as from Pol Pot, Stalin, and the Holocaust in Germany.

While the Framers' historic work predated the horrors of government described above, it is just as clear that they were acutely aware of the need to control both interest group excess and popular passion:

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.⁷⁸

In a nutshell, the problem I find with Chief Justice Rehnquist's jurisprudence is that he takes the view that enlightened statesmen always will be at the helm. This is inconsistent with the view of the Framers and the teachings of modern political theory, especially the interest group theory of government. It is also inconsistent with the best

77. For example, a Minnesota statute permitted taxpayers in the state to deduct some of the expense incurred in sending their children to private elementary and secondary schools. Justice Rehnquist rejected Establishment Clause challenges to the statute, protecting individual rights and allowing the State to improve education by promoting competition among schools and educators. *Mueller v. Allen*, 463 U.S. 388 (1982).

78. *THE FEDERALIST* No. 10, at 58 (James Madison) (Paul L. Ford ed., 1898).

interests of society. To paraphrase J.G.A. Pocock, perhaps America's foremost writer on the republican tradition, the "historical pessimism" in American thought as reflected in the work of the Framers recognized that the confrontations between virtue and commerce would not always result in a victory for virtue.⁷⁹

Constitutional checks and balances are most important when good government, in the form of compassion for the weak and concern with virtue, is on the wane. Constitutional checks and balances in the form of judicial review and careful attention to the traditional principles of statutory interpretation would hardly be necessary if government was never subverted by interest groups, political factions, and the winds of popular prejudice. Chief Justice Rehnquist does not distrust politics enough. He places too much faith in the legislature despite the clear lessons of both history and modern experience.

79. JOHN G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 523 (1975).