

# THE POTENTIAL EFFECTS OF NONDEFERENTIAL REVIEW ON INTEREST GROUP INCENTIVES AND VOTER TURNOUT

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*In this Note, Daniel J. Schwartz explores the connections between voter turnout, interest group mobilization, and the standards by which courts assess the constitutional validity of legislative enactments. As traditionally conceived, democracies only function properly when citizen participation in government is widespread and knowledgeable. Since the 1960s, however, few citizens have voted in American congressional elections and fewer still have been aware of the issues at stake. While political scientists attribute this situation to various causes, they agree that an important factor is a lack of electoral mobilization—that is, the process by which interest groups and others stimulate citizens to go to the polls. Drawing from public choice theory, which posits that interest groups use political contributions and electoral support to buy rent-seeking laws from legislatures, Schwartz suggests that groups engage in little electoral mobilization because they successfully obtain the rents they seek through other means, such as lobbying and litigation. He argues that courts reinforce this state of affairs by reviewing the constitutionality of most legislation with a very deferential standard, thereby protecting the value of lobbying and litigation as means of cementing legislative bargains. Schwartz thus proposes that the deferential review of a statute should be contingent on a showing of fifty-percent turnout in the two elections prior to its enactment. He argues that such a condition would decrease the value of lobbying and litigation relative to that of mobilization, which, in turn, would furnish interest groups with the right incentives to turn out voters at election time.*

What are the implications for a democracy when citizens fail to exercise their right to elect the people who govern them? For the past forty years, America has been struggling to answer this very question. Since 1960, voter turnout in American congressional elections has declined steadily and substantially,<sup>1</sup> a trend widely viewed as problematic.<sup>2</sup> For all the discussion of low turnout, however, the nature of the problems it engenders often remains unstated.

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<sup>1</sup> See *infra* Part I.A.2.

<sup>2</sup> See, e.g., Editorial, Campaign Lessons, *Boston Globe*, Nov. 8, 2000, at A18, 2000 WL 3349831 (predicting that participation will remain “embarrassingly low . . . until the citizens

Throughout America's history, the popular election of legislators has been justified as necessary to achieve either of two goals: ensuring that the legislature is ultimately accountable to the people from whom its power derives,<sup>3</sup> or promoting majority rule.<sup>4</sup> At one time or another, each of these goals has been given the greater emphasis,<sup>5</sup> but both remain important principles in American government.<sup>6</sup> Despite

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feel their voices count"); Eric Lipton, *Counting the Vote: A Call for Change; The Process: Problems Stir Calls to End '19th Century' Voting Process*, N.Y. Times, Nov. 13, 2000, at A25 (noting low fifty-one percent voter turnout in 2000 election and describing proposals by Senator Schumer and Representative Gephardt for increasing voter turnout); see also John McCaslin, *A Nation Inside the Beltway*, Wash. Times, Sept. 27, 2001, at A8 (noting that half of nation failed to vote in 2000, in spite of "modest" increase in turnout).

<sup>3</sup> Popular elections were probably included in the Constitution to ensure a baseline of democratic legitimacy. See, e.g., *The Federalist* No. 39, at 255 (James Madison) (Isaac Kramnick ed., 1987) (stating that sufficient condition for republican form of government is "that the persons administering it be appointed, either directly or indirectly, by the people," and that they hold their offices for term of years or be removable at pleasure or for cause); Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology* 98 (1978) ("[A]ll [Constitutional Convention] delegates agreed that they must frame a government that would derive in all its parts and powers from a democratic people.").

<sup>4</sup> In the nineteenth century, majoritarianism engendered reforms in the states, making government more responsive to popular will. Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis 188-89* (1987) (discussing ideological divide over majoritarian reform of state constitutions); see also C.H. Hoebeke, *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment* 56, 60, 84-85 (1995) (describing direct election of three branches of state governments and presidential electors, and development of universal white male suffrage).

During the first part of the twentieth century, amendments to the federal Constitution codified several populist features in the national government as well, such as direct election of senators, U.S. Const. amend. XVII, and full suffrage for women, id. amend. XIX. For a discussion of the effect of populist sentiments on the passage of the Seventeenth Amendment, see generally, Hoebeke, *supra*.

<sup>5</sup> As originally adopted, the Constitution endorsed legislative accountability and rejected majority rule. See Isaac Kramnick, *Introduction to The Federalist Papers*, *supra* note 3, at 11, 50 (describing institutions that insulated Congress from popular will); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 43 (1985) (same). For an account of post-Revolution excesses of majoritarian state governments, which fueled Federalist opposition to majoritarianism, see, for example, Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 404-16 (1969). Majoritarianism, however, was on the ascent in the nineteenth century. See, e.g., Ellis, *supra* note 4, at 6-7, 15-18, 46-47 (explaining that Andrew Jackson "viewed himself as a democratic tribune representing the people," and attributing his installation of "spoils system" of political appointments and his opposition to South Carolina's claimed right to nullify federal legislation to his belief in majority rule). For a discussion of how government generally was becoming more democratic prior to the Civil War, see William E. Nelson, *The Roots of American Bureaucracy, 1830-1900*, at 10-40 (1982); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333, 381-85 (1998) (describing move towards majoritarian democracy in Jacksonian period).

<sup>6</sup> The debate about which view more accurately characterizes or should characterize government in this country has been joined contentiously on both sides. Compare, e.g., Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 Colum. L. Rev. 531, 565 (1998) (explaining accountability as means by which people enforce "compact with

their differences, the two views share some basic features. In order for the vote to be effective under either conception, two things must be true: First, electoral participation must be widespread;<sup>7</sup> second, voters must be knowledgeable both about their own policy positions and those of their representatives.<sup>8</sup>

Evaluated by these standards of widespread and knowledgeable voting, the American democratic system has largely failed over the last forty years. The majority of voters simply do not vote for Congress any more,<sup>9</sup> and those who do generally do not base their choices on policy issues.<sup>10</sup> Though political scientists attribute the turnout decline to a variety of factors,<sup>11</sup> a large consensus acknowledges insufficient voter mobilization as an important cause.<sup>12</sup> If this is correct, the solution to the problem of low turnout may be relatively simple: providing a well-positioned entity with the incentives to take a more active role in mobilizing and educating voters.

One set of institutions that is well-equipped to mobilize voters is often overlooked in proposals for increasing turnout: interest groups.<sup>13</sup> Much has been made of the pernicious effects that interest

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[their] government," not as means for implementing majority rule), with John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 7 (1980) ("Our constitutional development . . . [has] substantially strengthened the original commitment to control by a majority of the governed."). This Note takes no position regarding which view is "correct;" it merely acknowledges that the system of government currently in place has elements supporting both views and continues to shift between them.

<sup>7</sup> So far as legislative accountability is concerned, participation by "the great body of the society" is necessary to prevent "a handful of tyrannical nobles" from entrenching themselves in political office. The Federalist No. 39, *supra* note 3, at 255. It should be noted, however, that Madison did not think it essential that the people choose their legislators directly, so long as they had a voice somewhere in the process. See *id.* (calling indirect election "*sufficient*"). For purposes of majority rule, however, an actual majority of the people must vote; otherwise, the majority, strictly speaking, is not governing.

<sup>8</sup> See Richard R. Lau & David P. Redlawsk, *Voting Correctly*, 91 *Am. Pol. Sci. Rev.* 585, 585 (1997) (stating that classic democratic theory requires citizens to "be interested in, pay attention to, [and] discuss . . . politics," and that "[a]n apathetic public cannot possibly constrain government officials"). The two views do differ, however, on how much knowledge a voter actually needs: While the accountability view is satisfied if the voter chooses any candidate who has not opposed a policy the voter favors, majority rule requires the voter to select a candidate whose views, at least on a range of important issues, are identical to his own.

<sup>9</sup> See *infra* Part I.A.2.

<sup>10</sup> See *infra* notes 71-72 and accompanying text.

<sup>11</sup> See *infra* note 49.

<sup>12</sup> See *infra* Part I.A.3.

<sup>13</sup> Interest groups are "any group that, on the basis of one or more shared attitudes, makes certain claims upon other groups in the society for the establishment, maintenance or enhancement of forms of behavior that are implied by the shared attitudes." Burdett A. Loomis & Allan J. Cigler, *Introduction: The Changing Nature of Interest Group Politics*, in *Interest Group Politics* 1, 30 n.4 (Allan J. Cigler & Burdett A. Loomis eds., 5th ed. 1998) (citations omitted).

groups can have on the political process.<sup>14</sup> In particular, public choice theory<sup>15</sup> focuses on the evil of legislative capture, the process by which groups—using a variety of strategies, such as electioneering, lobbying, and litigation<sup>16</sup>—sell their resources to lawmakers in exchange for valuable entitlements.<sup>17</sup> If this critique is accurate, though, these flaws actually make interest groups a good instrument for increasing voter turnout. First, as the primary consumers of legislation, groups have the most riding on elections and thus are willing to invest heavily in their outcomes.<sup>18</sup> Second, interest groups have been remarkably successful at entrenching themselves and so are likely to continue to be a fixture of the political process.<sup>19</sup> Finally, interest groups are experienced mobilizers<sup>20</sup> and thus have a comparative advantage relative to

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<sup>14</sup> Interest group participation in the political process often has been criticized for not conforming to the pluralist ideal, in which all interests are represented in government in proportion to the intensity with which they are held. See Loomis & Cigler, *supra* note 13, at 4-5. For a further elaboration of these and other criticisms, see *infra* notes 94-100 and accompanying text.

<sup>15</sup> Public choice is the application of economic analysis to political science. Daniel A. Farber & Phillip P. Frickey, *Law and Public Choice, A Critical Introduction* 1 (1991).

<sup>16</sup> Electioneering here is used to mean activities designed to influence the results of a political campaign. Lobbying refers to activities designed to obtain desired policy outcomes from legislators or agencies. Litigation refers to participation in lawsuits—whether as a sponsor, a named party, or an *amicus curiae*—intended to further desired policy outcomes.

<sup>17</sup> See Farber & Frickey, *supra* note 15, at 15 (citing William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & Econ.* 875, 877 (1975)). It should be noted at the outset, though, that public choice theory oversimplifies the dynamics of lawmaking by ignoring the roles of ideology and public interest in legislators' choices. Farber & Frickey, *supra* note 15, at 27-33. Further, there are "few conclusive links between [group] campaign or lobbying efforts and actual patterns of influence." Loomis & Cigler, *supra* note 13, at 25. Consequently, this Note accepts the assumptions of public choice theory but is cognizant of its limitations.

<sup>18</sup> See *infra* text accompanying note 93.

<sup>19</sup> See Jeffrey M. Berry, *The Interest Group Society* 20-29 (3d ed. 1997) (describing surge in formation of interest groups between 1970s and 1980s, and increase in donations by political action committees (PACs) between 1980-1990); M. Margaret Conway, *Political Participation in the United States* 152 (3d ed. 2000) (observing "considerable increase in the number, activity, and impact of interest groups . . . seeking to influence the public agenda or policy outcomes"); Steven J. Rosenstone & John Mark Hansen, *Mobilization, Participation, and Democracy in America* 2 (1993) (noting increase in interest group membership between 1960 and 1980); Loomis & Cigler, *supra* note 13, at 3 (noting existence of 4000 PACs and increase in PAC donations by over \$400 million between 1976 and 1996); Paul S. Herrnson, *Parties and Interest Groups in Postreform Congressional Elections*, in *Interest Group Politics*, *supra* note 13, 145, 145-46 (observing importance of interest groups in 1996 election).

<sup>20</sup> See Frances Fox Piven & Richard A. Cloward, *Why Americans Still Don't Vote: And Why Politicians Want It That Way* 17 (2000) (describing mobilization by liberal and conservative interest groups in 1980s). In addition to interest groups, political parties also mobilize voters, Rosenstone & Hansen, *supra* note 19, at 89-90, 170-77, sometimes in conjunction with interest groups, Herrnson, *supra* note 19, at 150-51. Although this Note fo-

other organizations. Nevertheless, from the standpoint of voter turnout, interest groups currently engage in insufficient mobilization,<sup>21</sup> choosing instead to expend their resources on access to legislators.<sup>22</sup>

Drawing on public choice assumptions, this Note argues that focusing on interest group mobilization is a useful way to think about alleviating the problems of low voter turnout.<sup>23</sup> To this end, this Note offers a specific but hypothetical proposal for providing groups with incentives to devote more resources to mobilization by altering the standard used by courts when reviewing the constitutionality of legislation.<sup>24</sup>

Generally, courts defer to the political judgments of a legislature by according its duly enacted laws a “presumption of constitutionality”; in most cases, this presumption is sufficient to sustain those

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cuses on the role of interest groups, it does not deny that political parties or other entities may have important roles to play in improving voter turnout.

<sup>21</sup> See *infra* note 116 and accompanying text.

<sup>22</sup> See *infra* notes 111-12 and accompanying text.

<sup>23</sup> In a sense, interest groups can be likened to institutional investors in the market for corporate governance. Just as institutional investors, by their large stake in companies, can surmount the collective action problem to improve shareholder monitoring and corporate accountability, see Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. Rev. 811, 886-87 (1992) (“Institutional [investor] voice is potentially valuable because of the need for *someone* to monitor corporate managers . . . . [T]here is much that the institutions can do to increase corporate efficiency and value.”), so too can groups, by their large stake in the political process, overcome the collective action problem to improve voter monitoring and legislative accountability. Although there are limits to the analogy, the idea of modeling the political process on the market for corporate governance is hardly novel. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 647-49 (1998) (arguing that regulation of political process should follow regulation of market for corporate control and seek to destabilize rules that entrench control in established political parties).

<sup>24</sup> The hypothetical nature of this proposal must be stressed. The standard of review used by courts in constitutional cases has developed over the last 100 years. See *infra* notes 146-48. It is therefore highly unlikely that any court would actually adopt the standard that this Note suggests. Nevertheless, the Note’s proposal still has value in that it provides a way of approaching the voter-turnout problem that has not often been considered. Moreover, the proposal is no more radical than other suggestions for reforming judicial review. Cf., e.g., Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law 79* (1997) (advocating “public-regardingness” standard of review); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 Va. L. Rev. 373, 374-75 (1988) (advocating no deference at all). Because the goal of this Note is simply to lay out the foundation for this “thought experiment” and to sketch its general contours, it cannot deal extensively with the many objections that it will no doubt provoke, such as concerns about separation of powers, judicial competence, and the role of the courts in the American system of government. To be sure, there are appropriate responses to many of these objections; addressing them, however, is beyond the scope of this Note.

laws.<sup>25</sup> Public choice theory holds that this deferential standard of review contributes to preserving and enforcing the bargains struck between legislators and interest groups;<sup>26</sup> therefore, deferential review may encourage groups to pursue strategies that give them access to lawmakers, through which they can strike further legislative bargains.<sup>27</sup> However, if deferential review could be conditioned on a showing of some minimum level of voter turnout—possibly fifty-percent participation in two consecutive elections<sup>28</sup>—and if, absent deferential review, legislation stood a greater chance of being struck down, then access alone would become far less valuable to interest groups.<sup>29</sup> Instead, groups would likely split their resources between litigation and mobilization.<sup>30</sup> Given the costs and benefits of each strategy, this Note argues that there is reason to believe that groups would devote relatively more of their efforts to mobilization,<sup>31</sup> helping to increase both the level of turnout and the information content of elections.<sup>32</sup>

Part I of this Note examines the state of congressional elections in America today. It sets forth the evidence of turnout decline, and then explains how a lack of mobilization interacts with institutional features of congressional races to produce low-participation, low-information elections. Part II then focuses on the way interest groups fit into the political process and how they pursue their political agenda through the strategies of electioneering, lobbying, and litigation. The Note concludes with Part III, which, after briefly covering the history of deferential review, explains how tying deferential review to a minimum showing of voter turnout could provide interest groups with incentives to mobilize.

## I

### THE CAUSES OF LOW VOTER TURNOUT AND LOW INFORMATION ELECTIONS

In the classical conception, the popular vote fails to perform its role within the American governmental system unless numerous, relatively well-informed citizens exercise their voting right.<sup>33</sup> Part I of this

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<sup>25</sup> See *infra* notes 141-145 and accompanying text. For exceptions to the general rule of deferential review, see *infra* note 154.

<sup>26</sup> See *infra* note 148.

<sup>27</sup> See *infra* text accompanying notes 149-151.

<sup>28</sup> These numbers are meant to be guidelines rather than immutable features of the proposal. See *infra* note 159.

<sup>29</sup> See *infra* Part III.B.

<sup>30</sup> See *infra* text accompanying notes 173-174.

<sup>31</sup> See *infra* notes 174-181 and accompanying text.

<sup>32</sup> See *infra* notes 183-186 and accompanying text.

<sup>33</sup> See *supra* notes 7-8 and accompanying text.

Note describes the situation in America today, in which neither large numbers of voters nor well-informed voters participate in elections. Part I.A demonstrates that a majority of voters do not participate in elections. Part I.A.1 explains the public choice theory about why people vote and describes the cost-benefit calculus of the individual voter. Part I.A.2 sets forth the statistics illustrating the decline in voter turnout over the last forty years. Part I.A.3 concludes that lack of mobilization is an important cause of low voter turnout. Part I.B then goes on to examine how lack of mobilization interacts with the institutional features of congressional campaigns to raise voting costs and produce low-turnout, low-information elections.

### *A. Forty Years of Turnout Decline*

#### *1. The Individual Voter's Cost-Benefit Calculus*

Public choice theory<sup>34</sup> assumes that each voter is economically rational, meaning that he will vote only if his expected benefits, discounted by the possibility that his vote will not affect the outcome, exceed his costs.<sup>35</sup> To resolve the conflict between the fact that some people do vote and the fact that voting is a costly activity with little apparent benefit, public choice theorists have been compelled to modify their understanding of the voter's cost-benefit analysis.<sup>36</sup> They now recognize that there are noneconomic, or "expressive," benefits that make the act of voting more worthwhile.<sup>37</sup> Expressive benefits

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<sup>34</sup> See *supra* note 15 (defining public choice theory as application of economic analysis to political science).

<sup>35</sup> Conway, *supra* note 19, at 139-43 (explaining voter's cost-benefit calculus); see Farber & Frickey, *supra* note 15, at 22 (stating that in economic models of voting, constituents vote in their "economic self-interest").

<sup>36</sup> Registration, deciding for which candidate to vote, and getting to the polling place are examples of voting costs. On the other side of the equation, the chances that an individual vote will affect the election's outcome are infinitesimal. Moreover, the economic benefit one expects from voting—namely the implementation of beneficial policies by a chosen candidate—is a nonexcludable good that will be enjoyed whether the person has voted or not. Voting therefore presents a classic collective action problem. See Conway, *supra* note 19, at 3, 139 (suggesting that individual voter's share of benefit, discounted by likely impact of his vote, cannot justify cost of voting); Farber & Frickey, *supra* note 15, at 24 (describing costs of voting and incentives to free ride in elections); Ruy A. Teixeira, *Why Americans Don't Vote: Turnout Decline in the United States, 1960-1984*, at 5 (Bernard K. Johnpoll ed., Contributions in Political Science No. 172, 1987) (noting that people do not vote because costs of voting are nonzero and expected benefits may be "indistinguishable from zero").

<sup>37</sup> See Teixeira, *supra* note 36, at 6 (describing as expressive "[those] other benefits involved in voting besides its expected value," and stating that "[t]he citizen, by voting, expresses his or her sense of duty toward society, responsibility toward a reference group, commitment to a candidate, party, or cause, or any number of other feelings that are linked to the election or its outcome"). Donald P. Green and Ian Shapiro, however, dispute that such benefits could ever outweigh the costs of voting and believe they were hypothesized

come in two forms: "solidary" benefits that derive from doing voting-related activities with other people<sup>38</sup>, and "purposive" benefits that derive from the act of voting itself.<sup>39</sup> Similarly, it is now acknowledged that voters do not bear all the costs of voting themselves; "get-out-the-vote" campaigns, for example, make it easier for people to register and remember to go to the polls.<sup>40</sup>

The fact remains, however, that as a percentage of voting age population (VAP),<sup>41</sup> fewer people vote today than did in 1960. Whatever the factors responsible for this decline, they must operate by making the costs of voting more expensive relative to all the benefits that the act of voting confers.

## 2. *Turnout Decline by the Numbers*

In the midterm congressional elections of 1998, only 41.9% of the VAP bothered to vote, giving the country its worst turnout in modern history.<sup>42</sup> The 1998 elections, however, were only the culmination of a trend forty years in the making. In the congressional elections held

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to rescue economic theories of voting from contradictory empirical evidence. Donald P. Green & Ian Shapiro, *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* 59-61 (1994); cf. Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 *J. Legal Stud.* 765, 783-84 (1998) (arguing that people vote to signal cooperation with patriotic norms, and that voting is useful symbol because its costs exceed its benefits). Nevertheless, even Green and Shapiro concede that although they may never outweigh the costs of voting, expressive benefits still might make some people more likely to vote, especially in close elections and when they are already likely to vote for other reasons. See Green & Shapiro, *supra*, at 60-63, 69-70.

<sup>38</sup> Solidary benefits are "intangible rewards that stem from social interaction, like status, deference and friendship." Rosenstone & Hansen, *supra* note 19, at 16. An example might be bonding with one's fellow party members at the polls.

<sup>39</sup> Purposive benefits are "intrinsic rewards that derive from the act of [voting] itself." *Id.* An example might be performing one's duty as a citizen to vote.

<sup>40</sup> See Piven & Cloward, *supra* note 20, at 37 (noting rise in voting costs when voter not registered by parties).

<sup>41</sup> Voting Age Population (VAP) "refers to the total number of persons in the United States who are 18 years of age or older regardless of citizenship, military status, felony conviction, or mental state." Fed. Election Comm'n, *A Few Words About Voting Age Population (VAP)*, at <http://www.fec.gov/pages/vapwords.htm> (last visited Oct. 29, 2002). VAP overestimates the number of people who could vote but do not, since it includes noncitizens and others who cannot vote, such as felons. *Id.* Nevertheless, this Note uses VAP as the standard against which turnout is measured, as this is the convention. See *id.*

<sup>42</sup> Jennifer C. Day & Avalaura L. Gaither, *Voting and Registration in the Election of November 1998*, at 1 fig.1 & n.1 (U.S. Census Bureau, P20-523RV, 2000) [hereinafter *Census Report*] (noting that turnout in 1998 was lowest modern turnout since at least 1942). The figures are even worse when one looks just at the House of Representatives. Gary C. Jacobson reports that only thirty-six percent of the VAP voted for House candidates in 1998, the same number as in 1994, and up only three points from the mere thirty-three percent House turnout in 1990, the lowest in modern history. Gary C. Jacobson, *The Politics of Congressional Elections* 101 (5th ed. 2001).



throughout the 1960s, the average turnout was 54.6%; by the 1990s, it had dropped nine points to 45.7%.<sup>43</sup>

An insufficient number of voters has been participating in congressional elections either to ensure an effective popular check or to implement majority rule. Throughout the 1990s, on average, Congress has been elected by less than a majority of the VAP.<sup>44</sup> Yet these average figures do not reveal just how poor Congress's democratic pedigree has been in recent years. Indeed, not since 1970 has the turnout been over fifty percent in a midterm election.<sup>45</sup> Even in presidential election years, fifty percent of the VAP has not voted regularly for Congress.<sup>46</sup> In fact, 1992 was the first and last time in twenty years that the congressional vote in a presidential election year *did* surmount the fifty-percent mark.<sup>47</sup>

### 3. *Mobilization and Voter Turnout*

Many political scientists attribute a large portion of the decline in voter turnout to a lack of mobilization,<sup>48</sup> that is, "the process by which candidates, parties, activists, and groups induce other people to participate."<sup>49</sup> In political elections, some of the most visible types of

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<sup>43</sup> The figures are averages based on statistics from Conway, *supra* note 19, at 7 tbl.I-I and Census Report, *supra* note 42, at 1 fig.1.

<sup>44</sup> See *supra* text accompanying note 43.

<sup>45</sup> In 1970, 54.6% VAP voted, compared with 44.7% in 1974. Census Report, *supra* note 42, at 1 fig.1. Turnout proceeded to rise through 1982, reaching a high that year of 48.5%, before declining steadily to 41.9% in 1998. *Id.*

<sup>46</sup> In presidential election years, the House vote tends to be roughly four percent lower than the presidential vote. Jacobson, *supra* note 42, at 101.

<sup>47</sup> In 1972, 50.7% VAP voted for Congress. Conway, *supra* note 19, at 7 tbl.I-I. Turnout dropped to 48.9% in 1976; it then hovered between 47% and 48% until 1988, when it bottomed out at 44.7%, before climbing to 50.8% in 1992. *Id.*

<sup>48</sup> See, e.g., Conway, *supra* note 19, at 174-75 (describing several studies that attribute large portion of turnout decline to changes in mobilization patterns); Rosenstone & Hansen, *supra* note 19, at 213 (stating that changing pattern of mobilization accounts for at least half of turnout decline since 1960s); Gregory A. Caldeira et al., *The Mobilization of Voters in Congressional Elections*, 47 J. Pol. 490, 491, 501 (1985) (concluding that political demobilization accounts for more of turnout decline than other explanations). See generally Piven & Cloward, *supra* note 20 (arguing that decline in voter turnout throughout history has resulted from active demobilization of segments of electorate by specific interests).

<sup>49</sup> Rosenstone & Hansen, *supra* note 19, at 25. There are, of course, other explanations for the decline. Researchers have correlated voter turnout with social factors, such as education, income, age, and mobility. See Teixeira, *supra* note 36, at 21-24. Some have argued that declining turnout after 1960 is partly attributable to the decrease in mean voting age and an increase in mobility. See *id.* at 24. Turnout has also been correlated with political factors, such as partisanship and efficacy, which is a measure of a person's confidence that (1) he can comprehend and participate in politics (internal efficacy), and (2) his political participation influences government action (external efficacy). Rosenstone & Hansen, *supra* note 19, at 15. Researchers have claimed that a decline in both of these factors

mobilization are campaign and issue advertisements, direct mail, voter guides, telephone banks, and face-to-face conversations with candidates or their supporters.

Mobilization affects turnout both by lowering the costs of voting and by making the vote more meaningful. For example, campaign and issue advertisements lower information costs by providing information to voters with which they can better decide for whom to vote.<sup>50</sup> Conversations with a candidate's supporters can also provide voters with information; but in addition, these contacts increase the material and expressive benefits of the election.<sup>51</sup> In turn, these reduced costs and increased benefits create closer elections, making people feel that their votes matter more, another factor that stimulates turnout.<sup>52</sup> In close elections, mobilizations also beget countermobilizations, which magnify all of these turnout-increasing effects.<sup>53</sup>

Some amount of mobilization undoubtedly occurs in every election. Political scientists, however, think that less of it may occur now than in the past, and that the mobilization that does occur is characteristically different from how it once was. Although several theories have been advanced,<sup>54</sup> they all emphasize elements that have been

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accounts for much of turnout decline. See Conway, *supra* note 19, at 170-71. Finally, low turnout, particularly among the poor and uneducated, has also been linked to rules that close registration long before an election. See Rosenstone & Hansen, *supra* note 19, at 208. Indeed, in states with election-day registration or no registration, turnout is approximately ten percent higher than the national average. Benjamin Highton, *Easy Registration and Voter Turnout*, 59 J. Pol. 565, 568 (1997). This Note does not deny the importance of these other causes; they are, however, beyond its scope.

<sup>50</sup> See Rosenstone & Hansen, *supra* note 19, at 27 (explaining how political mobilization can subsidize information costs).

<sup>51</sup> Cf. James L. Guth et al., *Thunder on the Right? Religious Interest Group Mobilization in the 1996 Election*, in *Interest Group Politics*, *supra* note 13, at 169, 185-87 (analyzing effectiveness of mobilization strategies employed within different religious traditions in 1996 elections, including informal discussion with other church members). Conversations with candidate supporters may increase the material and purposive aspects of the vote by causing voters to desire the candidate's election more strongly; or alternatively, they may increase its solidary aspects, turning the vote into an opportunity to bond with the candidate's supporters. See Rosenstone & Hansen, *supra* note 19, at 19-20 (arguing that "strong psychological attachments heighten the value of intrinsic rewards from participation").

<sup>52</sup> See Rosenstone & Hansen, *supra* note 19, at 144-45 (noting connection between external efficacy and turnout).

<sup>53</sup> See Jacobson, *supra* note 42, at 45 (describing campaign spending by incumbents to counter challengers' campaign strategies); Guth et al., *supra* note 51, at 173 (detailing countermobilization of liberal groups in response to Christian Right electioneering in 1996 elections). Where races are close and can be decided by increased participation, mobilization is likely to occur on both sides. See Rosenstone & Hansen, *supra* note 19, at 35.

<sup>54</sup> Francis Fox Piven and Richard A. Cloward, for example, think that historically parties, interest groups, and political elites have actively demobilized the lower socioeconomic strata of voters in order to entrench themselves and save money. Piven & Cloward, *supra* note 20, at 28-31. A demobilized electorate is desirable to parties and interest groups for several reasons: (1) It keeps their opponents' supporters from the polls; (2) it saves them

linked to low turnout in modern elections: competition, spending, and information.<sup>55</sup> These factors stand in a reciprocal relationship to mobilization and each other. Since campaign resources are limited, they are only made available where the potential for electoral competition exists; and where campaign resources are deployed, electoral competition increases. In races where money is spent, there is more information; in races where there is more information, turnout is higher.<sup>56</sup>

### *B. Competition, Spending, and Information in Congressional Elections*

A lack of mobilization is not only responsible for low turnout; it has also driven down the information content of electoral contests.<sup>57</sup> Specifically, insufficient mobilization has reduced competition and spending in congressional campaigns. In turn, low competition and spending have made information exceedingly difficult to obtain.

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from having to accommodate the "fractious elements" in their own parties; and (3) it reduces their campaign costs. *Id.* at 30-31. Therefore, what mobilization does occur is narrowly targeted, so as to avoid turning out those who would oppose the mobilizers' policies or candidates. See *id.*

Steven J. Rosenstone and John Mark Hansen hold a less cynical view of the decline in mobilization. According to them, the decline was a consequence of four changes in the political sphere that made effective mobilization prohibitively expensive: (1) Campaigns began to reach fewer people when they shifted to media advertisements rather than personally contacting voters; (2) races became less competitive; (3) campaign resources were increasingly divided among competing demands, such as additional primaries; and (4) participation in social movements declined. See Rosenstone & Hansen, *supra* note 19, at 217-18.

<sup>55</sup> See *infra* Part I.B.

<sup>56</sup> See Barbara Hinckley, *Congressional Elections* 10-13, 29 (1981) (noting that spending by least-visible candidates increases their recognition, and that people are more likely to vote for candidate when they have information about him); Jacobson, *supra* note 42, at 39, 134-35 (noting that districts where money is available tend to attract strong challengers, and that such challengers can successfully inject issues into campaign); Gary C. Jacobson & Samuel Kernell, *Strategy and Choice in the 1982 Congressional Elections*, in *Controversies in Voting Behavior* 239, 240 (Richard G. Niemi & Herbert F. Weisberg eds., 2d ed. 1984) [hereinafter *Controversies*] (observing correlation between strong qualifications of candidates challenging incumbents and their level of financing); Piven & Cloward, *supra* note 20, at 266 (describing increase in mobilization efforts in tight races "[w]hen issue[s] . . . resonate with the electorate").

<sup>57</sup> Like low turnout, low information renders the popular vote inadequate as either a popular check on the legislature or as a tool for implementing majority rule. See *supra* note 8 and accompanying text. Some dispute this proposition, however, and claim that in modern elections, voters can use the "shorthand cue of party" to vote as if they were informed. See e.g., Jacobson, *supra* note 42, at 106. Studies of such heuristics, though, demonstrate that the behavior of voters "deviates in significant and politically consequential ways from the projected behavior of a 'fully informed' electorate." Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 *Am. J. Pol. Sci.* 194, 195 (1996); see also Lau & Redlawsk, *supra* note 8, at 594 (finding that twenty-five percent of voters vote "incorrectly" in typical presidential election and predicting even fewer correct votes in elections for lower levels of elected office which garner less media attention).

It is perhaps the most striking feature of modern congressional elections that there is almost no competition.<sup>58</sup> Incumbents win the vast majority of electoral contests,<sup>59</sup> and since the 1960s, they have done so by increasing margins of victory.<sup>60</sup> As such, incumbents generally are perceived as safe,<sup>61</sup> and consequently face weak challengers.<sup>62</sup> The effects of this situation are predictable and self-perpetuating: Challengers are unable to attract donations, voter turnout is depressed, challengers lose, and incumbents are perceived as even safer than before.<sup>63</sup>

The safety of incumbents largely stems from the familiarity advantage they possess over their challengers. Most House elections are extremely low-information events. While many voters recognize their incumbent's name and can evaluate how they feel about him, most are far less familiar with challengers.<sup>64</sup> To stand any chance of defeating

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<sup>58</sup> Caldeira et al., *supra* note 48, at 492 ("[E]lectoral politics bereft of . . . competition . . . fails to generate the stimulation required for meaningful levels of participation.").

<sup>59</sup> Hinckley, *supra* note 56, at 37 (stating that for House and Senate races, incumbents win eighty to ninety percent of time).

<sup>60</sup> E.g., *id.* at 37-38 (noting that winning incumbents have margins of victory that are five percent higher than those of winning nonincumbents). This trend is sometimes referred to as "vanishing marginals," since competitive, or marginal districts are disappearing. See What Determines the Congressional Vote, in *Controversies in Voting Behavior*, *supra* note 56, at 199, 203 (surveying theories explaining trend). Some, however, question the validity of this theory and note that as marginal districts have grown safer nonmarginal districts have become more competitive. Thus, incumbents who win by a "safe" margin in one election are more likely than in the past to lose in the next one. Jacobson, *supra* note 42, at 28-29.

<sup>61</sup> An incumbent is considered safe if he won the previous election with fifty-five to sixty percent of the vote. Jacobson, *supra* note 42, at 28 (adopting sixty-percent standard); Hinckley, *supra* note 56, at 54-55 (adopting fifty-five-percent standard). Perception of incumbent vulnerability increases when incumbents seek their first reelection, see Jacobson, *supra* note 42, at 35, and when they have not maintained a presence in their districts, *id.* at 47. For a description of this last factor at work in the defeat of senior Democrats in 1980 and 1994, see *id.* at 47-48.

<sup>62</sup> The strongest challengers have previously run for Congress and have spent large amounts on their campaigns, Hinckley, *supra* note 56, at 26-27; they have also held prior elective office, Jacobson, *supra* note 42, at 37. But see Hinckley, *supra* note 56, at 26 (stating prior elective office "makes no difference"). House incumbents rarely face serious challengers. See, e.g., Jacobson, *supra* note 42, at 132 ("[M]ost incumbent House members continue to face obscure, politically inexperienced opponents whose resources [are insufficient] to mount a serious campaign.").

<sup>63</sup> Cf. Jacobson, *supra* note 42, at 39 (noting reciprocal relationship between strong challengers, availability of funds, and perceived likelihood of electoral success).

<sup>64</sup> Between 1980 and 1998, ninety-two percent of voters in House elections recognized the incumbent's name when it was provided, compared with only fifty-two percent who could recognize the challenger's. When asked to *recall* the candidates' names, however, only forty-six percent could name the incumbent, while a dismal seventeen percent could name the challenger. Both numbers were higher for Senate candidates, although on average, only thirty-five percent of voters could recall challengers' names. *Id.* at 111-12. Even among voters who recognized House candidates' names, though, fewer than fifty percent

the incumbent, challengers must surmount a threshold of minimum recognition.<sup>65</sup>

Everything changes when money is poured into a campaign, however. Each dollar a challenger spends, subject to diminishing marginal returns, increases the closeness of the election.<sup>66</sup> In those rare races that feature well-financed challengers and in open-seat elections, nonincumbent candidates are much more familiar to voters.<sup>67</sup> In addition to being closer, well-financed, competitive races also have higher turnouts.<sup>68</sup> Unfortunately, they are also extremely expensive,<sup>69</sup> and candidates rarely have sufficient funds to run them.<sup>70</sup>

Campaign spending not only increases the amount of information, it also increases the quality of the information. Typical incumbent elections have little to do with policy issues<sup>71</sup> and, as such, cannot

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could say they liked or disliked something about them. *Id.* at 114. Again, more voters were able to evaluate Senate candidates. *Id.* at 114-15.

<sup>65</sup> Hinckley, *supra* note 56, at 33.

<sup>66</sup> See Jacobson, *supra* note 42, at 43 (“At any given level of incumbent spending, challengers do better the more they spend.”); see also Caldeira et al., *supra* note 48, at 500 (stating that spending increases contact with voters, but is subject to law of diminishing returns). But see Ctr. for Voting and Democracy, Overview, Monopoly Politics, at <http://www.fairvote.org/reports/monopoly/overview.html> (denigrating role of money in outcomes of House elections and arguing that partisan redistricting over last twenty years has foreordained results in most races) (last visited Oct. 29, 2002).

<sup>67</sup> See Jacobson, *supra* note 42, at 112 (reporting eighty-percent recognition rate for open-seat candidates in House and ninety percent in Senate). Well-financed challengers enjoy similar increased name recognition. *Id.* at 121. Indeed, when a challenger contacts voters in any way—personally, by mail, by mass media, or indirectly—he increases his visibility. But when he contacts them in all four ways, his name is recalled and recognized at virtually the same rates as the incumbent’s. *Id.* at 120-21.

<sup>68</sup> *Id.* at 104; Conway, *supra* note 19, at 87 (stating that close elections cause high turnout).

<sup>69</sup> Estimates for serious House campaigns range from \$600,000 to \$800,000, and in large states, serious Senate campaigns may cost ten times more. Jacobson, *supra* note 42, at 43-44. The figure is even more striking when one considers that between 1972 and 1998, fifty-eight percent of all House challengers spent less than \$100,000. *Id.* at 41.

<sup>70</sup> Challengers receive less in donations than other types of candidates. The bulk of all donations actually goes to incumbents, see Hinckley, *supra* note 56, at 29-30, followed by open-seat candidates, and then challengers of vulnerable incumbents, Jacobson, *supra* note 42, at 38-39. Ironically, incumbents need donations least, since their spending has little effect on the outcome of the election. E.g., Hinckley, *supra* note 56, at 29. But see M. Margaret Conway & Joanne Connor Green, Political Action Committees and Campaign Finance, in *Interest Group Politics*, *supra* note 13, at 193, 204 (observing that early donations allow incumbents to begin campaigning early, discouraging possible challengers). As a result, incumbents spend far more than necessary in order to win and then hoard the rest, consuming resources that could better be used by challengers. See Jacobson & Kernell, *supra* note 56, at 247 (describing three safe, senior, Democratic incumbents who over-campaigned in 1982, won with eighty percent of vote, and were left, in aggregate, with \$1.5 million on hand).

<sup>71</sup> See Hinckley, *supra* note 56, at 44 (“In [House] races it is the perception of candidates—not of parties or issues—that emerges as important . . .”); see also Kim Ezra

be viewed as referenda on the incumbent's voting record.<sup>72</sup> Issues normally play so small a role in congressional elections for two reasons. First, most issues lack traceability; that is, the negative consequences of a particular vote cannot be pinned on the incumbent.<sup>73</sup> Second, the necessary conditions for policy voting generally are lacking. These are: (1) salience of the issue, meaning it is important and timely; (2) knowledge of the candidates' issue positions; and (3) a preference between them.<sup>74</sup> Monitoring any candidate's issue positions is expensive, however. Additionally, some voters project their own policy views onto the candidate they prefer, while others conform their policy views to those of their preferred candidate.<sup>75</sup>

By contrast, issues play a much greater role in well-funded campaigns. By spending large sums of money, challengers or their sup-

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Shienbaum, *Beyond the Electoral Connection: A Reassessment of the Role of Voting in Contemporary American Politics* 4 (1984) ("[V]oters . . . [are] presented with electoral debates for the most part devoid of meaningful issue content . . .").

<sup>72</sup> Most voters focus on candidates' personal characteristics and experience rather than their issue positions. See Jacobson, *supra* note 42, at 127 (explaining that positive survey comments had more to do with personality than political achievements). Very few voters can cite anything good that the incumbent has done while in office. See *id.* at 126-27 (reporting thirty-two percent of Senate voters and twenty-seven percent of House voters). Voters are also unable to say how incumbents voted on any bill, see *id.* at 126 (reporting that only eighteen percent of House voters knew this information), even when they involved controversial issues, see Thomas E. Mann, *Public Awareness of Congressional Candidates*, in *Controversies*, *supra* note 56, at 251, 267 (reporting that seventy to eighty percent of voters in 1976 were unaware of candidates' positions on abortion and gun control). Most disturbingly, a majority of House voters cannot even say whether they agree with how the incumbent generally votes, although a majority of Senate voters can. Jacobson, *supra* note 42, at 126 (reporting forty-six percent of House voters and fifty-six percent of Senate voters). Interestingly, very few voters say they generally disagree with either House or Senate incumbents. See *id.* (reporting nine percent of House voters and sixteen percent of Senate voters).

<sup>73</sup> See Jacobson, *supra* note 42, at 85 (stating that incumbents take only "explainable" votes—i.e. votes supported by plausible reasons—making it difficult for challengers to attack their records); Shienbaum, *supra* note 71, at 36-37 (explaining voters' difficulty in holding individual incumbents accountable when votes do not go along party lines). Most voters actually blame Congress as a whole for disfavored policy outcomes, while believing that their own representative is "doing a good job." Hinckley, *supra* note 56, at 104-05.

<sup>74</sup> Richard A. Brody & Benjamin I. Page, *Comment: The Assessment of Policy Voting*, 66 *Am. Pol. Sci. Rev.* 450, 455 (1972).

<sup>75</sup> See *id.* at 457 (describing effects of "projection" and "persuasion"). Some voters also engage in post-hoc "rationalization" of their voting decisions, fabricating reasons why they supported a particular candidate, even if those reasons did not motivate their votes. Jacobson, *supra* note 42, at 127.

Although exceedingly rare, incumbents are occasionally voted out of office based on their records. *Id.* at 85. Issue voting against incumbents is more likely when the incumbent has repeatedly taken extreme positions during roll call votes relative to other members of his party, for example, a very conservative Republican, or a very liberal Democrat. Hinckley, *supra* note 56, at 105.

porters can politicize particular issues, making them salient.<sup>76</sup> Challengers can also use mass-media advertising and other educational tools to provide voters with information about an incumbent's issue positions.<sup>77</sup> Anecdotal evidence suggests that advertising campaigns targeting incumbents' voting records are successful.<sup>78</sup> Studies demonstrate that voters who are exposed to campaign advertisements are more knowledgeable about candidates' issue positions;<sup>79</sup> importantly, they are also more likely to vote.<sup>80</sup>

From the large amount of scholarship on turnout decline and congressional elections, several conclusions emerge. First, people decide whether to vote or abstain based on their relative benefits and costs.<sup>81</sup> Second, it is necessary to take into account the effects of mobilization when trying to explain the decline in voter turnout since the 1960s.<sup>82</sup> And third, the lavish expenditure of funds by challengers in congressional campaigns increases competitiveness, information content, and voter turnout.<sup>83</sup>

## II

### INTEREST GROUP PURSUIT OF POLICY GOALS

As Part I demonstrated, popular elections are typically characterized by low turnout and a lack of policy voting.<sup>84</sup> Consequently, vot-

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<sup>76</sup> Successful challengers often try to focus on issues, since politicizing the campaign hurts incumbents. See Jacobson, *supra* note 42, at 130 (noting that incumbents become "more vulnerable when the focus is on their . . . policy stances"). Sometimes, they get assistance from interest groups in doing so. Hinckley, *supra* note 56, at 107.

<sup>77</sup> See Jacobson, *supra* note 42, at 129 (stating that voters evaluate candidates based on campaign messages, which have become increasingly political since 1980).

<sup>78</sup> See, e.g., *id.* at 94 (crediting AFL-CIO issue advocacy campaign with defeat of seven Republican incumbents in 1996); Herrnson, *supra* note 19, at 161 (describing successful issue advocacy campaigns by groups in 1994 and 1996).

<sup>79</sup> See Craig Leonard Brians & Martin P. Wattenberg, Campaign Issue Knowledge and Salience: Comparing Reception from TV Commercials, TV News, and Newspapers, 40 *Am. J. Pol. Sci.* 172, 183 (1996) (finding that "political advertising is . . . consistently and significantly associated with both higher levels of issue knowledge and more issue-laden candidate evaluations").

<sup>80</sup> Steven E. Finkel & John G. Geer, A Spot Check: Casting Doubt on the Demobilizing Effect of Attack Advertising, 42 *Am. J. Pol. Sci.* 573, 587 (1998). There is debate, however, about the effect on turnout of negative tone in campaign advertisements. Compare Paul Freedman & Ken Goldstein, Measuring Media Exposure and the Effects of Negative Campaign Ads, 43 *Am. J. Pol. Sci.* 1189, 1199 (1999) (finding three-percent increase in voter turnout), and Finkel & Geer, *supra*, at 587 (finding no negative effect), with Stephen D. Ansolabehere et al., Does Attack Advertising Demobilize the Electorate?, 88 *Am. Pol. Sci. Rev.* 829, 833 (1994) (finding five-percent decrease in voter turnout).

<sup>81</sup> See *supra* notes 35-40 and accompanying text.

<sup>82</sup> See *supra* Part I.A.3.

<sup>83</sup> See *supra* Part I.B.

<sup>84</sup> See *supra* Parts I.A.3, I.B.

ing fails to effectuate either of its historic functions: popular accountability or majority rule.<sup>85</sup> In the presence of mobilization, however, higher-turnout, policy-focused elections do occur.<sup>86</sup> Thus, organizations capable of significant mobilization efforts are well-situated to improve the electoral process.

Within the framework of low-competition, low-information congressional elections, interest groups serve both as a powerful force for democratic ideals and as a formidable threat to them. Both in and out of elections, interest groups convey information from elected officials to the populace,<sup>87</sup> and from constituents back to elected officials.<sup>88</sup> Groups do this, however, as part of an overall strategy to implement their political policy goals, which can be expensive—or even harmful—to everyone else.<sup>89</sup>

Part II of this Note explores some of the positive and negative effects interest groups have on the democratic system as they pursue different strategies to achieve their goals. Part II.A describes the public choice theory about how interest groups operate in the political marketplace. Part II.B then looks at interest group activity in three contexts: (1) electioneering; (2) lobbying; and (3) litigation. Part II concludes that interest groups behave more or less rationally, using the most cost-effective strategies available to them to achieve specific policy goals.

### *A. Interest Group Theory*

Public choice theorists see politics as a marketplace in which legislators sell services and legislation to the highest bidders in exchange for donations, votes, or even bribes.<sup>90</sup> The exact price of the transaction will depend on both the value of the legislation to those seeking it and the costs of obtaining it.<sup>91</sup> These costs are several: For example, would-be buyers must determine which legislators are best able to help them achieve their goals, and they must amass resources with

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<sup>85</sup> See *supra* notes 7-8 and accompanying text.

<sup>86</sup> See *supra* Part I.B.

<sup>87</sup> See *infra* note 103 and accompanying text.

<sup>88</sup> See *infra* note 105 and accompanying text.

<sup>89</sup> See *infra* notes 94-100 and accompanying text.

<sup>90</sup> See Landes & Posner, *supra* note 17, at 877 (“[L]egislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation. . . . Payment takes the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes.”). Public choice theory sees potentially *all* legislation—not just tax breaks and pork—as the product of such bargains.

<sup>91</sup> *Id.* In theory, the benefits of legislation are evaluated like those of any other commodity: by their expected net present value. See *id.* at 880 (“the maximum price the group will pay to obtain the legislation will equal the present value of th[e] profits” it expects to obtain from the legislation while it is in effect).



which to pay for them. This second cost is an important one; since most of the benefits legislation provides are collective, there is an incentive to free ride among individuals who stand to profit from the legislation's enactment.<sup>92</sup>

Unlike diffuse individuals, interest groups, which obtain resources from their members,<sup>93</sup> are well-suited to compete in the legislative marketplace. This creates several problems for democratic accountability. First, interest groups historically have overrepresented the viewpoints of those segments of society that already enjoy entrenched privileges.<sup>94</sup> From the standpoint of majority rule, this poses a problem since legislation will tend to favor the groups that can afford it, which may constitute only a small minority of society.<sup>95</sup> This problem, however, is mitigated somewhat by the fact that when interest groups form on one side of an issue, they tend to form on the other as well.<sup>96</sup>

Secondly—and more importantly—groups may pursue rent-seeking legislation—that is, legislation with widely distributed costs, that exceed its benefits, and that are enjoyed predominantly by the group.<sup>97</sup> Not only is this economically inefficient,<sup>98</sup> but it also creates an accountability problem. Although many individuals who pay for this legislation but do not enjoy its benefits might wish to censure legislators for enacting it, they cannot because they lack the means to

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<sup>92</sup> See Terry M. Moe, *The Organization of Interests: Incentives and the Internal Dynamics of Political Interest Groups* 23-24 (1980) (identifying common political goal shared by multiple individuals as collective good, which, if realized, would benefit “noncontributors and contributors alike”).

<sup>93</sup> Interest groups attract members by providing a range of expressive benefits and “selective” benefits—those enjoyed only by group members. *Id.* at 28. Examples of selective benefits include exclusive trade journals and group-sponsored insurance policies. *Id.* at 28-29. Members are useful to groups in a variety of ways. They pay dues, provide services, and, in some cases, even lobby on the group's behalf. See *infra* notes 119, 125.

<sup>94</sup> See Berry, *supra* note 19, at 12-13 (describing liberal critique of interest group pluralism).

<sup>95</sup> See Loomis & Cigler, *supra* note 13, at 4 (contrasting success of “numerically small, cohesive, well-heeled defense industry” with that of “marginal farmers and the urban poor”). Many groups tend to be highly focused because they attract members more easily that way. See Berry, *supra* note 19, at 46. However, there are often constituencies who share interests with a group, even though they are not members. See *id.* at 5-6.

<sup>96</sup> See Loomis & Cigler, *supra* note 13, at 7 (“Group politics thus is . . . characterized by successive waves of mobilization and countermobilization.”); cf. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 *Colum. L. Rev.* 1369, 1373 (1994) (arguing that absent inequality of resources, group political contributions are not problematic).

<sup>97</sup> See Farber & Frickey, *supra* note 15, at 34 (defining rent-seeking legislation as “not justified on a cost-benefit basis”).

<sup>98</sup> Rent-seeking legislation is Kaldor-Hicks inefficient, that is, the groups that it benefits do not gain sufficiently to compensate society fully for the costs of the legislation. *Id.* at 34 & n. 91.

discover which legislators are to blame.<sup>99</sup> Interest groups, on the other hand, do monitor legislators' voting records,<sup>100</sup> with the perverse results that legislators are accountable to the groups, but to no one else.

Interest groups use a variety of strategies to obtain their goals.<sup>101</sup> Sometimes, both in and out of electoral campaigns, these goals will be achieved best through grassroots mobilization.<sup>102</sup> When interest groups mobilize, they actually promote accountability since they educate the populace about which legislators have done what.<sup>103</sup> Interest groups also promote accountability when they engage in grassroots lobbying strategies,<sup>104</sup> because in doing so, they convey to the legislature the policy preferences of some segments of society.<sup>105</sup>

How much an interest group actually mobilizes, though, depends on the cost-effectiveness of the mobilization strategy relative to other strategies for achieving the same goals. Interest groups have limited resources.<sup>106</sup> Since groups are presumed to be economically rational, it is thought that they will engage in the strategy best-suited to achieving their goals, up to the point where the benefits of achieving those goals equal the costs of doing so.<sup>107</sup> Past that point, the interest group will either pick a cheaper strategy or move on to a different goal.<sup>108</sup> The strategies that interest groups employ fall under three general headings: (1) electioneering, (2) lobbying, and (3) litigation.

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<sup>99</sup> Cf. Farber & Frickey, *supra* note 15, at 23 (stating that since voters know little about conduct of legislature, elections are determined by services provided by groups).

<sup>100</sup> See *infra* note 103.

<sup>101</sup> See Berry, *supra* note 19, at 6-8 (describing roles played by interest groups and some of strategies used to achieve their goals).

<sup>102</sup> See Kenneth M. Goldstein, *Interest Groups, Lobbying, and Participation in America* 126-27 (1999) (describing different types of mobilization used to achieve different goals).

<sup>103</sup> See Jacobson, *supra* note 42, at 221 (observing that since 1970s, interest groups have monitored congressional voting records and communicated them to constituents through grassroots campaigns).

<sup>104</sup> Grassroots lobbying is the "identification, recruitment, and mobilization of constituent-based political strength capable of influencing political decisions." Goldstein, *supra* note 102, at 3 (internal citations omitted).

<sup>105</sup> See *id.* at 129 (observing that grassroots campaigns are effective because Congress listens to vocal constituents while ignoring those who are silent). However, there may be limits on how much mobilization can increase accountability. See *id.* at 129-30 (suggesting that if mobilization were more frequent, and if more people voted, Congress would have to balance constituent interests and mobilization would be less effective).

<sup>106</sup> See Berry, *supra* note 19, at 90 ("For interest groups, the law of resources is that *on any given day, any given group will have more relevant issues before it than it can possibly handle.*").

<sup>107</sup> See Rosenstone & Hansen, *supra* note 19, at 30 (stating that mobilization is one of several tools used by elites to achieve political goals and that consequently, it is used when it is likely to be best tool available).

<sup>108</sup> See Berry, *supra* note 19, at 92 (explaining that in practice, some issues become less pressing over time and are replaced by new issues).

## B. Interest Group Strategies

### 1. Electioneering

The major role of interest groups in electoral politics is to funnel money to particular candidates in the form of PAC donations and other contributions.<sup>109</sup> PACs are the second highest source of donations to seekers of political office.<sup>110</sup>

From the standpoint of voter turnout, most interest group contributions are squandered. Groups make campaign donations to obtain post-election access to the candidates they supported.<sup>111</sup> Because access requires that those candidates actually get elected, interest groups donate overwhelmingly to incumbents, and in particular to committee chairpersons since they are influential and occupy safe seats.<sup>112</sup> Expenditures by incumbents, however, have little effect on turnout or electoral outcomes.<sup>113</sup> Challengers, on the other hand, whose spending affects both turnout and outcome, have poor electoral chances;<sup>114</sup> consequently, they receive the least support from groups.<sup>115</sup>

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<sup>109</sup> See *id.* at 55 (“The most intimate connection between political parties and interest groups is campaign finance.”).

<sup>110</sup> Jacobson, *supra* note 42, at 59. In 1996, PACs gave candidates \$430 million, amounting to one-third of all House, and one-fifth of all Senate campaign funds. Loomis & Cigler, *supra* note 13, at 3. PACs also spent an additional \$50 million in “soft money.” Herrnson, *supra* note 19, at 154. This number is anecdotal, since soft money was not subject to expenditure limits or reporting requirements. *Id.* at 145-46. Although the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101, 116 Stat. 81, 82-86 (2002) bans soft money contributions to national parties and candidates altogether, interest groups have shown themselves adept at avoiding similar limitations in the past. See Herrnson, *supra* note 19, at 154-58 (discussing “creative money transfers,” by which groups swap funds between national parties, state parties, and other interest groups); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *Tex. L. Rev.* 1705, 1713-17 (1999) (arguing that regulation of campaign expenditures has channeled political money into less-regulated avenues and that further regulation would only increase trend).

<sup>111</sup> See Berry, *supra* note 19, at 56 (noting that “PACs are often preoccupied with access”).

<sup>112</sup> *Id.*; see Herrnson, *supra* note 19, at 150 (observing that majority of PACs have given to incumbents since mid-1980s because of influence and high reelection rates). For a discussion of incumbent safety generally, see *supra* notes 59-62 and accompanying text. Though less generously than they donate to incumbents, groups also support open-seat candidates and challengers. See Berry, *supra* note 19, at 154 (noting that “the campaigns where the money will do the most good are widely identified and monitored closely”).

<sup>113</sup> See *supra* note 70 and accompanying text.

<sup>114</sup> See *supra* notes 63-66 and accompanying text.

<sup>115</sup> Since 1986, challengers have received less in PAC donations than either incumbents or open-seat candidates. Berry, *supra* note 19, at 153. When challengers come from the minority party, however, they do receive donations from nonconnected, highly ideological groups which care more about “the makeup of Congress” than access. Jacobson, *supra* note 42, at 71; see also Conway & Green, *supra* note 70, at 202-03 (noting that nonconnected PACs are more likely to contribute to challengers). Even these groups still give more to incumbents: In 1996, only twenty-two percent of nonconnected PAC donations

Though only a small fraction of interest groups participate in elections in any way other than donations,<sup>116</sup> their nondonative participation is far more significant with respect to voter turnout. Many of their strategies fit under the rubric of voter mobilization. Under the right circumstances, groups conduct grassroots campaigns to influence an election through agenda setting<sup>117</sup> and voter education.<sup>118</sup> Additionally, groups participate in electoral politics in two other important ways. First, some groups provide parties or candidates with organiza-

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went to challengers, compared to fifty-six percent for incumbents. Conway & Green, *supra* note 70, at 204.

<sup>116</sup> Berry, *supra* note 19, at 52.

<sup>117</sup> Interest groups engage in agenda setting when they attempt to frame issues in order to make them useful during a campaign. Goldstein, *supra* note 102, at 33. For example, during the year before the election, a group that intends to oppose an incumbent might opt to mount an issue advocacy campaign that emphasizes the importance of an issue the incumbent is likely to oppose, such as the environment. Such a campaign will cue voters that the environment is an important issue. *Id.* at 35. They will then be primed to respond when the environment is again brought up during the electoral campaign. In this way, groups can make issues salient, one of the preconditions for issue voting. See *supra* note 74 and accompanying text. Additionally, agenda setting allows groups to test campaign messages and signal incumbent vulnerability, thereby attracting quality challengers. Goldstein, *supra* note 102, at 34-35.

<sup>118</sup> Voter-education activities use many of the same tactics as agenda-setting activities. For example, groups may buy media spots for issue advertisements during the electoral campaign, highlighting an incumbent's poor record on a particular issue. See Goldstein, *supra* note 102, at 26 (describing issue advertisements by environmental groups in 1996 elections targeting fifteen House Republicans); Herrnson, *supra* note 19, at 161 (describing issue advertisements in 1996 by ideologically disparate groups).

Although the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 203-04, 116 Stat. 81, 91-92 (2002), bans corporate and labor issue advertisements on television and radio that target specific candidates within sixty days of an election or thirty days of a primary, there are grave doubts about the constitutionality of these provisions. Cf. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604 (1996) (striking Federal Election Campaign Act (FECA) provisions limiting independent party expenditures for violation of First Amendment); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) (striking FECA limits on independent expenditures by individuals and groups for violating First Amendment). Indeed, two lawsuits challenging these provisions have already been filed. See Michael Hedges, Senator, NRA, Special Interest Groups File Suits Aimed at Overturning New Law, *Houston Chron.*, Mar. 28, 2002, at A4 (describing suits by Senator McConnell and NRA challenging provisions limiting issue advertising).

In addition to media advertisements, groups contact voters by other means, such as (1) targeted direct mailings, see Jacobson, *supra* note 42, at 82; (2) voter guides, e.g., Herrnson, *supra* note 19, at 160; and (3) encouraging members to persuade their friends to vote for the group's chosen candidate, see Guth et al., *supra* note 51, at 170. This last method has proven both effective and inexpensive. See Guth et al., *supra* note 51, at 183 (noting increased Republican vote in 1996 among those who talked with Christian Right members in church); Rosenstone & Hansen, *supra* note 19, at 27-30 (describing reduced costs of indirect mobilization through social networks).

tion for their campaigns.<sup>119</sup> Second, groups sometimes take an active role in soliciting challengers.<sup>120</sup>

Several conclusions, then, may be drawn about interest group participation in elections. First, groups can influence electoral participation and outcomes by supplying money; by providing abundant, high-quality information; and by inducing strong challengers to run. Second, the vast majority of interest groups choose not to do so, limiting their involvement to donations to incumbents, which may promote access, but have little effect on either turnout or outcome.

## 2. *Lobbying*

Lobbying is the sine qua non of the interest group. While few interest groups take active roles in electoral campaigns, nearly all maintain offices in Washington, D.C. for the purposes of lobbying Congress.<sup>121</sup> Much of what lobbyists do is simply reminding legislators that they exist.<sup>122</sup> Lobbyists also compile information about the issues they champion and supply it to members of Congress, hoping to attract support.<sup>123</sup>

When a legislative outcome is especially important, interest groups will sometimes use grassroots campaigns to lobby in favor of or against a particular bill.<sup>124</sup> These campaigns can either be highly targeted or broad-based. In targeted campaigns, those group members who are likely to be active, powerful, and influential with particu-

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<sup>119</sup> See Jacobson, *supra* note 42, at 79-80 (describing interest group provision of campaign organization to nonincumbent candidates). Some groups ask their members to volunteer to staff candidate campaign offices, see Berry, *supra* note 19, at 53 (noting that group volunteers help campaigns man phone banks and run registration and get-out-the-vote drives), while others provide valuable services such as consulting or compiling lists of voters likely to be active and sympathetic, see *id.* at 150 (describing interest group's provision of precinct-targeting data to electoral campaigns); Herrnson, *supra* note 19, at 151 (noting PAC provision of "precinct targeting data, candidate training sessions, and public opinion polls[, as well as] fund-raising assistance").

<sup>120</sup> If there is an incumbent who consistently opposes the group's interests, the group might target him with an issue advocacy campaign prior to the election, in order to make him appear vulnerable on that issue. See Goldstein, *supra* note 102, at 56 (describing legislative grassroots campaigns in 1993 designed to convince challengers that incumbents would be vulnerable on particular issues in 1994 election); *supra* notes 61-62 (noting that vulnerable incumbents attract well-qualified challengers).

<sup>121</sup> See Loomis & Cigler, *supra* note 13, at 10-11, 13 (remarking on tenfold increase in interest group presence in Washington, D.C. since 1960s).

<sup>122</sup> See Berry, *supra* note 19, at 96-97 (stating that much lobbyist time "is taken up in trying to be visible" and describing lobbyists' efforts to meet and talk with members of Congress).

<sup>123</sup> See *id.* at 99-101 (stating that lobbyists are more useful to members of Congress when they can provide accurate information on policy issues).

<sup>124</sup> See Goldstein, *supra* note 102, at 54 (distinguishing interest group grassroots campaigns with electoral and legislative objectives).

lar legislators are asked to contact them on behalf of the group.<sup>125</sup> These “grasstops” campaigns are rather inexpensive because relatively few group members are used and their efforts are directed at only a small number of legislators.<sup>126</sup> Occasionally, groups pursuing legislative goals will also seek broader participation, both from members and nonmembers.<sup>127</sup> Broad campaigns are much more expensive than targeted ones; thus, there is reason to believe that they are used much less frequently.<sup>128</sup>

When comparing interest group electioneering and lobbying, then, two trends emerge: (1) Groups engage in lobbying much more frequently than electioneering; and (2) most lobbying activities are significantly less expensive than electioneering ones.

### 3. *Litigation*

For most interest groups, litigation is a less significant strategy for achieving policy goals than either electioneering or lobbying. Relatively few interest groups litigate.<sup>129</sup> With the exception of public-interest law firms, most groups do not have in-house legal departments.<sup>130</sup> Litigation is also very expensive;<sup>131</sup> therefore, only

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<sup>125</sup> See *id.* at 61 (stating that lobbyists pursuing legislative objectives tend to use targeted campaigns relying on “key contacts” or “grass tops” who are most likely to influence legislators). These contacts tend to be well-educated and “upper class,” *id.* at 111-12, or have some personal connection with targeted legislators, *id.* at 62. In these campaigns, groups target legislators who sit on committees with jurisdiction over the legislation at issue and are undecided about how they will vote. *Id.* at 59-60.

<sup>126</sup> See *id.* at 59, 62 (reporting results of survey, in which most legislative campaigns target legislators at congressional committee level and mostly target them through “grass-tops” strategy). This is not to say that a grasstops campaign is inexpensive; the top consultant charges as much as \$9000 to set up a face-to-face meeting between a member of Congress and a key constituent. *Id.* at 62.

<sup>127</sup> See *id.* at 65 (giving examples of interest groups using broad-based mobilization campaigns to enlist credible third parties to convey their message to legislators); William P. Browne, *Lobbying the Public: All-Directional Advocacy*, in *Interest Group Politics*, *supra* note 13, at 347 (stating that groups try to enlist sympathetic nonmembers and opinion leaders in grassroots campaigns to convey stronger messages). Participants in such campaigns are often asked to bombard legislators with letters and phone calls in support of or opposition to a bill. Berry, *supra* note 19, at 131-32. These campaigns seem to be effective. See Goldstein, *supra* note 102, at 1-3 (citing role of interest-group stimulated constituent communications in outcomes of various bills).

<sup>128</sup> See Berry, *supra* note 19, at 132.

<sup>129</sup> Andrew Jay Koshner, *Interest Group Participation and the United States Supreme Court* 177 (1996) (“[I]t is important to realize that the vast majority of interest groups do not engage in litigation as a means of influencing public policy. It is also important to note that even the majority of those groups that do file amicus briefs, do so sparingly.” (citations omitted)).

<sup>130</sup> Berry, *supra* note 19, at 175.

<sup>131</sup> When groups sponsor litigation, the costs quickly “can reach six figures.” *Id.* at 177. Berry tells of one interest group that lost its case on appeal when it could not afford the

wealthier groups will be able to afford to use the court system extensively.<sup>132</sup>

There are signs, however, that interest group litigation is growing more important. A 1996 study of the United States Supreme Court docket found that groups participate as amici in ninety-two percent of Supreme Court cases, compared to under fifteen percent in 1950.<sup>133</sup>

While it is not clear exactly why interest group litigation has surged, one theory suggests that it is due to an increase in congressional legislation and judicial activism.<sup>134</sup> As Congress has enacted broader legislation, the judiciary has had more opportunities to pass on it, increasing the stakes for interest groups whose policy goals are implicated.<sup>135</sup> Further, the courts have responded to Congress by becoming more activist; in the 1980s, for example, the Supreme Court struck down provisions in sixteen congressional acts and 161 state acts, compared with five congressional acts and sixty-four state ones in the

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\$40,000 price tag for copies of the trial transcript. *Id.* Even when groups only participate as amici curiae, the costs of participation are nonnegligible. See Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. Pol. 782, 800 (1990) (estimating cost of amici curiae briefs at "\$10,000 to \$15,000, and quite often more"). The price tag increases when one considers that some groups participate at the certiorari stage as well as at the merits stage. *Id.* at 787-88. Furthermore, since most groups participating as amici submit briefs on their own or in small coalitions, see *id.* at 799, the cost of amicus participation generally will not be dispersed over many participants.

<sup>132</sup> Berry, *supra* note 19, at 177 ("Because the cost of litigation is so high, it is the wealthier lobbies like large corporations and trade associations that are the least likely to be deterred by [its] price . . .").

<sup>133</sup> Koshner, *supra* note 129, at 13. The number of interest groups per case has also increased: In 1950, the number was less than one, while it was approximately six in 1993. *Id.* In particular, the rise in amicus participation has disproportionately favored nonconnected, ideologically conservative groups. See Karen O'Connor & Lee Epstein, *The Rise of Conservative Interest Group Litigation*, 45 J. Pol. 479, 482 (1983) (noting three-fold increase of conservative-group participation between 1969 and 1980). Nevertheless, studies of both the Supreme Court and lower federal courts have indicated that a wide variety of groups from all parts of the political spectrum frequently participate. See Caldeira & Wright, *supra* note 131, at 802 ("[T]he Supreme Court is remarkably accessible to a wide array of organized interests."); Susan M. Olson, *Interest-Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory*, 52 J. Pol. 854, 859-60 (1990) (noting that both poor and wealthy interest groups litigate).

<sup>134</sup> Although Koshner presents these as two separate theories, see Koshner, *supra* note 129, at 25, 27, they are conceptually intertwined.

<sup>135</sup> See *id.* at 27-28 (

[T]he explosion of Congressional legislation and regulation dealing with [broad policy] issues . . . ha[s] led the Court to expand its scope as it was pressed to interpret ambiguous language and give concrete meaning to politically charged areas. [It has] create[d] opportunities for groups to pursue policy outcomes in the judicial arena . . .)

*Id.* at 148-49 (citations omitted). Koshner notes that although Congress did not pass more statutes between 1945 and 1990, the number of pages per statute vastly increased in this period, increasing the number of issues and the total amount of legislation.

1950s.<sup>136</sup> Not surprisingly, then, interest groups have litigated more because the courts have become a more important forum for achieving policy goals.<sup>137</sup>

Though it may account for the general increase in interest group litigation, this theory does not explain why interest groups litigate in any particular case as opposed to using more traditional channels for political change.<sup>138</sup> Fortunately, interest group theory suggests an answer.<sup>139</sup> If groups are rational, they will litigate when the expected benefits of a policy change pursued through litigation, less the costs of litigation, are greater than the expected benefits of the same policy change pursued through other strategies, less the costs of those strategies. Further, the net benefits of the policy change (the expected benefits minus the costs) pursued through litigation must be positive. Expected benefits here not only include the net present value of the desired policy, but also the likelihood that the policy will be implemented through the chosen strategy—for example, an eighty-percent chance of winning in court, or a twenty-percent chance of winning at the polls.<sup>140</sup>

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<sup>136</sup> *Id.* at 123 tbls.4-5. This trend has clearly continued into the 1990s and 2000s, in which the Court struck down provisions in the Americans with Disabilities Act (ADA), *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001) (holding unconstitutional civil suits for damages against states for violations of Title I of ADA), the Violence Against Women Act (VAWA), *United States v. Morrison*, 529 U.S. 598 (2000) (striking down civil remedies under § 13981 of VAWA for gender-motivated violence), the Age Discrimination in Employment Act (ADEA), *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding unconstitutional civil suits for damages against states for violations of ADEA), the Religious Freedom Restoration Act (RFRA), *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down RFRA), and the Gun-Free School Zones Act, *United States v. Lopez*, 514 U.S. 549 (1995) (holding Act unconstitutional), just to name a few.

<sup>137</sup> See Koshner, *supra* note 129, at 122-23 (stating that activism should make groups more likely to pursue policies in Court and noting increase in amicus activity during periods of activism).

<sup>138</sup> Several theories have been proposed. Berry suggests that groups will litigate when the costs of government policy outweigh those of litigation or when they lack sufficient popular support to obtain policy changes through lobbying. See Berry, *supra* note 19, at 176. Olson has proposed that groups will litigate when their ratio of political resources to legal resources is lower than their opponents' ratio. See Olson, *supra* note 133, at 862. However, both of these theories fail to adequately consider the costs and benefits of alternative policies.

<sup>139</sup> Cf. *supra* notes 106-08 and accompanying text (arguing that rational groups will mobilize up to point where benefits equal costs).

<sup>140</sup> See *supra* note 91 (explaining how value of legislation is computed). Additionally, the calculus should include extraneous costs and benefits, such as whether pursuing litigation will alienate other groups with similar policy goals or whether pursuing a lobbying strategy will attract new members. Cf. Berry, *supra* note 19, at 71, 90 (stating that groups are unwilling to take positions that could alienate substantial number of members and that groups try to show members that they are achieving their goals). For the mathematically inclined, this formula can be rendered as  $EV_L - C_L > EV_N - C_N$  and  $EV_L - C_L > 0$ , where  $EV_L$  and  $EV_N$  are the expected values of the policy change pursued, respectively, through litigation



In thinking about interest group litigation, then, it is essential to remember two points. First, few groups litigate, although more do so now than in the past, largely because activist courts have shown themselves willing to make desired policy changes. And second, groups will choose litigation over other strategies when the expected net benefits of litigation are nonzero and are greater than the expected net benefits of an alternative strategy, like electioneering or lobbying.

### III

#### DEFERENTIAL REVIEW, INTEREST GROUP INCENTIVES, AND INCREASING VOTER TURNOUT

Part III looks at how judicial review interacts with the costs and benefits of interest group strategies. Specifically, Part III.A surveys the current deferential standard for reviewing the constitutionality of statutes, concluding that it encourages interest group lobbying. It also contends that the increase in interest group litigation as a response to judicial activism demonstrates that a change in judicial doctrine can alter interest group incentives. Part III.B then presents a proposal for changing the standard of judicial review. It argues that premising deferential review on a showing of higher voter turnout will provide incentives for interest groups to engage in more electoral mobilization.

##### *A. The Connection Between Deferential Review and Interest Group Strategies*

Courts in this country review most legislative enactments using a deferential standard of review.<sup>141</sup> Statutes are said to “bear[ ] a strong

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and an alternative strategy, and  $C_L$  and  $C_N$  are the respective costs of litigation and the alternative strategy. For example, imagine that the net present value of the group's desired policy change is \$1000, and that the group has an eighty-percent chance of obtaining it in court, but only a forty-percent chance through another strategy. Further, assume that the costs of litigation are \$800 and the costs of the alternate strategy \$200. The net benefit of litigation ( $0.8 \times \$1000 - \$800$ ) is 0, while the net benefit of the alternative ( $0.4 \times \$1000 - \$200$ ) is \$200. Thus, the group will pursue an alternative strategy, even though it has a better chance of winning in court, since the alternative has greater value.

This formulation is oversimplified, however, since it does not take into account how pursuing multiple strategies simultaneously affects the chances of success. Nonetheless, it will suffice for the purposes of this Note.

<sup>141</sup> Not so long ago, deferential review consistently applied across doctrinal areas. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984) (noting “the overlap—almost the identity—of current tests under many of the most important clauses of the Constitution: the dormant commerce, privileges and immunities, equal protection, due process, contract, and eminent domain clauses”). Additionally, such deference also applied to congressional exercise of its Commerce Clause authority, for example, *FERC v. Mississippi*, 456 U.S. 742, 754 (1982), and its power under § 5 of the Fourteenth Amendment to enforce that Amendment's provisions, for example, *Katzen-*

presumption of validity,"<sup>142</sup> meaning that they will be upheld unless those challenging them can "negative every conceivable basis which might support [them]."<sup>143</sup> Perhaps the most familiar form of deferential review is the "rational basis" standard that courts use under the Equal Protection and Due Process Clauses to evaluate legislative enactments that do not implicate any protected class or fundamental right.<sup>144</sup> Under deferential review, the rational basis for upholding the law need not be one on which the legislature actually relied, nor does it need to be supported "by evidence or empirical data."<sup>145</sup>

Many justifications have been advanced in support of such a deferential standard.<sup>146</sup> Among them, Landes and Posner, writing from a

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bach v. Morgan, 384 U.S. 641, 650-51 (1966). More recently, however, the Court has carved out some of these areas for more searching analysis. See *infra* note 154.

<sup>142</sup> FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993) (applying rational basis review to provisions in Cable Communications Policy Act of 1984 that regulated satellite network while exempting similarly situated cable networks, and upholding provisions against economic due process challenge).

<sup>143</sup> *Id.* at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

<sup>144</sup> See, e.g., *Vacco v. Quill*, 521 U.S. 793, 808 (1997) (upholding against Fourteenth Amendment equal protection challenge New York law that rationally distinguished between assisted suicide and withdrawal of life support); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (using rational basis standard to uphold Filled Milk Act challenged under Due Process Clause of Fifth Amendment).

While this Note's discussion of deferential review will draw primarily from equal protection and due process cases, it must be stressed that deferential review is not limited to these clauses and applies in other doctrinal areas as well. See *supra* note 141.

<sup>145</sup> *Beach Communications*, 508 U.S. at 315. This is the position of the majority of the Court. Justice Stevens, however, would require that "the classification [be] rationally related to 'a legitimate purpose that [the Court] may reasonably presume to have motivated an impartial legislature.'" *Id.* at 323 n.3 (Stevens, J., concurring in judgment) (quoting *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring in judgment)).

<sup>146</sup> James Bradley Thayer, for example, argued that a deferential standard is called for on separation-of-powers grounds. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 150 (1893). Thayer's claim was not only normative, but descriptive—he claimed that historically, courts *had* deferred to legislative judgments of constitutionality. *Id.* at 139-42.

Drawing on Thayer, Alexander M. Bickel wrote that deference is essential in order to avoid the "counter-majoritarian" difficulty of unaccountable courts overturning the will of the people's elected representatives. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16, 58 (2d ed. 1986). Since Bickel, the "counter-majoritarian" difficulty has become "the central obsession" in American constitutional theory. Friedman, *supra* note 5, at 334-35 & n.1 (surveying voluminous literature on countermajoritarian difficulty). It has led to such notable works as John Hart Ely's *Democracy and Distrust*, which describes a "process theory" of judicial review where courts only declare statutes unconstitutional when they discriminate against groups that lack effective access to the channels of the political process; and it has spawned numerous pieces questioning and defending Bickel's underlying assumptions of a democratically accountable legislature. Compare, e.g., Mashaw, *supra* note 24, at 56, 59-60 (arguing that public-choice critique of democratic system shows that legislative enactments are either

public choice perspective, suggested that deferential review serves to cement bargains between the interest groups and the legislature. According to them, since longer-lasting statutes are more valuable to groups and legislators,<sup>147</sup> deferential review makes statutes more profitable to both by increasing their stability.<sup>148</sup>

Though Landes and Posner do not argue it, their theory suggests that deferential review has increased interest group pursuit of access to lawmakers through lobbying and electoral support of incumbents.<sup>149</sup> If courts generally have sustained legislative enactments, then they have increased the expected net benefits of a policy change pursued through lobbying, both by making it last longer and by making its results more certain.<sup>150</sup> Moreover, since interest groups have limited resources and can only pursue a few goals through a few strategies at any one time,<sup>151</sup> an increase in lobbying activity has likely resulted in a reduction in other strategies such as electoral mobilization on behalf of challengers.

As the Supreme Court has become more activist,<sup>152</sup> however, it has altered the deferential standard in many areas of constitutional doctrine. In equal protection and due process cases, the Court has, at

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random or controlled by special interests and, as such, are undeserving of deferential standard for judicial review), with, e.g., Einer R. Elhague, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *Yale L.J.* 31, 34-35 (1991) (arguing that proposals for more stringent judicial review are flawed because they implicitly adopt controversial normative baselines, uncritically assume that litigation process is more democratic than legislative one, and incorrectly conclude that stricter scrutiny will raise transaction costs for interest groups).

<sup>147</sup> Groups will pay up to the present value of the future benefits they receive from favorable legislation. Landes & Posner, *supra* note 17, at 880. Legislation that lasts longer will provide benefits over a longer period, increasing its present value. *Id.* at 881-82. Further, the more certain that the legislation will continue in force, the higher its expected value. *Cf. id.* at 895 (postulating that if judiciary were sufficiently unreliable, expected benefits of legislative deals would not outweigh costs).

<sup>148</sup> *Id.* at 882-83. Landes and Posner go even further, and argue that enforcing these deals is the reason for an independent judiciary. *Id.* at 892 ("We have argued that the existence of an independent judiciary . . . [is a] method[ ] of imparting durability to an initial legislative judgment protecting some group.").

<sup>149</sup> Although electoral support of incumbents is, properly speaking, an electioneering strategy, see *supra* note 16, it is not primarily intended to achieve interest group policy goals directly. Rather, support of incumbents facilitates access, see *supra* note 111 and accompanying text, and allows groups to pursue legislative bargains through lobbying, see *supra* note 112. By contrast, electoral support of challengers or open-seat candidates is itself intended to achieve group goals directly, by putting in office someone who is more ideologically inclined to vote for the group's preferred policy outcomes. See *supra* note 115.

<sup>150</sup> See Landes & Posner, *supra* note 17, at 880-83, 895; see also *supra* note 147; *cf. supra* note 91 and text accompanying notes 139-40.

<sup>151</sup> See *supra* notes 106-08 and accompanying text.

<sup>152</sup> See *supra* note 136 and accompanying text.

times, struck down statutes for lacking a rational basis, even when those statutes were almost certainly as rational as others it had previously upheld.<sup>153</sup> In recent years, the Court increasingly has carved out specific doctrinal areas exempt from the general presumption of constitutionality.<sup>154</sup> Furthermore, the Court has also shown itself willing to evaluate some statutes under these exempt doctrines, even when they arguably do not apply, simply in order to avoid deferential review.<sup>155</sup>

Although a direct causal relationship has not been proven, the Court's derogation from deferential review in many areas of constitutional doctrine seems related to its increasing activism since the 1950s and the increase in interest group litigation during the same period.<sup>156</sup> Together, these phenomena at least support the idea that changing legal doctrines affects the incentives and cost-benefit calculus of inter-

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<sup>153</sup> See *Romer v. Evans*, 517 U.S. 620, 640-41 (1996) (Scalia, J., dissenting) (arguing that amendment to Colorado Constitution prohibiting preferential treatment for homosexuals clearly survived rational basis scrutiny since Court previously had upheld as rational laws criminalizing homosexual activity (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986))); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 456 (1985) (Marshall, J., dissenting) ("The Court holds the ordinance invalid on rational-basis grounds . . . . Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation.").

<sup>154</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act because it was not "congruent and proportional" to scope of possible constitutional violations by states and therefore exceeded congressional authority under § 5 of Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating Gun-Free School Zones Act because it regulated noneconomic conduct, exceeding congressional authority under Commerce Clause); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (limiting state's ability to condition zoning on provision of easement under Fifth Amendment Takings Clause). Previously, laws challenged under these doctrines were reviewed deferentially. See *supra* note 141.

<sup>155</sup> A particularly good example of this phenomenon is *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), in which a plurality of the Court invalidated provisions of the Coal Industry Retiree Health Benefit Act of 1992 because they imposed retroactive liability on a former coal producer in violation of the Takings Clause of the Fifth Amendment. After *Nollan*, the Court has subjected governmental action in takings cases to a much higher level of scrutiny. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 394-95 (1994) (following *Nollan's* "reasonable relation" test to invalidate city's conditioning of building permit on petitioner's grant of easement); see also *supra* note 154. Interestingly, though, the plurality was alone in applying a Takings Clause analysis. Six courts of appeals previously had upheld the provisions on rational basis grounds under the Fifth Amendment's Due Process Clause. *E. Enters.*, 524 U.S. at 517-18, 519 n.4. Even Justice Kennedy, who concurred in the judgment but dissented in part, vehemently disagreed with the plurality's Takings Clause analysis, *id.* at 540, but concluded that even when evaluated under an economic due process challenge, the statute failed to survive rational basis scrutiny. *Id.* at 547-48. Dissenting for four Justices, Justice Stevens would have applied a deferential standard of review and upheld the statute. *Id.* at 553; see also *Mashaw*, *supra* note 24, at 62-63 (describing cases in which Court invalidated statutes by construing substantive due process challenges as procedural ones, thereby avoiding deferential review).

<sup>156</sup> See *supra* notes 133-137 and accompanying text.

est groups, and may even suggest that group behavior is directly responsive to shifts in legal doctrine.<sup>157</sup>

*B. Restructuring the Presumption of Constitutionality to Encourage Electoral Mobilization*

If interest group incentives can be—and have been—altered by changes in legal doctrine, then it may be possible to structure legal doctrine to foster interest group electoral mobilization. A proposal to achieve this goal might premise a deferential standard of review on a showing that some minimum number of voters turned out in some minimum number of elections preceding the enactment of the legislation.<sup>158</sup> A reasonable suggestion might be a showing of fifty-percent turnout in the two previous elections.<sup>159</sup>

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<sup>157</sup> See Koshner, *supra* note 129, at 214-15 (concluding that there is some support for idea that groups respond to changes in legal doctrine, especially shifts in ideology and landmark cases).

<sup>158</sup> One might object to such a proposal on separation of powers grounds, presumably because one believes that a heightened standard of review inevitably will lead courts to substitute their policy judgments for those of a legislature, resulting in judicial lawmaking. Such a view, however, is hard to reconcile with the fact that in many types of cases, courts already employ a nondeferential standard of review and routinely second-guess the legislature. See *supra* note 154. Alternatively, one might believe that the Constitution exclusively commits to Congress the supervisory role over matters relating to elections. See U.S. Const. art. I, § 4, cl.1 (authorizing Congress “at any time” to regulate time, place, or manner of congressional elections); *id.* art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .”). Again, though, one would then have trouble accounting for the Court’s line of voting-rights cases. E.g., *Webster v. Sanders*, 376 U.S. 1, 6-7 (1964) (stating that nothing in Constitution immunizes from judicial protection apportionment laws that debase citizens’ voting rights). Finally, one might think, as Thayer would, that the proposal does not accord proper respect to a coordinate branch of government. See *supra* note 146. A possible response to this is that coordinate branches only deserve respect when they are properly constituted. In that sense, this Note’s proposal is in line with Ely’s process theory. See *id.* By adopting nondeferential review, the courts intervene to correct the failures of the political process—low-turnout, low-information elections—and serve to check the excesses of an unaccountable legislature. However, once a showing has been made that the process works—that a certain percentage of people voted in the previous elections—intrusive judicial intervention is no longer needed, and the courts may appropriately defer to the legislature.

<sup>159</sup> Although there is nothing talismanic about either of these numbers, both are justifiable because they are the minimum numbers required to implement majoritarianism: Since the House of Representatives stands for election every two years, as does one-third of the Senate, U.S. Const. art. I, §§ 2-3, assuming that a majority of people vote in each election, all of the House and two-thirds of the Senate will have been elected by a majority of the people after two elections. Fifty-percent turnout is also an attainable number; indeed, turnout routinely topped fifty percent in the 1950s. Teixeira, *supra* note 36, at 11; see also *supra* note 43 and accompanying text.

If one rejects the idea that American democracy is majoritarian, see *supra* notes 4-5, then the numbers may seem arbitrary. The line, however, needs to be drawn somewhere; if experience were to show other numbers to be more appropriate standards, they could be adopted instead. While some might prefer a more fluid formulation, in which the more

In practice, how would such a presumption work? Most cases come with no presumptions; the plaintiff or moving party must persuade the court of its interpretation of the relevant law and then must offer sufficient evidence—normally a preponderance—to convince the trier of fact that he has satisfied the requirements of the relevant law. In normal cases under the current system, presumptions assist litigants by relieving them of having to satisfy some elements of their cases; once the litigants prove some set of basic facts, those elements are deemed to have been established.<sup>160</sup> In constitutional cases, however, the presumption of constitutionality functions differently; without any showing of proof,<sup>161</sup> it imposes on the party challenging the statute the heightened burden of demonstrating that there is no rational basis on which the statute can be upheld.<sup>162</sup>

In effect, this Note's proposal would make constitutional cases look more like regular ones.<sup>163</sup> As an initial matter, the party chal-

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people that turn out, the more deference given to legislative enactments, such a rule would be impractical. It would ensure some amount of deference, no matter how poor the turn-out. The benefit of a bright line, however, is that it establishes a cutoff point below which groups simply would be unable to trust courts to uphold their legislative bargains. Creating this uncertainty is essential to motivating groups to mobilize. See *infra* notes 167-68 and accompanying text.

<sup>160</sup> See 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5124, at 356 (2002) (“[P]resumption means a rule of law which declares that the trier of fact must, upon proof of a certain basic fact, find a certain further fact . . . unless sufficient evidence of the nonexistence of the presumed fact is offered.”).

<sup>161</sup> According to Wright and Graham, the “presumption” of constitutionality is not a real presumption at all, but rather an “assumption,” since it does not depend on the establishment of any basic fact. *Id.*

<sup>162</sup> In constitutional cases, there is some conflation of the standards for evaluating evidence and law. The early cases developing the presumption of constitutionality held that “act[s] of the legislature [are] not to be declared void, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.” Thayer, *supra* note 146, at 140 (quoting *Commonwealth v. Smith*, 4 Binn. 117, 123 (Pa. 1811)). Many states continue to employ the “beyond a reasonable doubt” standard for establishing unconstitutionality. See, e.g., *Bradbury v. Idaho Judicial Council*, 28 P.3d 1006, 1011 (Idaho 2001); *City of Chicago v. Ill. Dep’t of Revenue*, 590 N.E.2d 478, 487 (Ill. 1992); *Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137, 1152 (N.J. 1998); *Port Jefferson Health Care Facility v. Wing*, 726 N.E.2d 449, 452 (N.Y. 1999). As the Colorado Supreme Court recently explained, in constitutional cases, “beyond a reasonable doubt” describes a “burden of persuasion,” not an evidentiary standard. *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 n.11 (Colo. 2000) (declining to reformulate “reasonable doubt” standard).

<sup>163</sup> This Note's proposal would have no effect on laws that contain suspect classifications or infringe on fundamental rights. Strict scrutiny would continue to apply in such cases. See, e.g., *United States v. Virginia*, 518 U.S. 515, 532-34 (1996) (employing intermediate scrutiny to invalidate, on equal protection grounds, Virginia school's policy of not admitting women); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (applying strict scrutiny to all racial classifications); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (applying strict scrutiny to invalidate poll tax that violated Equal Protection Clause

lenging the constitutionality of a statute would not have to meet a heightened standard. Instead of having to show that there is no conceivable rational basis for upholding the statute, perhaps it would have to show only that the legislature's actual or probable basis for enacting it was irrational, that the goals at which the law aims are not important enough to justify such sweeping legislation, or that the means employed by the statute to achieve its goals are too broad.<sup>164</sup> The party seeking to uphold the statute, however, could offer a showing that fifty percent of the people voted in the two elections immediately prior to the legislation's enactment. At that point, the law would be presumed constitutional; the showing on voter turnout alone would be sufficient to uphold the statute. The party challenging the law then could try to rebut the presumption, but it would have to establish that there was no conceivable rational basis to support it.<sup>165</sup>

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by impinging on fundamental right to vote); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (applying strict scrutiny to contraceptive law impinging on right to privacy).

<sup>164</sup> This is similar to "intermediate scrutiny," which applies to gender classifications under the current system and requires

the reviewing court [to] determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

*Virginia*, 518 U.S. at 533 (1996) (citations omitted).

<sup>165</sup> That is, the rational basis standard, as currently understood by the majority of the court, would again apply. See *supra* note 145 and accompanying text.

It is important to recognize that this proposal does not advocate any change in substantive doctrine. Thus, once the standard of review has been determined, judges would continue to evaluate the statute's constitutionality in the manner they normally do. Of course, even under current standards of review in constitutional cases—especially in equal protection and economic due process cases—the nature of the judicial inquiry is highly fact specific, and there often will not be much substantive law on whether a particular statute is rational. That is, unlike in the law of antitrust, for example, in which numerous cases guide the determination of whether a particular business practice amounts to monopolization, see, for example, *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir.) (elucidating substantive legal principles that have emerged "[f]rom a century of case law on monopolization"), cert. denied, 122 S. Ct. 350 (2001), in the constitutional sphere, there often will be little or no law that bears on a statute's rationality, see, for example, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (holding, without precedent, that city zoning ordinance violates Equal Protection Clause because it is irrational). Thus, in constitutional cases, the standard of review will tend to determine the outcome. Cf. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (characterizing strict scrutiny as "strict" in theory and fatal in fact" and rational basis scrutiny as "minimal . . . in theory and virtually [nonexistent] in fact").

What effect would this proposal have on interest group incentives? Such predictions cannot be made with any real certainty. However, if fewer than fifty percent of the people voted and if sufficient constitutional challenges were brought,<sup>166</sup> a less deferential standard

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To give an example of how this Note's proposal will work, imagine that *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), had been decided under the proposed scheme. In the actual case, the Supreme Court upheld the constitutionality of certain provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Act of 1972, which compensates mine workers who die from or become disabled by pneumoconiosis. *Id.* at 19-20. On Fifth Amendment due process grounds, mine operators challenged the Act's scheme of compensation, claiming that it was irrational: (1) to require them to compensate retroactively workers who had left the mining industry prior to the Act's enactment; and (2) to assess liability only against the workers' former employers rather than taxing the industry as a whole, since the scheme disproportionately harmed older mine operators by giving a competitive advantage to new entrants who would not be saddled with the costs of retroactive liability. *Id.* at 14-15, 18. Noting the strong presumption of constitutionality attached to legislative enactments, *id.* at 15, the Court rejected both arguments, stating that it was "unwilling to assess the wisdom of Congress' chosen scheme . . . [and] that the Act approaches the problem of cost spreading rationally . . . ." *Id.* at 18-19.

The Court would have reached the same result under this Note's proposal. Since the Act was amended on May 19, 1972, Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150, the government could have shown that voter turnout was greater than fifty percent in both 1968 (55% in the House) and 1970 (54.6% in the House), the two previous elections. See Conway, *supra* note 19, at 7 tbl.I-I. The Act thus would have been entitled to the presumption of constitutionality and would have been upheld on the rational basis standard, just as it actually was.

If the Act had been amended in 1975, however, things might have been different. Only 44.7% VAP voted for Congress in 1974, see *supra* note 45; thus turnout would not have exceeded fifty percent in the two elections prior to the amendment, and the Act could not have been presumed constitutional. The Court could then have inquired into Congress's reasons for passing the Act. Was it really a cost-spreading measure, as the Court assumed, designed to force operators and their consumers to internalize the health costs they had imposed on mine workers for years? See *Turner Elkhorn Mining*, 428 U.S. at 18. Or, in fact, was it a rent-seeking subsidy extracted by a powerful and cohesive mine workers' union from the general public and a declining, fractious mining industry? Even if the Act was intended as a legitimate cost-spreading device, the Court might have queried whether the compensation scheme it created served that purpose reasonably well. In the actual case, Justice Powell, concurring in part, asked these very questions. And although he strongly suspected "that Congress ha[d] acted irrationally in pursuing a legitimate end," he was "not satisfied that [the mine operator's arguments were] sufficient . . . to override the presumption of constitutionality." *Id.* at 45. Without that presumption, however, Powell—and with him the Court—might have gone the other way.

<sup>166</sup> There is reason to think that there might be a sufficient number of challenges. Although the Supreme Court has not struck down that many statutes over the course of its history, it has been far more active in doing so in recent years. See *supra* note 136 and accompanying text. Additionally, many cases that are now presented as issues of statutory interpretation so as to avoid deferential review might be brought as constitutional challenges if the doctrine were more favorable. Compare, e.g., *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. "The Benzene Case,"* 448 U.S. 607, 659 (1979) (plurality opinion) (invalidating OSHA regulation for exceeding statutory authority), with *id.* at 685-86 (Rehnquist, J., concurring) (applying moribund nondelegation doctrine to hold act itself unconstitutional); see also Brief for Respondents at 1, *The Benzene Case*, 448 U.S. 607



of review might reduce the value of rent-seeking legislation to both interest groups and Congress. A nondeferential standard would make legislation far more vulnerable to constitutional challenges, rendering it less likely to last into the future. As a result, the legislation's expected present value would probably decrease,<sup>167</sup> and groups would not be willing to pay Congress as much to obtain it.<sup>168</sup> It is also likely that there would be a decrease in interest group pursuit of access strategies,<sup>169</sup> assuming that the costs of these strategies remain roughly constant. Since groups would benefit less than they currently do from the passage of rent-seeking legislation, they would have less reason to pursue the strategies that lead to its enactment. In particular, donations to incumbents, which currently draw a great deal of group resources,<sup>170</sup> would decline.

With the resources they would save from the reduction in access strategies, groups would be able to invest in alternative ones.<sup>171</sup> Absent the possibility of the presumption, groups would only have an increased incentive to invest in litigation.<sup>172</sup> The potential for a pre-

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(1979) (Nos. 78-911 & 78-1036) (limiting question presented to statutory interpretation issues and ignoring nondelegation issues). Furthermore, traditional estimates of statutory challenges may be underrepresentative, since they focus on the Supreme Court docket, but not all challenges, particularly those that are unsuccessful at the circuit level, make it up to the Supreme Court. See Landes & Posner, *supra* note 17, at 883 n.18.

<sup>167</sup> See *supra* note 147 and accompanying text.

<sup>168</sup> See *supra* note 91 and accompanying text.

<sup>169</sup> The term "access strategies" refers to those strategies designed primarily to influence legislators, such as electoral support of incumbents and the various lobbying strategies. See *supra* note 149. By contrast, electioneering strategies are much broader and encompass any strategy that occurs in the context of elections. See *supra* Part II.B.1. Electioneering strategies can include access strategies, such as campaign donations to incumbents, see *supra* notes 111-12, but also include strategies designed to place candidates in office, especially challengers and open-seat candidates. See *supra* note 115. Of course, when groups use electioneering strategies successfully to elect challengers and open-seat candidates, they often follow up with access strategies in order to influence the new legislators.

<sup>170</sup> See *supra* note 112.

<sup>171</sup> Groups would almost certainly reinvest these funds, given the abundance of relevant issues and shortage of resources. See *supra* notes 106-08 and accompanying text.

<sup>172</sup> In the extreme scenario, nondeferential review potentially could make courts, rather than legislatures, the primary policymaking bodies. In such a case, groups understandably would devote substantial resources to litigation since the important decisions would be made in court. See *supra* note 137 and accompanying text. Even in the more likely situation, where legislatures continue to be the primary policy makers, nondeferential review gives courts a heightened role in the lawmaking process, and it is likely that groups would respond to that role by increasing their investment in litigation. *Id.* Groups would not, however, increase their electioneering, because even if groups sought to elect more ideologically desirable challengers and open-seat candidates rather than buying access to incumbents, the success of electioneering depends on whether those challengers and open-seat candidates get elected and pass favorable laws. If nondeferential review seriously curtailed the legislature's ability to make sustainable laws, then groups would not invest in lobbying or electioneering. Cf. Elhague, *supra* note 146, at 88-89 (arguing that in face of

sumption of constitutionality, however, would give interest groups an incentive to divide their resources between litigation and electioneering. If groups believe that in the course of pursuing electioneering strategies they also can turn out at least fifty percent of the people (or whatever the requisite percentage is), then they begin to have an incentive to mobilize. By mobilizing in the electoral context, groups would help to ensure the primacy of legislative lawmaking, thus safeguarding any bargains that come out of the electioneering process from later challenges in the courts. In other words, by engaging in electioneering, groups would increase the stability, and hence the value, of the legislation they obtain.<sup>173</sup> Whether groups pursued access or electioneering strategies would depend upon whether they preferred to pursue their policy goals in courts or through legislatures. In turn, that determination would depend upon the relative costs and benefits of each. Since groups pursue one strategy over another only when the expected net benefits of the one are nonzero and exceed those of the other,<sup>174</sup> it is likely that they would only invest in litigation when its expected net benefits exceed those of electioneering.

The net benefits of electioneering, however, might often exceed those of litigation. Litigation strategies may not compare favorably to electioneering ones. The relationship between increased spending and success is not as clear in the court system as it is in the electoral one,<sup>175</sup> making it likely that dollar for dollar, electioneering will be a better investment.<sup>176</sup> Moreover, it is possible that in some contexts,

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nondeferential review, groups could achieve their goals by influencing courts alone and not legislatures).

<sup>173</sup> See *supra* notes 147-48.

<sup>174</sup> See *supra* note 140 and accompanying text.

<sup>175</sup> Certainly, money plays a role in successful litigation. Money is necessary to meet certain threshold requirements, such as paying filing fees and hiring competent counsel. See Olson, *supra* note 133, at 859. Further, increased funds can purchase better legal talent, which may affect the outcome of the case. *Id.* However, "fancy lawyers" lose cases to merely competent lawyers all the time. Thus, in the litigation context, once both sides have a certain threshold of resources, money is not so great a predictor of outcome. By contrast, money directly impacts the outcome of elections; indeed, when challengers spend money, every dollar they spend increases recognition, turnout, and information. See *supra* notes 66-68 and accompanying text.

<sup>176</sup> Electioneering may have further benefits over litigation as well. Policy changes achieved through electioneering rely on the legislative process, see *supra* note 149, which is better than litigation at creating new policies. While a court case is as good a method as legislative repeal or amendment for blunting the effects of a disfavored statute, a case is not a particularly good forum for implementing a desired policy. Although courts occasionally do create new policies by crafting judicial rules, see, for example, *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (holding that prior to questioning, prisoners in custody must be informed of their right to remain silent and to be provided with attorney, and that until prisoners waive rights, no usable evidence may be obtained), they do so relatively rarely. Thus, in this respect, if a group is seeking to implement a desired policy, it has a

litigation costs would exceed electioneering costs. First, most interest groups already donate to some types of candidates.<sup>177</sup> Thus, they have both the requisite experience and infrastructure to make campaign donations. The same is not true of litigation activities. Far fewer groups litigate, and fewer still have their own legal departments.<sup>178</sup> Before interest groups could begin to benefit from funds put into the litigation process, they would have to establish a critical threshold of experience and personnel. Furthermore, there are more electoral strategies, at a variety of costs, to choose from than there are litigation strategies.<sup>179</sup> It therefore seems probable that a greater number of attractive combinations of costs and benefits would be available in the electoral arena than in the court system. On balance, then, more of the resources made available by the predicted decline in lobbying strategies and incumbent donations might well go to electioneering activities rather than to litigation.<sup>180</sup> Given the cycle of mobilization and countermobilization,<sup>181</sup> if some significant percentage of interest groups began to devote the bulk of their resources to electoral campaigns, then it is probable that many more would soon follow suit.<sup>182</sup>

The important question, then, is whether interest groups really could mobilize sufficient voters to meet the minimum threshold that confers a presumption of constitutionality on legislation. It is clear that any strategy that groups might employ to surmount that threshold

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comparatively greater chance of success through an electioneering strategy than through a litigation one, increasing the expected value of electioneering relative to litigation. See *supra* note 140 and accompanying text.

<sup>177</sup> See *supra* notes 109-10 and accompanying text.

<sup>178</sup> See *supra* notes 129-30 and accompanying text.

<sup>179</sup> Litigation strategies are basically limited to sponsorship and amicus participation. See *supra* notes 129-32 and accompanying text. Electioneering strategies include donations of money, services, and volunteers, as well as independent spending campaigns for issue advertising and "get-out-the-vote" drives. See *supra* Part II.B.1.

<sup>180</sup> It should be pointed out that this Note's proposal might not properly alter the incentives of an interest group that pursues very few issues. Imagine, for example, a hypothetical group that has only one issue; further, assume that the group has implemented its goals fully with respect to that issue through a rent-seeking statute. Because this Note's proposal focuses on turnout in the two elections preceding the year of the legislation's enactment, *supra* note 165 and accompanying text, whether a court will presume the statute constitutional depends on an historical fact over which the group no longer exercises any control. Since the group is concerned with no other issues, though, it has no reason to mobilize in future elections, as it is unlikely to seek any further rents from Congress that it will wish to insulate from judicial scrutiny.

Nevertheless, there are few single-issue groups, see *supra* note 106 (stating that groups tend to have more issues than resources); consequently, the scope of this problem might be quite limited.

<sup>181</sup> See *supra* note 96.

<sup>182</sup> Of course, litigation is subject to the same mobilization-countermobilization phenomenon. Thus, which strategy would actually benefit from this effect depends on the initial distribution of funds.

would have to focus on funding challengers' campaigns. Challengers increase the competitiveness of congressional races with every dollar they spend, promoting high information content and high voter turnout.<sup>183</sup> By contrast, incumbent spending has little effect on turnout,<sup>184</sup> and open-seat candidates already receive adequate funding.<sup>185</sup> Whether funding challengers alone would suffice to bring voter turnout up to fifty percent is an open question, but there is at least one reason to think that it might: Even at its current historic low, voter turnout is only eight percentage points below a fifty-percent threshold.<sup>186</sup> Although this turnout rate is dismal for a western democracy, it is still high enough that fifty percent should not be an insurmountable hurdle.

### CONCLUSION

In practice, courts are highly unlikely to adopt any plan for increasing voter turnout that resembles the one proposed in this Note. Despite the recent trend towards judicial activism,<sup>187</sup> deferential review is far too entrenched in legal doctrine to be in danger of any major shift.<sup>188</sup> More importantly, though, America has become thoroughly disgusted with interest group influence on the political process. America's current approach to interest groups is typified by the recently enacted Bipartisan Campaign Reform Act of 2002, which contains specific provisions aimed at limiting—or even eliminating—interest group influence.<sup>189</sup> This approach of grudging toleration and rigorous regulation is unrealistic,<sup>190</sup> however, in that it does not acknowledge that interest groups have already established themselves as fixtures in the political process<sup>191</sup> and will most likely find ways to continue to make their influence felt.<sup>192</sup> It also fails to acknowledge that groups have real potential to improve the political process through further investment of their considerable resources in electoral

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<sup>183</sup> See *supra* Part I.B.

<sup>184</sup> See *supra* note 70 and accompanying text.

<sup>185</sup> See *supra* note 112. Since the correlation between campaign spending and close elections is subject to decreasing marginal returns, *supra* note 66, giving additional donations to open-seat candidates, who already spend a great deal on their campaigns, would have little effect on stimulating increased voter turnout.

<sup>186</sup> See *supra* note 42 and accompanying text.

<sup>187</sup> See *supra* note 136 and accompanying text.

<sup>188</sup> See *supra* notes 141-47 and accompanying text.

<sup>189</sup> See *supra* notes 110, 118.

<sup>190</sup> This Note does not take the position that groups should be unregulated or even that the provisions of the Campaign Reform Act will prove deleterious. Rather, it simply has tried to suggest that the approach embodied in the Act is only half the story.

<sup>191</sup> See *supra* note 19 and accompanying text.

<sup>192</sup> See *supra* note 110.

politics, especially in the campaigns of challengers. By ignoring this potential, the country wastes an opportunity to save itself from recurring low-turnout, low-information elections. As long as elections continue to stagnate, the democratic process—from the perspective of both accountability and majoritarianism—will continue to suffer.

