

1997

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Thomas W. Merrill
Columbia Law School, tmerri@law.columbia.edu

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Recommended Citation

Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J. L. & PUB. POL'Y 219 (1997).

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DOES PUBLIC CHOICE THEORY JUSTIFY JUDICIAL ACTIVISM AFTER ALL?

THOMAS W. MERRILL*

Some legal scholars have argued that public choice theory justifies certain kinds of judicial activism.¹ Others have said it does not.² Given the present state of the debate, it would appear that those finding no necessary support for judicial activism have the stronger argument. I will suggest, however, that if we tweak the analysis a little further, it may turn out that public choice theory provides limited support for judicial activism after all.

From an economic perspective—which is to say, the public choice perspective—it may be useful to think of judicial activism as part of a larger market in which a product called “law change” is bought and sold.³ This market has many potential buyers, in the form of the interest groups to which the previous panelists have already referred. Virtually every group has some change in law it would like to see adopted, whether it be producer groups that would like to see new limitations on entry by potential competitors, or environmental groups that would like to see new limitations on the development of natural resources.

On the seller side, we can simplify the analysis by assuming that there are only two firms in the market for law change—the legislature and the courts. We can then reformulate the inquiry as follows: what sorts of factors will determine the demand for

* John Paul Stevens Professor of Law, Northwestern University. Thanks to Ian Ayres and Eric Rasmusen for their suggestions.

1. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (drawing in part on public choice ideas to support wide-ranging judicial activism under the Takings Clause); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 *TUL. L. REV.* 849 (1980) (using interest group analysis to justify more intrusive judicial review of legislation for rationality).

2. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31 (1991).

3. For present purposes, I will define judicial activism broadly to include any change in the law by courts, whether produced by the overruling of precedent or by some kind of novel interpretation of the law that has not been enunciated before.

and supply of law changes from the courts—that is, the demand for and supply of judicial activism—as opposed to the demand for and supply of law changes from the legislature?

The demand side of the equation has been pretty thoroughly analyzed by public choice scholars. Building on Mancur Olson's pioneering account,⁴ we can say that a group's demand for law change is a function of its ability to organize for collective action. That ability, in turn, is a function of such variables as the per capita stakes of the individuals who make up the group, and whether the group has a preexisting associational structure.⁵

The following example can be used to illustrate Olson's analysis of group demand. The U.S. Department of Agriculture currently maintains a system of annually-adjusted quotas on the importation of sugar cane. Consumers as a group would benefit from raising the quotas: more imported sugar cane would increase the supply of refined sugar, which would in turn slightly lower the price of Frosted Flakes and Cokes. American farmers who grow sugar beets and sugar cane, however, would lose revenues if the quotas were raised: more imported sugar cane would lower prices for domestic producers.

Olson's theory predicts that consumers will transmit a very weak demand for raising the quotas. Consumers are an extremely large group, and the savings to any individual consumer from a liberalization in the quotas would amount to only a few dollars a year.⁶ This will make it very hard for consumers to get organized and raise resources for collective action. No consumer has a strong incentive to pay much attention to the issue, and consequently free riding will be rampant if any collective action is attempted. Moreover, there is no preexisting associational structure of consumers devoted to this particular issue.

Domestic sugar beet and sugar cane farmers, in contrast, are a much smaller group, with much higher per capita stakes. For them, the current system of quotas translates into thousands of dollars a year in additional revenues. Moreover, these farmers

4. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

5. See generally *id.* at 22-36.

6. The total amount of money involved is substantial. The aggregate cost to consumers has been calculated to be over \$500 million per year. See JACK HIRSHLEIFER, *PRICE THEORY AND ITS APPLICATIONS* 195-96 (5th ed. 1992). Divided over all consumers in the United States, however, this works out to only about two dollars per consumer.

are geographically concentrated in only a few states. This makes it easier for them to organize and raise money for collective action devoted to maintaining the quotas. Given their high stakes and geographic concentration, farmers will be more likely to pay attention to the issue, which will discourage free riders. And the farmers have a preexisting associational structure, in the form of farmers' organizations and marketing cooperatives set up and supported by the government.

Legal scholars who have assimilated Olson's analysis have occasionally concluded that it justifies greater judicial activism. After all, if well-organized groups are over-represented in the legislative process, and poorly-organized groups are under-represented in that process, then perhaps social welfare would be advanced by having courts decide these kinds of issues.

More recently, however, other public choice-influenced scholars have successfully challenged this conclusion.⁷ One is Einer Elhauge of Harvard Law School, who wrote a terrific article a few years ago pointing out, among other things, that the groups that are over-represented or under-represented in the legislative or administrative process are likely also to be over-represented or under-represented, as the case may be, in the judicial process.⁸ Another is Neil Komesar of Wisconsin Law School, who recently wrote a book that takes the point one step further. Komesar argues that the groups that are over-represented or under-represented in the political process will also be over-represented or under-represented, as the case may be, in the courts *and* in the economic marketplace.⁹

As Elhauge and Komesar have demonstrated, it is not a valid argument to point to some kind of failure in the political process—like interest-group capture—and say that this means we should have judicial activism. Such a shift may just replace capture of the legislature with capture of the judiciary. To return to my sugar cane quota example, it will not do to suggest that consumers would be better off having the Agriculture Department's quotas challenged in court—perhaps by arguing that they violate the Administrative Procedure Act or the Constitution. For the same reasons that consumers will be able

7. See *supra* note 2.

8. See Elhauge, *supra* note 2, at 67-8.

9. See KOMESAR, *supra* note 2, at 98-150.

to transmit only a weak demand to the legislature for change, they will be unlikely to mount any credible action in court. In fact, as far as I am aware there have been no judicial challenges to the sugar quotas brought on behalf of consumers.

But so far we have looked only at the demand side of the equation. Perhaps when we turn to the supply side we can discover some basis for differentiation between the legislature and the courts as a source for law change. Here, I would suggest two factors that are potentially significant.¹⁰

The first I will call the *minimum bid limitation* for procuring a law change. The idea here is that neither the legislature nor the courts will supply a change in law unless an interest group is willing to pay at least a certain threshold price. This is easiest to see with respect to the courts, so I will explain the idea in that context first.

As should be obvious, one cannot produce a change in law from the courts simply by writing a letter to Chief Justice Rehnquist and saying "please change the law." Instead, you have to file a lawsuit and frame the facts and the legal arguments in such a way as to demonstrate the plausibility of a judgment that embodies the desired legal change. Then, of course, you have to have the resources and the skill to get the issue passed on by one or more appeals courts, and perhaps ultimately by the Supreme Court itself. All of this takes a significant amount of resources—someone has to pay the lawyers. It also requires organizational skills, such as picking the right lawyers and the right cases, coordinating the lawyers, and so forth.

How much does it take in order to mount a credible campaign to get the courts to change the law? If the project entails both trial court and appellate proceedings, I would guess that something around \$250,000 in resources (or the equivalent in volunteer lawyering time) would be the minimum investment necessary to be a serious player in the market for judicial activism.¹¹ In other words, the judicial supply curve does not

10. The following draws upon Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 J.L. & SOC. INQUIRY (forthcoming 1997).

11. Given these substantial threshold costs, the most common form of judicial "lobbying" by interest groups takes the form of filing amicus briefs in an effort to influence appellate courts in their resolution of cases filed by someone else. See, e.g., Robert C. Bradley & Paul Gardner, *Underdogs, Upperdogs and the Use of the Amicus Brief: Trends and Explanations*, 10 JUST. SYS. J. 78 (1985).

peek its head out from the vertical axis until it starts to see bids of at least \$250,000 (see Figure 1 below).

The same point can be made with respect to the legislature, although here it is more uncertain exactly what the minimum bid might be. Every once in a blue moon someone writes an editorial advocating a new law, key members of the legislature read the letter and are persuaded by it, and a statute more or less spontaneously results. But 99.9 percent of the time it does not happen this way.

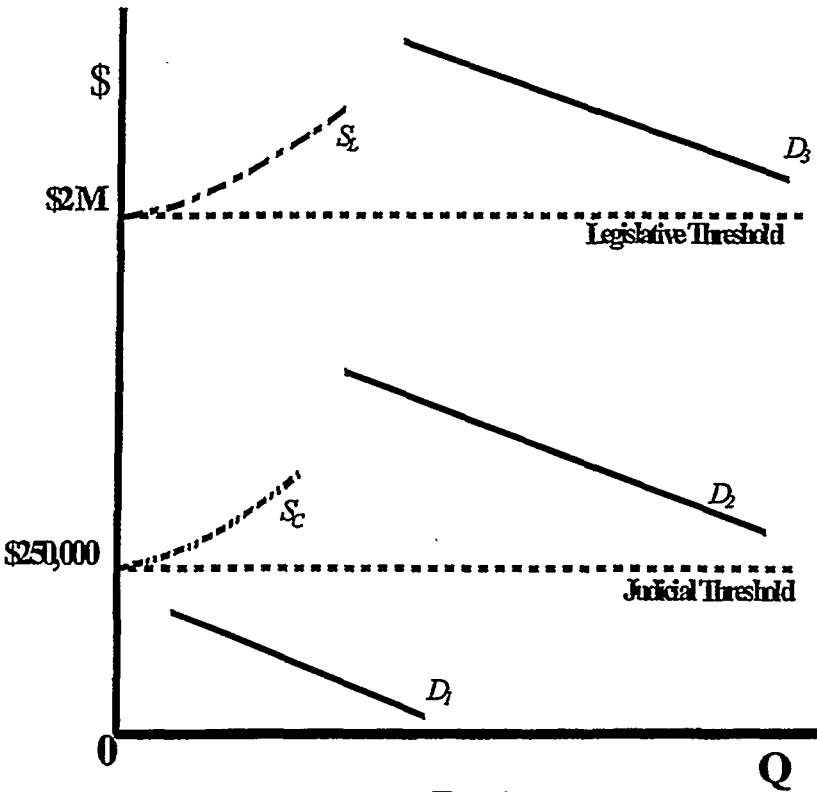


Figure 1

If a group wants to have a law change seriously considered by the legislature, it will have to mount a sustained and well-conceived campaign in pursuit of this end. The group will have to motivate key legislators to embrace its proposal, perhaps by showing them that the group has the ability to influence how a significant number of votes will be cast in the next election, or that the group can direct a large amount of campaign contributions to the legislators, or that the group has significant influence over the attitude that the media will adopt toward the legislators in the near future. In other words, in order to be taken seriously by legislators, the group has to command significant resources or organizational backing, and has to make a credible threat to deploy those assets in support of its request.

I have no idea what the exact magnitude might be of the minimum bid for invoking the legislative supply curve. It would depend on whether one is talking about the U.S. Congress, or a state legislature, or a city council.¹² It would also depend on whether the media is independently interested in the idea, and so forth. But my guess would be that, on average, the magnitude of the minimum bid, at least in the U.S. Congress, is much higher than in court. Just to pick a number, let us say \$2 million. This means that the supply curve for law change from the legislature does not peek its head out from the vertical axis until we have passed a significantly higher threshold than is the case for law change from the courts.¹³

The concept of threshold costs, together with the reasonable hypothesis that threshold costs are higher for legislative action than for judicial action, has important implications for determining the supply of law changes from legislatures and courts. In effect, it establishes a kind of triage among groups.

12. As Madison recognized, the larger and more complex the governmental body, the higher the cost of factional influence. *See* THE FEDERALIST No. 10 (James Madison).

13. It may be technically inaccurate to speak of "threshold costs" for legislative action. If the legislature had no one bidding for its services, it would sell legislation for very little, since opportunity costs would be zero. What I have called legislative threshold costs are largely a function of the high level of demand for legislative services—for example, the high opportunity costs to the legislature of attending to any one issue. From the perspective of a group seeking law changes, however, the source of the high costs of legislative action makes no difference. Thus, for ease of exposition I have used the term "threshold costs" to refer to the minimum bid necessary to elicit a response from either the courts or the legislature, even if in the case of the legislature the minimum bid is caused by demand from competing groups.

Those able to transmit only a feeble demand—represented by the downward-sloping demand curve D_1 in Figure 1—will elicit no response from either the legislature or the courts. They are nonplayers in terms of procuring law change. Most consumer groups, taxpayer groups, members of future generations, and the like will be so disorganized that they cannot make the minimum bid necessary to secure a response from either the courts or the legislature. Other groups, on the other hand—represented by the downward-sloping demand curve D_3 —are so powerful and well-endowed that they will be credible players in both the legislative and the judicial markets for legal change. These groups have the luxury of being able to choose which segment of the market for legal change in which to operate.

Perhaps the most interesting groups are those in the middle—represented by the downward-sloping demand curve D_2 . These groups are sufficiently well-organized and have enough resources to make a pitch for legal change in the courts, but they cannot overcome the high threshold costs needed to mount a credible campaign for change from the legislature. Included in this category may be many ideologically-oriented advocacy groups, such as civil rights groups, religious groups, environmental groups, and property rights advocates. These kinds of groups represent large numbers of people with fairly small per capita stakes, and hence they cannot afford very much in the way of campaigns for law change. For various reasons, however, they have been able to develop a skeletal organization and enough of a war chest occasionally to institute litigation (or at least file amicus briefs) seeking legal change.

This analysis helps explain why most advocacy groups are committed proponents of judicial activism, even if the cause they are promoting is momentarily out of favor with the judiciary. If a proposed legal change is fought out in the courts, then advocacy groups will at least get a hearing and have some chance of prevailing. But if a legal change is determined by the legislature, they will not even get in the door.

As a normative matter, the implications of the lower threshold costs for seeking law change through the courts are less clear. If you are a committed Burkean conservative who dislikes discontinuous legal change, then perhaps you would want to stamp out judicial activism. Judicial activism dramatically expands the universe of groups that can make an effective pitch

for law change, and hence presumably increases the total amount of change that takes place. On the other hand, if you love legal change (for example, if you are a lawyer), then you should favor judicial activism, since it will churn up more change.

Whether legal change is possible through judicial action may also have an impact on the type of legal change that occurs. Eliminating judicial activism would skew the market for legal change in favor of well-endowed and well-organized groups. If, as seems plausible to assume, the well-endowed and well-organized groups are more likely to be economic groups (for instance, labor unions, producer groups, and professional groups), then eliminating judicial activism might tilt social policy away from ideological causes in favor of purely bread-and-butter issues. Judicial activism therefore adds spice to the political system: issues like prayer in public schools and gay marriage become potential objects of legal change whereas otherwise they would be ignored.

The second factor I would introduce might be called the *maximum bid limitation*. Again, the point is most easily explained with reference to the courts, so let us start there. What is the shape of the judicial supply curve as groups seeking law change make higher and higher expenditures? There is no doubt that, at least initially, the supply curve slopes upward to the right: the higher the expenditures, the greater is the supply of law change. The cheapest form of participation would probably be filing an amicus brief using volunteer or pro bono lawyers. As the group is able to invest more resources, it can move on to doing things like bringing test cases and using full- or part-time paid staff lawyers. With even greater levels of expenditure, the group can fund multiple test cases, hire a top-flight private law firm, procure the filing of amicus briefs by other supporting groups, and so forth. It is reasonable to assume that as the level of investment in litigation effort rises, the supply elicited from the courts, in terms of the probability of securing favorable rulings, rises too.

After the litigation bills have piled up for a while, though, the law of diminishing returns starts to set in. Once one has hired Cravath, Swaine & Moore to file multiple lawsuits, and several boutique Washington firms to file amicus briefs, what else remains to be done? Hiring more and more lawyers will quickly

generate coordination problems and may interfere with the work product. In effect, there is a ceiling on how much one can spend effectively in seeking legal change through litigation. We can illustrate this in Figure 2 by indicating that after a point, the supply curve for courts is perfectly inelastic—no further increase in the level of expenditure by groups will yield a higher expected payout. Exactly where the supply curve becomes inelastic will depend on the nature of the issue; in the graph, I have somewhat arbitrarily assumed that it occurs at around \$1.5 million.

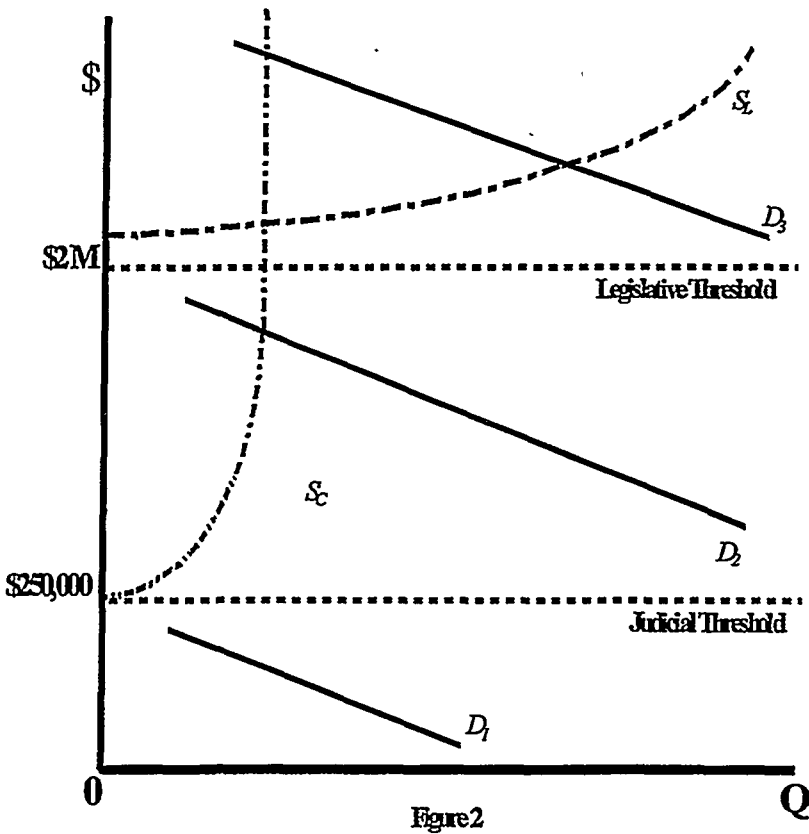


Figure 2

In the legislative arena, it is much less clear that the supply curve becomes inelastic, at least in the range of expenditures that we are talking about. If the sugar farmers want to secure legislation tightening quotas—or want to block efforts to liberalize quotas—then the more they spend, the greater the expected value of the legislative output. The more PAC contributions, the more television ads about the need to protect the family farm, and so on, the greater the likelihood of favorable legislation. At some point, it is reasonable to assume that limits will be reached, given restrictions on campaign contributions, public revulsion against bribery, and the danger of advertising overkill. But this will probably occur at a far higher level of expenditure than will be the case with respect to a campaign for judicial activism.

If the foregoing conjecture is correct, then we have a second way of distinguishing between the market for law change through courts and legislatures: the judicial supply curve becomes inelastic at much lower prices than the legislative supply curve. Suppose you have two groups, one seeking a change in the law and the other opposing it. Because of differences in per capita stakes and organizational structures, one group is able to transmit a demand for political action reflected by the downward-sloping demand curve D_2 in Figure 2; the other group is able to transmit a demand reflected by demand curve D_3 . Notice that if the fight over the proposed change in law occurs in the legislature, the better-organized and better-funded group— D_3 —will almost certainly prevail. It will outspend and outlobby its rival D_2 , and thus it will presumably collect more votes for its preferred outcome. Indeed, D_2 cannot even muster the resources necessary to get over the threshold for participation in the legislative forum. For this reason alone, as we have already seen, D_2 will strongly prefer to have the issue resolved by the courts.

In addition, however, D_2 has more than just a fighting chance in the judicial arena. Because of the position of the demand curves and the inelasticity of the judicial supply curve at the points where it intersects the demand curves, D_3 and D_2 are *exactly evenly matched* in terms of expected outcomes in the judicial arena. Both groups operate in the portion of the judicial supply curve where additional expenditures on litigation elicit

no additional supply. In effect, the public choice dimensions of choosing between D_1 and D_2 have been neutralized.

How plausible is it that the disparities in group demand for law change will be neutralized in the judicial forum? Obviously, this will not happen in every case. With respect to many controversies, groups that have low per capita stakes and poor or nonexistent organization will not be heard at all—they will not be able to surmount the threshold costs for participation in the judicial arena. Other controversies in the courts will pit a group that can reach the inelastic portion of the judicial supply curve against a group that can participate, but only at a lower level on the supply curve, in which case the first group will “outlitigate” the second. Still other controversies will be ones in which legislative action can trump a judicial outcome, with the result that the group that can prevail in the legislature ultimately triumphs even if the two groups are evenly matched in court.¹⁴

Nevertheless, it is plausible to believe that there is a range of controversies decided in the courts where the organizational capacities of the contending parties will have no effect on the outcome. When this happens, the dispute will be resolved, as the lawyers say, “on the merits,” not on the basis of disparities in group organizational capabilities.¹⁵

We are now in a position to see why public choice theory may provide a justification for judicial activism after all. It is not, as the early public choice-influenced accounts suggest, because legislatures and agencies are always subject to differential interest group influence whereas courts are wholly immune from the logic of collective action. Rather, the case for judicial activism from a public choice perspective is more qualified. Public choice theory suggests that judicial policy making may be less susceptible to interest group distortions—but only within a narrow range of controversies where each of the contending positions is represented by a group with significant (but not necessarily equal) organization strength, and only when the

14. This last qualification helps explain why groups that favor judicial activism also typically favor constitutionalizing large areas of law: constitutional decisions are more difficult for legislatures to trump than are nonconstitutional decisions.

15. For some empirical support for this proposition as it applies to the Supreme Court, see Reginald S. Sheehan et al., *Ideology, Litigant Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464 (1992).

outcomes reached in these circumstances will not be trumped by a legislated solution.

In offering these observations, I am not in any sense endorsing judicial activism. Interest group influence is only one variable that should be considered in evaluating the phenomenon of judicial activism. Other large and complicated issues involving judicial competence and constitutional and democratic legitimacy must also be evaluated.

The argument does help, however, to explain why so many law professors are drawn to judicial activism. Public choice theory makes it easy to understand why law professors who support ideological advocacy groups favor judicial activism: the theory tells us that advocacy groups will, on the whole, have a better change of achieving success when social change comes from the courts than when it comes from the legislature.

It is somewhat harder to explain why law professors influenced by public choice theory also sometimes favor judicial activism. As we have seen, however, public choice theory suggests that the dynamics of interest group influence may be neutralized in courts, at least under certain limited circumstances. This feature of judicial decision making will be appealing to those who are especially concerned by the distorting influence of interest groups in legislative and administrative proceedings.

What we have, then, is a kind of unholy alliance between advocacy-oriented professors and public choice-influenced professors, each supporting judicial activism, albeit for different reasons. Given this coalition of perspectives, it should come as no surprise that there are so few people left in the academy who have anything good to say about judicial restraint.