

# A Public Choice Progressivism, Continued

David B. Spence

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# A PUBLIC CHOICE PROGRESSIVISM, CONTINUED

*David B. Spence*<sup>†</sup>

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<sup>†</sup> Assistant Professor, Law and Regulation, University of Texas at Austin, McCombs School of Business. The author wishes to acknowledge the helpful comments to earlier drafts of this Article provided by participants in the Symposium.

## INTRODUCTION

In a recent article,<sup>1</sup> Frank Cross and I argued that while public choice scholarship may seem hostile to the delegation of policymaking authority to administrative agencies, public choice<sup>2</sup> is not by nature anti-delegation. To illustrate this point, we offered a neo-Progressive defense of delegation<sup>3</sup> expressed in public choice terms. Using a simple formal model, we demonstrated why rational voters might prefer delegation, and why that preference is consistent with our constitutional design.<sup>4</sup> Of course, our argument did not resolve the longstanding disputes over the wisdom of either delegation or public choice theory: both have plenty of critics.<sup>5</sup> In this essay, I will build upon that earlier argument in two ways: first, by examining the roots of some legal scholars' dissatisfaction with economic models of delegation; and second, by exploring in greater detail some of the key features of our public choice case for delegation.<sup>6</sup>

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<sup>1</sup> David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000).

<sup>2</sup> As in Spence and Cross, *id.*, and consistent with Farber and Frickey, *see, e.g.*, Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457 (1992), I use the term "public choice" here to refer to the analytical approach of neoclassical economics—one characterized by a focus on the maximizing behavior of rational individuals. For a more detailed description of public choice approaches to the study of the delegation issue, see *infra* Part I. For a good discussion of the relationship among the terms "public choice," "collective choice," "social choice," and "rational choice," see Farber & Frickey, *supra*.

<sup>3</sup> Our argument was based upon the notion that expert bureaucrats would do a better job of reaching decisions that voters would want, consistent with the defense of agency autonomy offered by early-twentieth-century Progressives. See *infra* notes 96–97 and accompanying text.

<sup>4</sup> For a summary of the argument in greater detail, see *infra* notes 100–16 and accompanying text.

<sup>5</sup> For a description of both sets of critics, see Spence & Cross, *supra* note 1, at 97–102. For an example of a critique of public choice in spite of our public choice case for delegation, see Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 114 n.16 (2000) (defining our argument as outside the public choice tradition because of its "particularly supple" definition of public choice). For an argument that our definition, *supra* note 2, is not unusual, see *infra* notes 68–71 and accompanying text.

<sup>6</sup> In this Article I do not revisit the more traditional pro-delegation arguments we made in our earlier article, including the argument that delegation was consistent with both Madisonian democratic theory and our constitutional design. See Spence & Cross, *supra* note 1, at 102–06 for those arguments.

I  
ADMINISTRATIVE LAW, DELEGATION, AND THE  
SOCIAL SCIENCES

Administrative law scholars' reactions to public choice scholarship range from qualified acceptance<sup>7</sup> to unconditional rejection,<sup>8</sup> and many see it as hostile to delegation.<sup>9</sup> In order to understand why this is so, it is necessary to understand the context in which public choice models of delegation arose: that is, to trace the historical relationship between public choice scholarship and the larger social science literature within which it fits, as well as the relationship between administrative law scholarship and the social sciences. The historical record shows that while administrative law scholars have always borrowed from the social sciences, they have borrowed selectively, adapting social scientific research and tools to their own ends. Today's reactions to and uses of economic scholarship echo earlier and longstanding disagreements over philosophies of science, disagreements that become further complicated when social science analyses are imported into a discipline (legal scholarship) that does not classify itself as a science at all.<sup>10</sup>

More specifically, legal scholars react to social scientific analyses of the law along two orthogonal dimensions: one dimension pits those who believe that complex social and political phenomena are amenable to "scientific" study against those who do not; the other dimension pits two groups of social scientists—empiricists and formal theorists—against one another. However, while these arguments are not new, recent developments in the social sciences and in legal scholarship—particularly the trend toward mathematical sophistication in the social sciences, and the zeal with which legal scholars have recently em-

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<sup>7</sup> For examples of qualified acceptance, see the discussion of Professor Robinson's views, *infra* note 89 and accompanying text.

<sup>8</sup> For examples of unconditional rejection, see Abner J. Mikva, *Foreword*, 74 VA. L. REV. 167, 168 (1988) (condemning the dim view of human nature he says is fostered by public choice analyses); and Farina, *supra* note 5, at 114 ("Taken at its word and applied with logical rigor, public choice theory is utterly useless to [us]."). Public choice has engendered an equally passionate response among social scientists. See *infra* notes 18–20 and accompanying text (summarizing this response).

<sup>9</sup> See Spence & Cross, *supra* note 1, at 98–99.

<sup>10</sup> Of course, social scientists react to legal scholarship according to their own professional norms and biases as well. Presumably, many social scientists would find traditional doctrinal analyses of case law to be: (1) overly semantic in their attention to judicial rhetoric and precedent; (2) descriptively unpersuasive, in that their factual premises are not "scientifically" demonstrated; and/or (3) unscientific in another way, in that they mix normative and descriptive concerns in ways that social scientists try to avoid. My purpose here, however, is not to examine social scientists' reactions to legal scholarship, but rather to examine legal scholars' reactions to social science scholarship.

braced economic analysis<sup>11</sup>—have brought many of these issues back to the fore.

#### A. Law and the Social Sciences: A Mundane Illustration

When legal scholars venture into the world of social science inquiry, they encounter deep-rooted divisions between empirical social scientists on the one hand, whose scientific method is based upon observation and induction, and formal theorists on the other, whose scientific method is characterized by deductive reasoning from stated postulates.<sup>12</sup> Intuition drives legal scholars' reactions to these different forms of analysis, and because human intuition is not uniform, neither is the legal community's reaction to social scientific treatments of the law. By way of introduction to these issues, consider the following hypothetical disagreement over a mundane issue.

Geoff and Pamela are a power couple. Both are lawyers working at the same firm in town. They drive separately to the office each day, Geoff in their Range Rover and Pamela in their Humvee. Because of a long-running disagreement between the two over the quickest way to get from their home to the office, they take different routes each day. Geoff takes Route *A*, depicted in Figure 1; Pamela takes Route *B*. At the annual Cinco de Mayo party they host at their home, they resume their argument in front of two friends, one an economist named Plato and the other a behavioral social scientist named Skinner, each of whom listens intently. Four days later, on May 9, Plato and Skinner show up at Geoff and Pamela's door, each claiming to have resolved the argument.

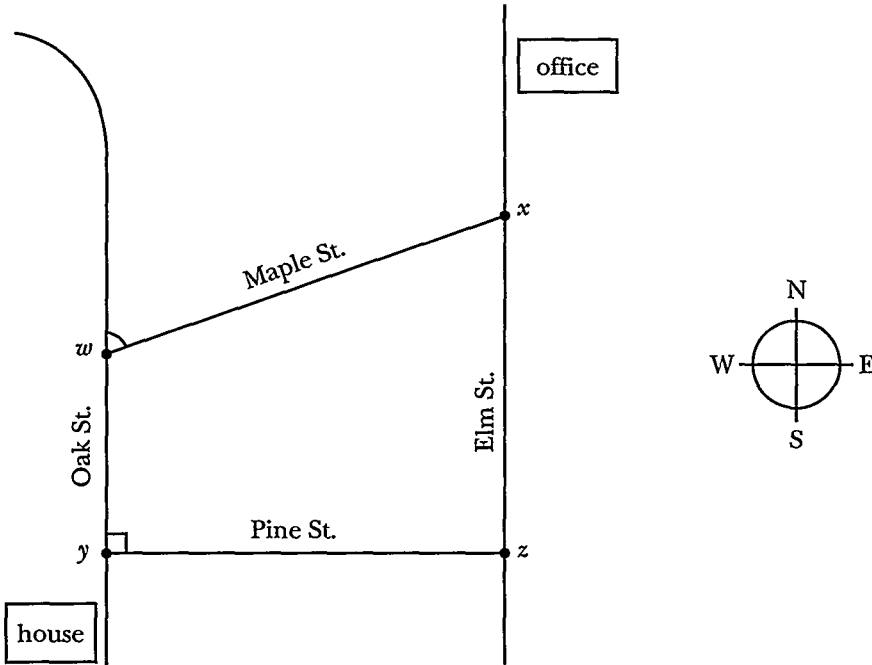
Skinner's solution is as follows. He reports that he spent the mornings of May 6 through May 8 interviewing drivers who drove along the two disputed routes during rush hour, between the hours of 7:00 a.m. and 10:00 a.m. He interviewed three drivers of each route on each of the three days. He reports that all the drivers indicated that they drove at the speed traffic allowed, up to the speed limit when traffic permitted. His survey results are summarized in Table I below. Skinner notes further that the average travel time is twenty-two minutes via Route *B*, and just over nineteen minutes via Route *A*, a difference of nearly three minutes. He concludes that Route *A* has the shorter travel time, and adds that the probability that he is wrong is

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<sup>11</sup> Another important part of this development is the powerful reaction to the rise of law and economics. See *infra* Part I.B.3.

<sup>12</sup> This is not to suggest that all social scientists fall neatly into one of the two camps, or that all are equally partisan in these philosophy-of-science debates. See *infra* Part I.B-C. Rather, I mean only to suggest that this methodological fault line exists and affects how scholars treat one another's work.

FIGURE 1



ROUTE A: North on Oak St.; right on Pine St.; left on Elm St.  
 ROUTE B: North on Oak St.; right on Maple St.; left on Elm St.

less than ten percent.<sup>13</sup> Geoff turns toward Pamela with a satisfied smirk.

However, before Geoff can celebrate his victory, Plato disagrees with Skinner's analysis. Plato has spent the intervening days visiting

TABLE 1  
 TRAVEL TIMES

Date	Route A (min.)	Route B (min.)
May 6	19, 25, 16	18, 24, 21
May 7	17, 22, 18	19, 27, 23
May 8	18, 21, 17	19, 23, 19

the town traffic department and consulting his map (on which Figure 1 is based), and has determined the following:

1. The two routes cover the same ground except that Route A contains segments  $yz$  and  $zx$ , while Route B contains segments  $yw$  and  $wx$ .

<sup>13</sup> This is based upon a t-test of these two distribution means. The test yields a t-statistic of 1.8643 and a probability of error (*i.e.*, probability that the true means are not different) of less than 0.09.

2. Maple Street and Pine Street each run in a straight line between Oak Street and Elm Street.
3. The first turn in Route *A*, represented by the angle at point *y*, is a ninety-degree turn, while the first turn in Route *B*, represented by the angle at point *w*, is a less than a ninety-degree turn.
4. Oak Street and Elm Street are parallel streets over the longitudinal distance between points *z* and *x*.
5. Over that same longitudinal distance, the speed limit on each street (Oak and Elm, respectively) is the same:  $r_{Oak} = r_{Elm}$ .
6. Between Oak Street and Elm Street, Maple and Pine each have the same speed limit:  $r_{Maple} = r_{Pine}$ .

Furthermore, says Plato, assume that:

7. There are no differences in delays associated with traffic volume or turns in the two routes.

Then:

8. If  $[r_{Pine}yz + r_{Elm}zx] > [r_{Oak}yw + r_{Maple}wx]$ , then Route *A* is quicker.
- If  $[r_{Pine}yz + r_{Elm}zx] < [r_{Oak}yw + r_{Maple}wx]$ , then Route *B* is quicker.
- If  $[r_{Pine}yz + r_{Elm}zx] = [r_{Oak}yw + r_{Maple}wx]$ , then neither route is quicker than the other.
9. Since  $r_{Oak} = r_{Elm}$  and  $r_{Maple} = r_{Pine}$ , we can eliminate the terms representing all of the speed limits, leaving only the distance terms.
10. Since angle  $w <$  angle  $y$ , then the distance quantity  $yw + wx$  must be less than the distance quantity  $yz + zx$ .
11. Hence, Route *B* must be the quicker route by virtue of being the shorter distance between the two points.

To which Plato adds the concluding remark: "I have proven that this is so, Q.E.D." Before Pamela can turn smugly to Geoff, their friends Plato and Skinner break into a shouting match. Skinner attacks the premises of Plato's argument, arguing that Route *B* is routinely more crowded than Route *A*, and that regardless of speed limits, drivers drive more slowly on Route *B* because it is both the bumpier and the more scenic route. Plato's logic, says Skinner, is flawed. For his part, Plato attacks the validity of Skinner's measures, arguing that the sample was not representative because one of the sample days was exceptionally cold and rainy, and because of unusual truck traffic on Route *B* from construction on a nearby side street. The drivers *say* they drove at the speed limit whenever possible, but can we trust that self-reported information? Can we trust their estimates of their travel times? Route *B* may have been slower these last few days, says Plato, but it was because these last few days were unusual.

Of course, Plato and Skinner are reenacting a very old argument. Long before modern economists borrowed formal, deductive logic from physicists, physicists borrowed it from Euclidean geometry. That logic begins with generally accepted truths or postulates, from which less obvious truths are deduced. In this example, Plato's analysis is

performed far from the real world problem he hopes to illuminate; he nevertheless believes that he is illuminating that problem. Of course, Skinner is following in John Stuart Mill's footsteps by demanding to see the empirical proof of Plato's postulates. He argues that analyses like Plato's are interesting mental exercises that prove nothing; rather, the ultimate proof must be empirical.

After considering Plato's and Skinner's arguments for twenty-four hours, Geoff and Pamela decide that both men are right—right about what is wrong with the other's arguments. Geoff and Pamela believe that both of their friends' arguments fail to take into account important contextual and circumstantial factors that bear directly on this issue. On the question of which route is faster, Geoff still agrees with Skinner, but he thinks Skinner's measurements do not resolve the issue. To the contrary, he is skeptical about Skinner's ability to draw a representative sample, and about the accuracy of the self-reported data. Pamela, who still agrees with Plato, finds his proof to be both unpersuasive and ridiculously formal. She believes that he could have made his point in three sentences without using mathematical notation, and that his entire argument rests or falls on his seventh assumption (that there are no differences in delays associated with traffic volumes or turns in the two routes). However, Plato never bothered to offer any evidence or argument to support that assumption. Pamela decides that Plato's case would never survive a summary judgment motion. She and Geoff agree that their friends have not resolved the argument, and that they must agree to disagree.

Suppose, however, that Geoff and Pamela had reconvened all of their party guests on May 9, telling them in advance that they were soliciting help from Plato and Skinner to resolve a disagreement over which of the two routes was faster. In that event, we might expect that some of the party guests would form a priori opinions about the question, perhaps arguing about it with spouses or friends in advance of the May 9 meeting. When the party guests hear the Skinner and Plato presentations, we can expect a variety of reactions. Among those who formed a priori opinions, some may be convinced by the opposing argument. For example, some of those who favored Route A may find Plato's proof in favor of Route B irresistible, perhaps because they firmly believe that his assumption (item number seven) is correct, and reason that Plato's conclusion therefore follows. Conversely, some who favored Route B may find Skinner's data persuasive, relying on their own beliefs that the May 6 through May 8 time period was indeed a representative sample. Still others who formed a priori opinions will not change their minds. Some of those who argued with spouses and friends in favor of Route A will argue that Skinner is right and Plato wrong; some of those who were in favor of Route B will



challenge Skinner's argument and defend Plato's. And if they argue long enough, we can expect some of the Route A partisans to argue that Plato's analytical method—deducing his conclusion from stated premises and assumptions—is fundamentally ill-suited to resolve this debate; likewise, some of the Route B partisans will reach a similar conclusion about Skinner's method—drawing an inference from sample data.

The point of this illustration is that legal scholars' reactions to social science scholarship mirror the reactions of Geoff and Pamela's party guests to the Skinner-Plato argument. This is neither surprising nor new. It is not surprising because while legal scholars and social scientists both use careful and rigorous logic to explain human behavior and institutions, they are guided by very different professional norms and seek different ends. Social scientists generally eschew normative arguments, limiting themselves to the search for general, factual truths. By contrast, lawyers embrace both case-specific context and argument, normative or otherwise.<sup>14</sup> However, legal scholars who are reasonably unpersuaded by a particular social scientific argument sometimes conclude, unreasonably, that the social scientist's analytical method is therefore faulty. I believe that legal scholars' indictment of public choice theory is sometimes overly broad in this way, and that a brief review of the historical relationship between the social sciences and administrative law scholarship will help explain why that is so.

## B. Administrative Law and the Social Sciences: An Historical Sketch

### 1. *Getting Beyond Politics: Progressives and Legal Realists*

Of course, the rise of the administrative state in the early years of the twentieth century coincided with a surge in popularity of the social sciences, both artifacts of the Progressive impulse.<sup>15</sup> With hindsight, the Progressives' faith in science, and in social science in particular, seems a bit naïve. Reacting as they were to the bossism of the party era in American history,<sup>16</sup> Progressive scholars combined a cynical view of politics and politicians with a kind of myopic faith in

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<sup>14</sup> Legal scholars might claim that their approach to normative issues is more forthright and that social scientists sometimes fail to acknowledge (maybe even to themselves) their normative biases.

<sup>15</sup> For arguments that these developments were not merely coincidental, see MARY O. FURNER, *ADVOCACY AND OBJECTIVITY* (1975); and THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE* (1977).

<sup>16</sup> For an example of the Progressive attack on bossism in politics, see WILLIAM ALLEN WHITE, *THE OLD ORDER CHANGETH* 19 (1910) (lamenting the "extra-constitutional place of the boss in government . . . as the extra-constitutional guardian of business"). See also JOSEPH LINCOLN STEFFENS, *THE STRUGGLE FOR SELF-GOVERNMENT* 79–119 (Johnson Reprint Corp. 1968) (1906) (extolling Progressive politician Robert LaFollette as a hero).

the ability of “scientific” administration to cleanse policymaking of the (inherently corrupt) influence of politics. Placing public administration in the hands of permanent civil servants would, in Woodrow Wilson’s words, “clear[ ] the moral atmosphere of official life by establishing the sanctity of public office as a public trust.”<sup>17</sup> As the administrative state began to mature in the first half of the twentieth century, social scientists like Wilson, Frank Goodnow,<sup>18</sup> Max Weber,<sup>19</sup> and others articulated a vision, naïve or not, of more rational, less political government. It was a vision of scientific management that mirrored the efficiency revolution underway in the field of business management,<sup>20</sup> one in which an administrative state insulated from political control could develop expertise and apply it to solving public problems.

For their part, legal scholars—particularly the legal realists—embraced many of these same sentiments. Indeed, the Progressive view of the administrative state seems to have dominated administrative law during the pre-World War II era. In his seminal administrative law text, James Landis touted the “advantages of specialization” made possible through the administrative state.<sup>21</sup> Among those advantages, wrote Landis, was Congress’s newfound ability to delegate policymaking to agencies.<sup>22</sup> According to Landis, delegation made frequent statutory fine-tuning unnecessary and made for better policy.<sup>23</sup> Not only that, it “gives some assurance against the entry of impertinent considerations into the deliberations relating to a projected solution.”<sup>24</sup> Thus, like his fellow legal realists, Landis shared the Progressives’ belief in better government through specialization and expertise.

But legal realists’ embrace of science was instrumental, not philosophical. Social scientists, then as now, sought to use the scientific method to discover and explain the rules of human behavior. For them, discerning these truths was an end in itself. Not so the legal realists, for whom social science was just one of the tools they brought to bear on the task of reforming government and law.<sup>25</sup> This explains Karl Llewellyn’s observation that legal realists were willing to divorce

<sup>17</sup> Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 210 (1887).

<sup>18</sup> See, e.g., FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* (Russell & Russell 1967) (1900).

<sup>19</sup> See, e.g., Max Weber, *Bureaucracy*, in *CLASSICS OF PUBLIC ADMINISTRATION* 23 (Jay M. Schafritz & Albert C. Hyde eds., 1978).

<sup>20</sup> See SAMUEL HABER, *EFFICIENCY AND UPLIFT* (1964).

<sup>21</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23–24 (1938).

<sup>22</sup> *Id.* at 68.

<sup>23</sup> *Id.* at 68–70.

<sup>24</sup> *Id.* at 69.

<sup>25</sup> See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

descriptive from normative analyses only temporarily;<sup>26</sup> that is, they used scientific methods to gather a description of the world that they could use. Just as Progressive activists used science to replace a corrupt patronage system that resisted reform, legal realists used it to reform a legal system that produced (what they saw as) the injustices of the *Lochner* era.<sup>27</sup> Thus, while Progressives saw agencies as the antidote to politics run amok, legal realists saw agencies as the antidote to courts run amok.<sup>28</sup> Each saw delegation to agencies as an instrument of social change that could help break the grip of business and conservatives on different parts of the policy process.

The legal realists' embrace of social science did not go unchallenged. Walter Cook's 1927 essay on the "scientific method"<sup>29</sup> laid bare old disagreements between empiricists and theoreticians, and challenged the usefulness of both forms of inquiry:

[T]he naïve belief that men think in syllogisms and that new truth about the world can be deduced from general laws arrived at by induction, still persists in much of the thinking that goes on in the field of the social sciences. It is a curious paradox that when men are confronted with situations still more complex than those found in the physical and biological sciences . . . the more insistent do they become as to the prior existence of fixed and universal principles or laws which can be discovered and directly applied and followed. . . . As a result they either fail to discover what their problems are or to deal adequately with them if they do.<sup>30</sup>

Given the nature of legal reasoning and the case-specific nature of legal analysis, it is unsurprising that legal scholars were dubious about the value of social scientific analysis. Indeed, at the time, this skepticism provoked a lively and sophisticated debate over such issues as the value of statistical analysis in the study of legal issues,<sup>31</sup> including administrative law,<sup>32</sup> and psychology's behavioral critique of Paretian economics.<sup>33</sup> Thus, even if administrative law scholars tended to agree about the benefits of delegation, they seem to have understood

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<sup>26</sup> *Id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See id.* at 1236-37.

<sup>29</sup> Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303 (1927).

<sup>30</sup> *Id.* at 307.

<sup>31</sup> *See, e.g.,* Underhill Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609 (1923) (offering an early defense of statistical behavioralism); Karl N. Llewellyn, *On What Makes Legal Research Worth While*, 8 J. LEGAL EDUC. 399, 401 (1956) (attacking Moore's statistical analysis as "the nadir of idiocy").

<sup>32</sup> *See* HAROLD J. LASKI, *AUTHORITY IN THE MODERN STATE* (1919) (using social scientific analysis to discuss the modern, increasingly administrative, state).

<sup>33</sup> *See* Peter H. Odegard, Book Review, 21 CORNELL L.Q. 686 (1936) (reviewing THURMAN W. ARNOLD, *SYMBOLS OF GOVERNMENT* (1935)).

the philosophical and methodological undertones of their substantive arguments as well as today's scholars do.

## 2. *Getting Beyond (Way Beyond) Naïveté: Bringing Politics Back In*

By the early 1940s, public administration theorists like Herman Finer and Carl Friedrich had begun to argue over the wisdom of agency autonomy.<sup>34</sup> But the critique of the Progressive model did not gather steam until after the war. The challenge came from sociologists and economists, sometimes by way of political science. All of these challengers took issue with the picture of the professional, dispassionate bureaucrat painted by Progressives, although in different ways. Members of the dismal science, using the mathematical notation and deductive logic of formal theory, began to paint a dismal picture of politics in general and of the administrative state in particular. To economists and their allies within political science, the policy process was a kind of Hobbesian free-for-all dominated by interest groups and their political allies.<sup>35</sup> They portrayed agencies as just another tool of these private interests, created and sustained in order to provide those interests with political "rents,"<sup>36</sup> irrespective of any sense of the public good. Indeed, many cited Arrow's Theorem for the proposition that there was no such thing as the public good,<sup>37</sup> and portrayed the state as nothing more than that at which private inter-

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<sup>34</sup> See, e.g., Herman Finer, *Administrative Responsibility in Democratic Government*, 1 PUB. ADMIN. REV. 335 (1941) (arguing that bureaucrats should be faithful to their elected representatives, not to their own notions of the public good); Carl Joachim Friedrich, *Public Policy and the Nature of Administrative Responsibility*, 1 PUB. POL'Y 3 (1940) (arguing that bureaucrats should exercise their discretion because political control is ineffective and the popular will is an unreliable guide).

<sup>35</sup> This is a varied literature, and includes WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (emphasizing the ways bureaucrats use their information advantages to take advantage of politicians); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976) (portraying regulation as a private rent-seeking activity); and George J. Stigler, *The Theory of Economic Regulation*, 2 J. ECON. & MGMT. SCI. 3 (1971) (same). For an update of this literature, see generally THE BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE (André Blais & Stéphane Dion eds., 1991). A milder but related view was Mancur Olson's group theory, which echoed group theorists in political science by emphasizing the ways groups represent certain interests better than others. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965).

<sup>36</sup> See Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & ECON. 103 (1990); Stigler, *supra* note 35.

<sup>37</sup> KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed., Yale Univ. Press 1963) (1951). Of course, Arrow's Theorem demonstrated the logical impossibility of devising a collective choice mechanism capable of satisfying simultaneously several desirable characteristics commonly held as essential attributes of democracy. *Id.* at 107. Arrow's Theorem echoed earlier work by mathematicians like Condorcet, who demonstrated the sensitivity of collective choice outcomes to manipulation of the voting agenda, and produced an enormous scholarly reaction, including a great deal of work attempting to demonstrate ways in which constitutions and legislatures modify some of Arrow's conditions to make meaningful social choice possible. For a summary of the pre-Arrow scholar-

ests pulled and tugged.<sup>38</sup> To the extent that these economic models addressed agencies' motives at all, they tended to assume that agency bureaucrats were primarily maximizers of their own resources and power who used their expertise to take advantage of their political overseers, rather than conscientious professionals discharging a statutory duty.<sup>39</sup>

The challenge from sociology's organization theory was different, and focused on politics as a source of complexity that limited bureaucrats' opportunity to pursue their goals, whatever those goals might be.<sup>40</sup> Like their economic counterparts, these analyses aimed to account for the role of political power and its influence on the bureaucracy.<sup>41</sup> However, where economists took the rational, motivated individual as their unit of analysis, organization theorists took a bird's eye view of the process,<sup>42</sup> and emphasized empiricism and inductive reasoning in the search for general truths about organizational behavior.<sup>43</sup> Borrowing from psychology, they focused instead on how larger, political forces can overwhelm human cognition,<sup>44</sup> rendering

ship, see WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* (1982); and Nicholas R. Miller et al., *The Geometry of Majority Rule*, 1 J. THEORETICAL POL. 379 (1989).

<sup>38</sup> Of course, this view stood in stark contrast to the Weberian idea of the state as an independent third party. See Weber, *supra* note 19.

<sup>39</sup> See, e.g., NISKANEN, *supra* note 35 (describing agency bureaucrats as resource-maximizers).

<sup>40</sup> Organization theorists drew on the earlier work of sociologists like Emile Durkheim and Talcott Parsons, and focused on the organizations as entities rather than assemblages of individuals—as systems worthy of study in their own right. Perhaps the best known of these theories was Charles Lindblom's model of "muddling through," which emphasized the ways in which political complexity negates administrators' ability to plan rationally and implement fundamental or drastic change. Rather, because of that complexity, policy change occurs only incrementally. See Charles E. Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79 (1959). See *infra* notes 41–45 and accompanying text for additional examples.

<sup>41</sup> See, e.g., Norton E. Long, *Power and Administration*, 9 PUB. ADMIN. REV. 257, 257 (1949) (decrying the "forlorn spectacle" of an agency "possessed of statutory life, armed with executive orders, sustained in the courts, yet stricken with paralysis and deprived of power").

<sup>42</sup> See Michael D. Cohen et al., *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1, 2–8 (1972) (describing the organizational decision process in terms of similar "streams" or forces); Lindblom, *supra* note 40 (emphasizing the limits of human intention in the face of organizational forces).

<sup>43</sup> See, e.g., Herbert A. Simon, *The Proverbs of Administration*, 6 PUB. ADMIN. REV. 53, 62 (1946) ("Before a science can develop principles, it must possess concepts. . . . These concepts, to be scientifically useful, must be operational; that is, their meanings must correspond to empirically observable facts or situations."); see also Robert A. Dahl, *The Science of Public Administration: Three Problems*, 7 PUB. ADMIN. REV. 1, 11 (1947) ("We are a long way from a science of public administration. No science of public administration is possible unless . . . there is a body of comparative studies from which it may be possible to discover principles and generalities that transcend national boundaries and peculiar historical experiences.").

<sup>44</sup> See, for example, psychologist Abraham H. Maslow's challenge to rationalist assumptions of human motivation, which argued that social needs motivate people at least as

impotent even the most ideologically pure and scientifically minded Wilsonian civil servant. Thus, the organization theorists challenged not only earlier theories of scientific management, but also their contemporaries within economics. Nobel laureate Herbert Simon, for example, contested the postulates of the Progressive view of public administration by objecting to the very possibility of rationality as economic models described it.<sup>45</sup>

For their part, political science treatments of administrative agencies were deeply affected by both of these critiques of the Progressive model. Interest group theorists like David Truman were already describing the policy process as the rope in a tug of war between competing interest groups.<sup>46</sup> It was thus a short leap to the conclusion that wealthy groups, like business organizations, could dominate the process because of their resource advantages<sup>47</sup> and their ability to organize.<sup>48</sup> Indeed, by the end of the 1960s, the prominence of interest group theories, capture theory, and other theories of industry dominance led many to the conclusion reached by political scientist Theodore Lowi: by delegating policymaking authority to administrative agencies, Congress abdicated its policymaking responsibility.<sup>49</sup>

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much as economic needs. A.H. Maslow, *A Theory of Human Motivation*, 50 *PSYCH. REV.* 370 (1943). Herbert Simon's theories of "satisficing" and "bounded rationality" later paved the way for the modern behavioral models of decisionmaking heuristics, such as those popularized by Kahneman and Tversky. See Herbert A. Simon, *Human Nature in Politics: The Dialogue of Psychology with Political Science*, 79 *AM. POL. SCI. REV.* 293 (1985) (explaining the significance of "bounded rationality" in political models); cf. Gerd Gigerenzer, *How to Make Cognitive Illusions Disappear: Beyond "Heuristics and Biases,"* in 2 *EUROPEAN REVIEW OF SOCIAL PSYCHOLOGY* (Wolfgang Stroebe & Miles Hewstone eds., 1991) (challenging the experimental data purporting to show errors in the way humans use information). Strangely, it is not uncommon to see law review articles challenging economic models of the law on these very same grounds without a single reference to Simon's work.

<sup>45</sup> Simon, *supra* note 44, at 295-97.

<sup>46</sup> See, e.g., DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* 505 (V.O. Key, Jr. ed., 1951) (examining "interest groups and their role in the formal institutions of government in order to . . . evaluat[e] their significance in the American political process").

<sup>47</sup> As the political scientist Schattschneider put it, "The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent. Probably about 90 percent of the people cannot get into the pressure system." E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 34-35 (Dryden Press 1975) (1960); see also CHARLES E. LINDBLOM, *POLITICS AND MARKETS* (1977) (analyzing resource advantages).

<sup>48</sup> Of course, Mancur Olson's economic argument attempted to logically demonstrate why smaller, better-heeled interest groups (like business organizations) could organize more easily than mass, public interest groups. Olson further reasoned that the mass interests were underrepresented in the policy process as a result. OLSON, *supra* note 35, at 14-43. For an update of Olson's analysis, see RUSSELL HARDIN, *COLLECTIVE ACTION* (1982); and TODD SANDLER, *COLLECTIVE ACTION: THEORY AND APPLICATIONS* (1992).

<sup>49</sup> See THEODORE J. LOWI, *THE END OF LIBERALISM* (1969). See also C. Wright Mills' earlier argument that dominance of the policy process by "elites" effectively shuts out the interests of non-elites:

From the individual's standpoint, much that happens seems the result of manipulation, of management, of blind drift; authority is often not explicit;

Thus, the debate had traveled half the circle: by the early 1970s, delegation was no longer the antidote to conservative dominance of the policy process; rather, it was the route to that dominance. While this growing skepticism toward agency policymaking did not provoke a revival of the nondelegation doctrine, it did provoke a judicial reaction—what Richard Stewart called a “reformation” of administrative law.<sup>50</sup> Fearing that agencies were susceptible to capture and subversion of their regulatory mission, courts began to impose constraints on agencies that were designed to protect the interests of under-represented groups.<sup>51</sup> The expansion of standing rights, the “hard look” doctrine, and other developments in administrative law in the 1960s and 1970s can be understood in this light, as attempts by the courts to “increase the government’s role in protecting the health and safety of its citizens and to decrease the influence of industry in regulatory policymaking.”<sup>52</sup> After this transformation, politicians could delegate power to agencies with the knowledge that administrative law had been redesigned to guard against the risk of capture.

### 3. *Getting Beyond Methodology: More Recent Developments*

Of course, neither the methodological debate<sup>53</sup> nor the debate over delegation<sup>54</sup> has abated in the last two decades. However, the

those with power often feel no need to make it explicit and to justify it. That is one reason why ordinary men, when they are in trouble or when they sense that they are up against issues, cannot get clear targets for thought and for action; they cannot determine what it is that imperils the values they vaguely discern as theirs.

C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* 169–70 (1959).

<sup>50</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

<sup>51</sup> *See id.* at 1712 (“Faced with the seemingly intractable problem of agency discretion, courts . . . [assured the] fair representation for all affected interests in the exercise of the legislative power delegated to agencies.”).

<sup>52</sup> R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 4 (1983); *see also* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 278–79 (1988) (suggesting a kind of judicial review as counterweight to the power of interest groups); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 696–97 (1992) (arguing that courts sometimes interpret legislation for the benefit of the less powerful).

<sup>53</sup> *See infra* Part I.C.

<sup>54</sup> *See, e.g.*, JERRY L. MASHAW, *GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 142 (1997) (positing that the “attempt to translate public choice theory into a brand of welfare economics cannot succeed”); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 812 (1999) (arguing that the Founders meant to balance legislative power with a strong executive only because they assumed that the electorally accountable executive would be able to exert effective control over executive-branch activities); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 296–97 (1987) (continuing his assault on delegation as a tool for power abuses by powerful interest groups); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG.

former debate has benefited from an increasing appreciation for cross-disciplinary approaches to the study of delegation and its effects, as scholars from the various methodological camps continue to infiltrate one another's lines. Empiricists' critiques of economic models have led the latter to produce analyses of legislative<sup>55</sup> and administrative agency behavior that are more sophisticated and more nuanced than their methodologically purer ancestors. For example, political scientists and legal scholars have produced formal models of the delegation process<sup>56</sup> that model the various government actors (politicians, agencies, interest groups, courts) as policy-maximizers, rather than mere maximizers of their own wealth and power. One strain of this literature uses formal logic and spatial modeling to illustrate the ways in which agencies can use their first-mover advantages to play politicians off against one another, making political control of policy difficult.<sup>57</sup> Another approach looks inside the agency decisionmaking process to mathematically model the complexity described by organization theory scholars years ago.<sup>58</sup> Yet another body of work focuses

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81 (1985) (responding to public choice critiques of delegation, and defending the latter as necessary and efficient); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 732–35 (1999) (arguing that delegation to experts represents an abdication of responsibility by elected politicians); David Schoenbrod, *Environmental Law and Growing Up*, 6 YALE J. ON REG. 357, 364 (1989) [hereinafter Schoenbrod, *Growing Up*] (arguing that the Clean Air Act is an overly broad delegation); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323 (1987) (defending broad delegation along Progressive lines); see also Spence & Cross, *supra* note 1, at 100–01 (drawing from Mashaw's critique of public choice, and presenting "a Madisonian argument for deliberative decisionmaking in the modern administrative state . . . that mirrors non-public-choice defenses of administrative agencies as loci of deliberation" (footnotes omitted)).

<sup>55</sup> See discussion of work by Weingast and Marshall *infra* note 127 and accompanying text.

<sup>56</sup> See, e.g., Kathleen Bawn, *Political Control Versus Agency Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995); David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994).

<sup>57</sup> See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992); John Ferejohn & Charles Shipan, *Congressional Influence on the Bureaucracy*, 6 J.L. ECON. & ORG. 1 (1990); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119 (1996). In spatial models, the actors' preferences over policy outcomes are represented as utility distributions in Euclidean space, with the point of maximum utility representing each actor's "ideal point." Traditionally, models like these assume that policy outcomes and individual actors' preferences over those outcomes can be represented as points on a line. These models often assume that individuals' preferences (their utility distributions over the range of choice) are single-peaked, and that each actor's preference for any particular outcome (*i.e.*, her utility) is in direct inverse proportion to that outcome's distance from her ideal point.

<sup>58</sup> See GARY J. MILLER, *MANAGERIAL DILEMMAS* (James E. Alt & Douglass C. North eds., 1992); Jonathan Bendor, *A Model of Muddling Through*, 89 AM. POL. SCI. REV. 819 (1995); Jonathan Bendor & Thomas H. Hammond, *Rethinking Allison's Models*, 86 AM. POL. SCI. REV. 301 (1992).



on how politicians can use law to constrain agency independence.<sup>59</sup> For their part, empiricists have also entered this fray, attempting to derive and test hypotheses generated by many of these public choice models of delegation. Indeed, it is not uncommon these days for quantitative empiricists to borrow the theoretical framework for their analyses from formal economic models.<sup>60</sup> Similarly, the resurgence of the behavioral critique of law and economics<sup>61</sup> represents a further attempt at methodological and theoretical integration.<sup>62</sup> The result of all this cross-disciplinary dialogue is a rich and growing body of literature examining the distribution of influence within the policymaking process.

An equally important feature of this more recent interdisciplinary work is that it represents a reaction, by public choice *and* non-public choice scholars, to earlier analyses, by public choice *and* non-public choice scholars, that stressed the dangers of runaway bureaucracy. For example, McCubbins, Noll, and Weingast's "Congressional dominance" theory explored Congress's role in the "transformation" that Professor Stewart described from a public choice perspective, particularly the ways in which Congress can structure the agency decision process to steer the agency in particular substantive directions and to

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<sup>59</sup> See Bawn, *supra* note 56; Epstein & O'Halloran, *supra* note 56; Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 253-64 (1987); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413 (1999).

<sup>60</sup> The literature on politicians' control of agencies illustrates this point. See B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS* (1994); Randall L. Calvert et al., *Congressional Influence over Policymaking: The Case of the FTC*, in CONGRESS: STRUCTURE AND POLICY 493 (Matthew D. McCubbins & Terry Sullivan eds., 1987); Evan J. Ringquist, *Political Control and Policy Impact in EPA's Office of Water Quality*, 39 AM. J. POL. SCI. 336 (1995); Spence, *supra* note 59; B. Dan Wood, *Does Politics Make a Difference at the EEOC?*, 34 AM. J. POL. SCI. 503 (1990); B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213 (1988); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801 (1991).

<sup>61</sup> "Behavioral law and economics" approaches exist on the cusp between economics and psychology, and many attempt to graft psychologists' ideas about the limits of human cognition and rationality onto economic models of the law in interesting ways. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998). While behavioral law and economics is a relatively new phenomenon in law review literature, these approaches derive from 1940s scholarship on bounded rationality by Simon and Maslow. See *supra* notes 43-44 and accompanying text. Simon and many of his progeny are viewed as critics of economic models, but some of their works were also early attempts to integrate economic and "behavioral" models. Perhaps the best known example is Cyert and March's "behavioral theory of the firm." RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* (Herbert A. Simon ed., 1965).

<sup>62</sup> For an interesting argument that rational actor models and behavioral psychology models are not inconsistent and yield similar hypotheses, see William T. Bianco, *Different Paths to the Same Result: Rational Choice, Political Psychology, and Impression Formation in Campaigns*, 42 AM. J. POL. SCI. 1061 (1998).

limit its effective discretion.<sup>63</sup> Administrative law scholars are likewise participating in this evolution toward greater methodological integration and a subtler view of agency policymaking. For example, some have reacted to their predecessors' emphasis on administrative formality and legalism as an antidote to capture by lamenting the "ossification" that formalism has caused;<sup>64</sup> still others defend formalism on a variety of grounds, including as a defense against capture.<sup>65</sup>

### C. Zen and the Art vs. Science Debate

Why recite this history? For two reasons. First, I hope to demonstrate that public choice scholarship has moved beyond the dark "creation myth," described by Cynthia Farina,<sup>66</sup> that "posits the innate depravity or corruption" of administrative bodies and of regulation in general.<sup>67</sup> Some legal scholars (proponents and opponents alike) have been slow to recognize that this dark version of public choice is

<sup>63</sup> Much of the theoretical and empirical work on political control of the bureaucracy supports this argument—to varying degrees. See WOOD & WATERMAN, *supra* note 60; Bawn, *supra* note 56; Epstein & O'Halloran, *supra* note 56; James T. Hamilton, *Going By the (Informal) Book: The EPA's Use of Informal Rules and Enforcing Hazardous Waste Laws*, in 7 ADVANCES IN THE STUDY OF ENTREPRENEURSHIP, INNOVATION AND ECONOMIC GROWTH 109 (Gary D. Libecap ed., 1996); James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 L. & CONTEMP. PROBS. 111 (1994); McCubbins et al., *supra* note 59; Spence, *supra* note 59.

<sup>64</sup> Mark Seidenfeld recognizes the ossification problem, but believes that its potentially negative effects are muted in practice by agencies' adaptive behavior, and that proposed solutions may do more harm than good. See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 494–95 (1999).

<sup>65</sup> There is a very large literature on the ossification problem. See, e.g., Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 676–80 (1996); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 18 (1997) (arguing that "adversarialism . . . has contributed to a rigid rule-making and implementation process that fails to encourage creativity, adaptation, and cooperation in solving regulatory problems"); William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351 (1997) (defending formalism on democratic theory grounds); Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 26 (1998); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 82–86 (1995); Seidenfeld, *supra* note 64 (arguing, among other points, that agencies' ability to evade procedural mandates helps ameliorate the ossification problem); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1996) (advocating more adaptive rules).

<sup>66</sup> Farina, *supra* note 5, at 109–10.

<sup>67</sup> *Id.* at 110. See also Theodore Lowi's critique of public choice, which seems to accept this dark view of the literature. See, e.g., Lowi, *supra* note 49, at 310–13. Indeed, Professor Lowi's objection to public choice seems to be an outgrowth of his more general objection to "interest group liberalism." See e.g., Theodore Lowi, *The Public Philosophy: Interest-Group Liberalism*, 61 AM. POL. SCI. REV. 5, 19 (1967) (decrying the legitimization of gov-

either an anachronism or a caricature, and that a less monolithic, more nuanced and flexible kind of law and economics has burrowed its way into administrative law scholarship. This distinction between what public choice is and how it has been used is an important predicate to the analysis in Part II. Second, by attempting to put public choice analyses of delegation into their historical and epistemological context, I hope to make it easier to understand the philosophical reasons why nonbelievers react to public choice analyses as they do. This context is important, as the growing influence of economic models within political science and law has fanned the embers of old methodological debates.

Clearly, public choice models have moved beyond the assumption that human beings are guided by base or venal motives.<sup>68</sup> The debate over public choice methods has moved beyond this kind of cynicism to a related issue: namely, the subtler question of whether human beings can act rationally in the broader sense. This question, in turn, breaks down into at least two parts: (1) whether people process information in ways suggested by public choice models; and (2) whether they behave instrumentally or are goal-maximizers at all.

Scholars working under the banner of behavioral law and economics address both of these questions. The intellectual descendants of Herbert Simon continue to explore the ways heuristics, biases, and other limitations on human cognition prevent people from behaving in a purely rational fashion.<sup>69</sup> Another Nobel laureate, Amartya Sen, heads a long list of scholars who argue that, cognitive limitations aside, humans often do not act instrumentally in any case, but are guided instead by social norms (of duty, altruism, and the like) or the desire to act expressively.<sup>70</sup> If these scholars are correct, does that

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ernment by clash of private interests, a system in which such conflicts become "a principle of government rather than a criminal act").

<sup>68</sup> See, e.g., JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 10 (1983) (contrasting "rational man," who merely acts purposively and logically, with "economic man," who is selfish as well); Jon Elster, *Rational Choice History: A Case of Excessive Ambition*, 94 AM. POL. SCI. REV. 685, 692 (2000) [hereinafter Elster, *Excessive Ambition*] ("[R]ational choice theory can easily accommodate nonmaterial or nonselfish interests. What matters is whether the actors pursue their goals in an instrumentally rational manner, not whether these goals are defined in terms of material self-interest."); Morris P. Fiorina, *Rational Choice, Empirical Contributions, and the Scientific Enterprise*, 9 CRITICAL REV. 85, 87 (1995) ("[T]he only thing that all [rational choice] people would agree upon is that their explanations presume that individuals behave purposively.")

<sup>69</sup> See, e.g., Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, in *RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY* 67 (Robin M. Hogarth & Melvin W. Reder eds., 1986).

<sup>70</sup> See, e.g., STEPHEN KELMAN, *MAKING PUBLIC POLICY* 244-45 (James Q. Wilson ed., 1987) (arguing that while rational, instrumental action is the norm in the economic realm, it is not the primary motivating force of human behavior in the political and social realm); Elster, *Excessive Ambition*, *supra* note 68, at 692 ("[E]ven when expanded to include broader goals, rational choice theory is often inadequate because people may not conform to the

mean that public choice models serve no purpose? Of course not. As others have noted, public choice models can (and some have tried to) accommodate some of these extra-rational effects on human behavior.<sup>71</sup> Alternatively, these two families of models can coexist because both explain important aspects of human behavior. That is, sometimes people act instrumentally; sometimes they do not.

Donald Green and Ian Shapiro argue that public choice scholars have not met the burden of demonstrating empirical support for their embrace of instrumental rationality as the most important motivator of political behavior.<sup>72</sup> While Green and Shapiro would place the burden of proof squarely on public choice scholars, the jury is still out on this empirical question. Furthermore, it is important to recognize that they fault public choice for failing to live up to the scientific standards of quantitative empiricism; however, that is not a legal scholar's standard. Rather, legal scholars try to persuade, and some find public choice persuasive. Moreover, other legal scholars' skepticism toward public choice probably implies not an endorsement of quantitative empiricism, but rather a general skepticism toward social science. In effect, if a model (theoretical *or* statistical) seems to fail to capture accurately the essence of the social problem it purports to investigate, the reader may logically discount the model's implications. An economic theorist, in his quest for parsimony, may produce a formal model that abstracts away too much reality by employing unreasonable or erroneous assumptions.<sup>73</sup> Likewise, a quantitative empiricist may make an analogous error by mis-specifying her model<sup>74</sup> or by

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canons of instrumental rationality."); *id.* at 694 ("[N]onrational motivations are important and pervasive."); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977); Michael Taylor, *Battering RAMs*, 9 CRITICAL REV. 223, 228–31 (1995) (crediting expressive behavior and intrinsic motivations—not instrumental rationality—with greater explanatory power in the political and social realm).

<sup>71</sup> See Bianco, *supra* note 62 (noting the remarkable similarities between psychologist Susan Fiske's model of voters as "motivated tacticians" who formulate and update their impressions of candidates, and traditional models of voters as rational actors who consider the transaction costs of gathering information and engage in "Bayesian updating" when they do acquire more information); Elster, *Excessive Ambition*, *supra* note 68; see also Jolls et al., *supra* note 61, at 1474 (using behavioral economics "to model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior, and more accurate predictions and prescriptions about law").

<sup>72</sup> DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* (1994). The book provoked a book-length response. See *Symposium on Pathologies of Rational Choice Theory*, 9 CRITICAL REV. 25 (1995).

<sup>73</sup> Some scholars argue that Mancur Olson's familiar analysis of interest group formation represents just such an example. For a discussion of this literature, see SANDLER, *supra* note 48, at 23–25. For critiques of Olson, see John Chamberlin, *Provision of Collective Goods as a Function of Group Size*, 68 AM. POL. SCI. REV. 707 (1974); Norman Frohlich & Joe A. Oppenheimer, *I Get By with a Little Help from My Friends*, 23 WORLD POL. 104 (1970).

<sup>74</sup> That is, the modeler may underspecify the model by omitting important explanatory variables, or overspecify the model by including irrelevant variables. A quantitative

operationalizing variables poorly.<sup>75</sup> Some legal scholars may be persuaded that these sorts of errors are unavoidable—that the study of social phenomena is more of an art than a science—and that context is crucial.<sup>76</sup> If so, they share that conclusion with many historians,<sup>77</sup> public management scholars,<sup>78</sup> and others.<sup>79</sup>

However, it is important to recognize that this is an intuitive judgment, one that guarantees that the ultimate persuasiveness of social scientific models will always be in the eye of the beholder. In his

methods professor of mine once used the following as his example of an underspecified model: The price of whiskey =  $f$  {minister's salaries}. That model may yield statistically significant results; however, it is probably a spurious relationship caused by an omitted third variable.

<sup>75</sup> In other words, the statistical model may be properly specified, but the data the modeler uses to measure the variables are a poor measure of those variables.

<sup>76</sup> It is in this context that I understand Professor Farina's argument that once public choice scholars begin to accommodate unselfish motives, they are "cheating," and their method becomes "incoherent" and loses its theoretical power. See Farina, *supra* note 5, at 112; see also GREEN & SHAPIRO, *supra* note 72, at 27–28, 192–93 (arguing that rational choice theorists arbitrarily restrict the domain of their analyses—they call this "segmented universalism"—so as to insulate those analyses from empirical refutation). I will concede that public choice theory does not offer a universal explanation of human behavior that yields "point predictions" of human behavior in any and all situations. However, I disagree that that characteristic renders public choice useless. Responding to Green and Shapiro's version of this argument, Professors Ferejohn and Satz argued that rationality-based analyses can be "illuminating" even if they do not provide a "unique" explanation for an event or predict outcomes across a wide variety of settings. See John Ferejohn & Debra Satz, *Unification, Universalism, and Rational Choice Theory*, 9 CRITICAL REV. 71, 75 (1995). See also Professor Fiorina's argument that an analysis can be useful even if it provides only a "*ceteris paribus*" rather than "monocausal" explanation of events. See Fiorina, *supra* note 68, at 88–89. To me, Professor Farina's threshold of usefulness seems an unreasonably difficult one to meet; it is also consistent with the view that the study of agency policymaking is more of an art than a science. See, e.g., Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 989 (1997) (describing the "inescapable messiness" of administrative law as "an ongoing, and necessarily adaptive, inquiry").

<sup>77</sup> Robert Skidelsky, historian and biographer of John Maynard Keynes, described the dangers of trying to understand Keynes's theory:

The first thing to do was obvious: learn economics. This is easier said than done. It meant learning a style of thinking which is alien to the historian. Economics is a branch of logic; history is analytical description, based on evidence. There are no "models" in history, because every event is unique. This is especially true of biography.

It was equally important not to get bamboozled by economics; not to lose the historian's sense that economic ideas always have a context, and that biography is above all about context not propositions.

Robert Skidelsky, *Skidelsky on Keynes*, ECONOMIST, Nov. 25, 2000, at 83.

<sup>78</sup> This issue consumed an issue of the *Journal of Policy Analysis and Management* in 1994. See *Symposium on Public Management Scholarship*, 13 J. POL'Y ANALYSIS & MGMT. 231 (1994).

<sup>79</sup> This tension between appreciating context and the desire to generalize hangs particularly heavily over the field of comparative politics. See, e.g., Giovanni Sartori, *Comparing and Miscomparing*, 3 J. THEORETICAL POL. 243, 252–53 (1991) (distinguishing case studies, an "ideographic" method of analysis that sacrifices generality for depth of understanding, with science, which sacrifices context for generality).

1970s bestseller *Zen and the Art of Motorcycle Maintenance*,<sup>80</sup> Robert Pirsig argued that some of us have a “classical” understanding of the world, one that focuses on “underlying forms” rather than surface appearances, and tries “to bring order out of chaos and make the unknown known.”<sup>81</sup> Others, he said, have a “romantic” understanding, one that focuses on “immediate appearance,” and is skeptical about the possibility of discerning laws governing the unknown.<sup>82</sup> Regardless of whether psychologists would endorse Pirsig’s armchair theorizing, his taxonomy seems to echo methodological debates within administrative law.<sup>83</sup> That is, public choice analyses of delegation seem to provoke very different yet equally passionate reactions from scholars—reactions that may be traceable, at least in part, to those scholars’ differing intuitions about how the world works.

Recent developments in the social sciences have added fuel to this art-versus-science debate. Economics and political science, from which many social scientific analyses of delegation come, have grown increasingly mathematical in recent decades. Increasing mathematical sophistication—both in formal theories and statistical models—increases the skepticism with which others view social scientific models. Mathematical sophistication can render an analysis inaccessible to the less mathematically sophisticated, irrespective of the worth or value of the analysis.<sup>84</sup> More importantly, the quantification imperative can divert social scientists’ attention away from interesting issues that are not amenable to quantification. By studying only that which can be quantified, social scientists may miss important aspects of the delegation problem. This phenomenon is probably why so many empirical tests of the ability of politicians to control agency behavior focus on dependent variables like enforcement rates, inspection rates, and the like,<sup>85</sup> which are much easier to quantify than the substantive content of policy decisions.

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<sup>80</sup> ROBERT M. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* (1974).

<sup>81</sup> *Id.* at 73–74.

<sup>82</sup> *Id.*

<sup>83</sup> Michael Laver describes rational actor theories as “posit and deduce” social science, which is a search for “non-trivial tautological arguments.” MICHAEL LAVER, *THE POLITICS OF PRIVATE DESIRES* 11 (1981) (emphasis omitted). He contrasts this approach with inductive theories, which test the world as it really is. *See id.* at 11–13.

<sup>84</sup> An economic historian recently described modern economics as “so formal, or mathematicised, that even economists can no longer understand what they are saying to each other, still less the educated public.” *See* Skidelsky, *supra* note 77, at 84. Indeed, the trend toward mathematical sophistication in political science recently produced a minor revolt by political scientists who argued that the discipline’s leading journal had grown inaccessible to the majority of political scientists for the very same reasons. Emily Eakin, *Political Scientists Leading a Revolt, Not Studying One*, N.Y. TIMES, Nov. 4, 2000, at B11.

<sup>85</sup> For a more detailed explanation of this point, see David B. Spence, *Agency Policy Making and Political Control: Modeling Away the Delegation Problem*, 7 J. PUB. ADMIN. RES. & THEORY 199 (1997).

Such apparent methodological myopia may feed the perception that the study of administrative agencies is an art rather than a science. Clearly, however, there are many for whom the tools of economic analysis illuminate the relationship between administrative agencies and other institutions. That much is apparent from the increasing importance of economic models within administrative law scholarship. Nor is it difficult to discern the appeal of economic models for legal scholars. While the economist's quest for parsimony conflicts with the lawyer's appreciation for context, both embrace rigorous logic as an analytical technique. In the absence of an empirical resolution of the debate over human motivation, rational actor models are useful because they can illuminate the incentives facing those actors who do have the inclination and opportunity to act instrumentally,<sup>86</sup> and because they help scholars think more precisely about political and legal problems.<sup>87</sup> Hence their appeal to legal scholars, whose professional norms do not require them to prove factual truths scientifically (or to even try).<sup>88</sup> My own view is that for these modest reasons, public choice methods lend themselves nicely to the study of politics and law.<sup>89</sup> It is in this spirit that I will use these methods in the next Part of this Article.

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<sup>86</sup> Political scientist Morris Fiorina calls this the "*ceteris paribus*" aspect of rational choice models, one which (he says) critics fail to appreciate:

Mancur Olson's . . . theory of collective action is widely misinterpreted. It does not predict that . . . no individual would join such a group in the absence of selective incentives. . . . Rather, Olson's theory predicts that—*ceteris paribus*—it will be more difficult to organize groups for broad, general purposes than for narrow, special purposes . . . . Olson's theory makes no absolute or "point" prediction of zero participation. It predicts relative differences . . . .

Fiorina, *supra* note 68, at 88.

<sup>87</sup> See, e.g., Randall L. Calvert, *Lowi's Critique of Political Science: A Response*, 26 POL. SCI. & POL. 196 (1993) (extolling this virtue).

<sup>88</sup> For an interesting discussion of these differences between norms of legal analysis and social science inquiry, see Steven D. Smith, *Believing like a Lawyer*, 40 B.C. L. REV. 1041 (1999).

<sup>89</sup> I reach this conclusion for many of the reasons others have offered. Not only do I agree with Ferejohn and Satz's argument that we should "privilege" explanations that are based upon intentional or purposive human behavior, Ferejohn & Satz, *supra* note 76, at 78–83, I also find that the tools of public choice help me think precisely about these phenomena. In particular, they illuminate the incentives facing goal-oriented actors. And so I find appealing Glen Robinson's thoughtfully skeptical reaction to public choice: "I find this perspective always interesting, frequently provocative, and sometimes useful. I find very dubious many of the scientific pretensions made for it by its more ardent exponents, but in political science, as in social science generally, the 'science' component must be taken *cum grano salis*." GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* 2 (1991).

## II

A PUBLIC CHOICE CASE FOR THE ADMINISTRATIVE  
STATE, CONTINUED

For all their recent attention to policy goals and other, broader human motives, most public choice models continue to frame the delegation issue as “the delegation problem.” That is, they promote a cynical view of agency autonomy by posing a false choice: agencies may be faithful to their democratically elected overseers, thereby producing good government, or they may shirk, producing bad government.<sup>90</sup> Does public choice scholarship imply this cynical view of agency autonomy? In *A Public Choice Case for the Administrative State*,<sup>91</sup> Frank Cross and I argued that the answer to that question is “no,” and that public choice offers good reasons for delegating policymaking decisions to agencies.

Specifically, we tried to tackle head-on the concern about special interest influence that is so prevalent in the public choice literature by placing voter preferences at the center of our analysis. We began with the proposition that voters want government to choose the policies that they would choose if they could devote the time and resources necessary to make an informed choice.<sup>92</sup> We posited this goal for at least two reasons. It is an approach taken by other economic models of the delegation process.<sup>93</sup> Furthermore, while some public choice scholars would deny the existence of any “best” policy,<sup>94</sup> we chose the well-informed preferences of the median voter as both the next best alternative within the public choice paradigm, and an idea with roots in Madisonian democratic theory as well.<sup>95</sup> Because public choice

<sup>90</sup> See, e.g., NISKANEN, *supra* note 35; McCubbins et al., *supra* note 59.

<sup>91</sup> Spence & Cross, *supra* note 1.

<sup>92</sup> Specifically, we constructed a model in which the best decision is the one that comes closest to the fully informed preferences of the median voter. This is a Burkean view of policymaking—one that distinguishes between the immediate policy preferences of rationally ignorant voters and the policies those voters would want if they had information and the time to deliberate. We argued that voters prefer policy choices that are consistent with their fully informed preferences. *Id.* at 106–09.

<sup>93</sup> See Arthur Lupia & Matthew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J.L. ECON. & ORG. 96, 96 (1994) (asking whether politicians “may be able to rely on the bureaucracy to formulate policies that they themselves would have formulated if they had spent the time and resources necessary to acquire the bureaucracy’s level of expertise”).

<sup>94</sup> That is, some would argue that Arrow’s Theorem stands for the proposition that no decision rule can claim superior democratic legitimacy. See ARROW, *supra* note 37.

<sup>95</sup> Since our aim was to address public choice theory on its own terms, we accepted the classically liberal view of politics and government employed by both public choice and Madison, implicitly rejecting Jeffersonian notions of participatory democracy. The goal of producing policies favored by the well-informed median voter was our proxy for Madison’s preference for a system that would respond to the community’s permanent interests rather than the passions of factions. See Spence & Cross, *supra* note 1, at 102–06, for a more complete discussion of this issue.



models of the policy process have highlighted the ways minority factions exert disproportionate influence in the policy process, we thought it would be interesting to use public choice methods to evaluate delegation against this goal of satisfying the well-informed median voter.<sup>96</sup>

We then constructed a simple formal model to analyze the hypothetical question of which policymaker—elected politicians or the relevant administrative agency—is more likely to produce policy choices that satisfy that goal. We concluded that under certain circumstances, voters may have good reasons to believe that the agency will produce a more representative policy choice, suggesting that a strict nondelegation doctrine does not necessarily make policymaking more democratic.<sup>97</sup> Why are agencies often better agents? One reason is that agencies usually have better information about the policy choice in question; and since information is one of the determinants of policy preferences, voters may conclude that those information advantages make the agency the better agent. Another reason is that electoral accountability does not imply faithfulness to the median voter's preferences; to the contrary, we argued that electoral accountability can lead politicians' policy choices away from the median voter's preferences in systematic ways. Agencies, insulated as they are from direct electoral accountability but nevertheless indirectly accountable, can produce policy choices that are both more predictable and less susceptible to deviation from voters' wishes.

Thus, ours was essentially a neo-Progressive defense of agency policymaking in that it emphasized the benefits of information, expertise, and deliberation in the absence of direct electoral accountability. Do those Progressive virtues necessarily imply the kind of naïve view of agency policymaking that we commonly associate with the Progressives? I think not, and I will use this Part to elaborate upon that claim, and to further explore the ways in which electoral accountability makes policymaking by elected politicians riskier—that is, more amenable to interest group manipulation—than policymaking by an agency. Once again, the language and methods of public choice anal-

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<sup>96</sup> Unlike some other public choice models, ours did not ignore the issue of "the endogeneity of preferences," the influence of politicians and political processes on voters' preferences. See *id.* at 112–28; see also *infra* Part 11.C (further discussing this proposition).

<sup>97</sup> Bureaucratic politics scholars have advanced similar views in the past, though never in public choice terms. See, e.g., JOHN A. ROHR, *TO RUN A CONSTITUTION* (1986); Kenneth J. Meier, *Representative Bureaucracy: A Theoretical and Empirical Exposition*, 2 RES. PUB. ADMIN. 1 (1993) (summarizing this literature).

ysis seem to me (intuitively, I'll admit) a useful way of illustrating these points.<sup>98</sup>

### A. Centrifugal Forces in the Legislative Process

While Arrow's Theorem demonstrated some of the ways in which group decisionmaking is undemocratic,<sup>99</sup> different decision processes are undemocratic in different ways. Certainly legislatures can produce policy choices that bear little relationship to their constituents' preferences, for a variety of well-understood reasons.

#### 1. *Simple Model of Legislative Choice*

Assume that voters face the choice of whether to delegate a policy choice to their elected representatives or to an unelected administrative agency. If voters want the policymaker to make the policy choices they would make, the voters must evaluate the legislature as a possible policymaking agent with that goal in mind. That is, they must try to predict the range of possible outcomes in the event the legislature makes the decision. To simplify the analysis, assume a unicameral legislature consisting of seven members, four in the majority party and three in the minority party. Assume further that voters want their legislators to represent their interests by voting consistent with their constituents' preferences.<sup>100</sup> Next assume that the members of the legislature are rational utility-maximizers, and that their utility functions include both policy goals<sup>101</sup> and the desire to protect and en-

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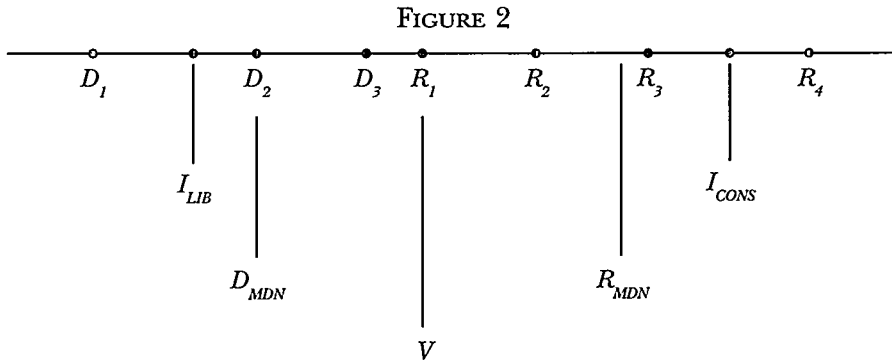
<sup>98</sup> I will look first at an idealized legislative process, one in which legislators are perfectly representative of their constituents. That way, we can see how legislative choice can be undemocratic even under those conditions. By adding greater complexity, we can see additional ways in which the process can produce outcomes that seem unfair or sub-optimal.

<sup>99</sup> That is, no such process can simultaneously satisfy five necessary (or desirable) conditions of democratic decisionmaking. For good summaries of Arrow's conditions and the logic of his proof, see NORMAN FROHLICH & JOE A. OPPENHEIMER, *MODERN POLITICAL ECONOMY* 19–31 (Robert A. Dahl ed., 1978).

<sup>100</sup> In our earlier analysis, we assumed that voters want government policymakers to act as trustees who represent them not by responding to their current preferences, but rather by pursuing policies that represent the median voter's hypothetical, fully informed preferences. See *supra* note 92 and accompanying text. Of course, agencies are more fully informed than politicians about the issue in question. However, we can ignore agencies' information advantages for the time being by assuming that all the constituent and voter ideal points correspond to the voters' fully informed preferences. Indeed, this model illustrates the potential dangers of legislative policymaking, regardless of whether we assume that legislators' ideal points represent voters' uninformed or fully informed preferences.

<sup>101</sup> So as to set aside the issue of conflict between constituent preferences and the legislators' personal policy preferences, I assume here that the legislators' policy preferences correspond perfectly with their median constituent's preferences on every issue, see *infra* note 104; hence, there is no discrepancy between the goal of serving constituents' interests and making good policy. Thus, I assume instrumental rationality, but equate personal maximizing behavior with duty, by equating constituent and legislator policy goals. It

hance their job security.<sup>102</sup> Other than these, I make no other assumptions here about the considerations that dominate legislators' voting decisions. Figure 2 represents one potential breakdown of the ideal points of such a legislature,<sup>103</sup> where individual legislators' ideal points correspond perfectly to their constituents' preferences.<sup>104</sup>



Assume further that:

$D_i$  = the representative ideal point<sup>105</sup> of Democratic legislator  $i$ .

$R_i$  = the representative ideal point of Republican legislator  $i$ .

$V$  = the ideal point of the median voter and the representative ideal point of the median legislator.<sup>106</sup>

$D_{MDN}$  = the median policy alternative among Democratic legislators.

$R_{MDN}$  = the median policy alternative among Republican legislators.

$I_{LIB}$  = the ideal point of the relevant liberal interest group.

$I_{CONS}$  = the ideal point of the relevant conservative interest group.

The argument for a strong nondelegation doctrine rests in part on the notion that forcing legislators to make policy choices will tend to produce policies nearer to point  $V$  than if agencies make those policy choices. However, that conclusion follows only under particular

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should become evident that this assumption actually overstates legislatures' tendency to produce representative policy choices.

<sup>102</sup> Consistent with the discussion in Part I.C, this assumption reflects my intuition that legislators often act purposefully and instrumentally with these goals in mind.

<sup>103</sup> As always, in Figure 2 all the points on the line represent policy alternatives in a policy space. Assume that legislators' individual preferences are single-peaked: each legislator prefers the policy at her ideal point, and her preferences over other alternatives are a direct function of the distance those alternatives lie from her ideal point in either direction.

<sup>104</sup> By assuming that legislators' ideal points match their median constituents' ideal points, I remove one of the incentives for legislators to deviate from their constituents' wishes. I do so to illustrate some of the other reasons why this happens.

<sup>105</sup> By representative ideal point, I mean the ideal point of that legislator's median constituent.

<sup>106</sup> Obviously, if each voter's vote carried the same weight (*i.e.*, each district was exactly the same size), then  $V$  would represent the ideal point of both the median legislator and the median voter.

conditions. That is, the electoral connection ensures that legislators will choose policy *V* only when the legislators perceive the vote as one that entails *electoral risk*.

Political scientists have devoted a great deal of attention to the notion of electoral risk. Richard Fenno distinguished between the representative's "geographical constituency" and her "reelection constituency."<sup>107</sup> Of course, it is the latter to which the legislator must attend to preserve her job,<sup>108</sup> and it is the legislator's relationship with the latter on which so many political scientists focus their attention. Many have concluded that constituents make voting decisions based upon retrospective evaluations of candidates' performance in office.<sup>109</sup> Legislators know this, but they also know that voters are rationally ignorant<sup>110</sup> about many aspects of that performance. Further, legislators know that different members of the reelection constituency have different preference intensities over certain issues. Thus, for each voting decision a legislator faces, she must try to anticipate the consequences of her action alternatives.<sup>111</sup> That calculation, in turn, will depend upon: (1) characteristics of the policy choice itself, and "traceability" of unfavorable outcomes resulting from the vote;<sup>112</sup> and (2) characteristics of the legislator, such as the safety of the legislator's seat and the reservoir of trust—or leeway<sup>113</sup>—that the legislator has developed among her reelection constituency. Thus, we can conceive of electoral risk as a function of the following:

- The legislator's perception of how *salient* the issue is to voters, and how likely it is that voters will become aware of the legislator's choice;<sup>114</sup>
- The *electoral vulnerability* of the legislator (safe versus marginal seat); and

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<sup>107</sup> RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 8 (1978); see also GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 60–63 (2d ed. 1987) (describing the central task of congressional candidates: to decide which parts of a heterogeneous constituency to write off and which to court, and how to reach the latter group).

<sup>108</sup> To the extent that this proposition is true, of course, the model represented by Figure 2 overstates the legislator's tendency to represent the geographical constituency.

<sup>109</sup> See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990); WILLIAM T. BIANCO, *TRUST: REPRESENTATIVES AND CONSTITUENTS* (John E. Jackson & Christopher H. Acher eds., 1994); MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* (1981).

<sup>110</sup> See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 207–19, 237 (1957).

<sup>111</sup> Arnold notes that a vote can rouse the "activated public," a risk to which legislators must constantly attend. See ARNOLD, *supra* note 109, at 60–63.

<sup>112</sup> For a discussion of this issue, see *id.* at 48–51.

<sup>113</sup> BIANCO, *supra* note 109, at 106–18.

<sup>114</sup> The term "salient" is sometimes used in ways that conflate the notions of voter awareness and preference intensity, as in the sentence "Abortion policy is highly salient to right-to-life organizations." I will use the term to refer to the level of current or likely future voter awareness of an issue or policy choice. I use the term "preference intensity" to refer to the issue of how much voters care about the issue.

- The legislator's perception of voters' *preference intensity*—that is, the importance of the issue to voters relative to other issues on which the legislator has taken a position.<sup>115</sup>

Electoral risk, when present, should discipline the legislators to produce a policy that represents the voters' wishes. More specifically, in Figure 2, *if* electoral risk is present for every legislator, *and* no party or committee controls the agenda (so that any alternative may be proposed for a vote against any other alternative), *then* the legislature should produce policy  $V$ ,<sup>116</sup> no matter what the status quo ante. This is, of course, because  $V$ , the policy favored by the median voter, will command a majority against any other proposal in the policy space.

## 2. *Varying Electoral Risk*

However, when one or more legislators face no electoral risk, the result may be a policy choice that does not reflect the median voter's preferences. Of course, there are lots of reasons why some votes do not entail electoral risk for some legislators. Legislators may know that voters are likely to remain unaware of the policy choice they make because it concerns an obscure issue. Legislators may believe that while voters are aware of the issue, voters do not care enough about the issue for the choice to produce electoral risk. Alternatively, for legislators holding safe seats, even votes on salient issues about which some constituents have strong preferences will not entail electoral risk because their safe seats afford them the luxury of losing some support without losing their seats in the legislature.

When a vote does not entail electoral risk, legislators may not be guided by their constituents' wishes. To the contrary, in such cases legislators face temptations to deviate from voters' wishes in ways that agencies do not. If the policy choice represented by Figure 2 does not entail electoral risk for a legislator, that legislator faces a choice among three possibilities: (1) she can pursue her constituents' preferences by seeking a policy at her ideal point; (2) she can pursue her electoral goals at the expense of her median constituents' preferences by voting to serve the interests of powerful interest groups; or (3) she can trade her vote on this low-risk policy choice for support on other

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<sup>115</sup> Even when an issue is salient or the legislator's seat is not safe, constituents might not care deeply enough about the issue to change their votes.

<sup>116</sup> Every legislator will seek a policy at his or her sincere ideal point because the vote entails electoral risk. Since  $V$  represents the ideal point of the median voter in the legislature, it will defeat any alternative offered against it. For example, assume the policy at  $R_{MDN}$  is under active consideration on the floor of the legislature. Anyone proposing to amend the bill to include the policy at point  $V$  will be successful because all the Democrats plus  $R_i$  will vote for the amendment, which produces a result closer to their ideal points.

issues about which she and her constituents care more.<sup>117</sup> By definition, for these low-risk issues, the legislator can do any of these things without fear of electoral consequences.<sup>118</sup> If she chooses any but the first option, she will change the location of the median policy. Note that only one of these options is inconsistent with idealized notions of representation: most legislators would be unapologetic about trading a loss on an issue about which her constituents care little for a gain on an issue about which they care deeply. However, both of these courses of action exert powerful centrifugal forces on the legislature's ultimate policy choice.

For example, assume that  $D_1$  (and only  $D_1$ ) perceived no electoral risk in this policy choice. Perhaps she holds a very safe seat, or her constituents do not—and never will—know or care about this issue.  $D_1$  is free to use her vote to benefit a powerful interest group, if she thinks that doing so might enhance her reelection prospects (for example, by attracting future campaign contributions or muting the intensity of their future opposition). If that powerful interest group is  $I_{CONS}$ , then the new median policy choice is  $R_2$ 's ideal point.<sup>119</sup> Likewise,  $D_1$  is free to trade her vote on this issue for another member's support on a future issue. If she trades with  $R_3$  or  $R_4$ , then  $R_2$  is once again the new median policy. More generally, if any legislator facing no electoral risk decides to trade votes or satisfy constituents on the opposite side of her ideal point from  $V$ , she moves the median policy alternative (and, therefore, the ultimate policy choice) away from her (and her constituents') sincere ideal point. As more legislators perceive an absence of electoral risk, more have the opportunity to en-

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<sup>117</sup> The latter two options do not directly violate Arrow's conditions for democratic choice because Arrow was concerned only with decisionmaking within a group, rather than group members' actions as representatives of other constituencies. Nevertheless, both options may reduce the representativeness of the ultimate decision. The third option, vote trading, does violate Arrow's "independence" condition, and one might argue that the second option does so indirectly as well, in that the legislator's vote is influenced by considerations other than her preferences over the policy issue in question. The independence condition states that the collective choice should be based only on the group members' preferences over the issue in question, and should be independent of irrelevant alternatives.

<sup>118</sup> Of course, under the first option, it is possible that a legislator's own policy preferences might better "represent" voters if those voters were to hold the same view given more information about the policy choice in question. Indeed, in Spence & Cross, *supra* note 1, we argued that agencies sometimes produced more representative decisions because of their greater expertise and information.

<sup>119</sup> When  $D_1$  votes as if her ideal point were  $I_{CONS}$ , then  $R_2$ ,  $R_3$ ,  $D_1$ , and  $R_4$  will support the policy at  $R_2$  against any policy alternative to the left of  $R_2$ ;  $D_2$ ,  $D_3$ ,  $R_1$ , and  $R_2$  will support  $R_2$  against any policy to the right of  $R_2$ . Thus, when legislators can freely amend legislation on the floor, they should produce alternative  $R_2$  under this scenario.

gage in that kind of behavior, with the possible result that the resulting median policy choice will lie even further from  $V$ .<sup>120</sup>

Of course, the absence of electoral risk enables legislators to look beyond the immediate (unidimensional) policy choice and to translate their votes into valuable currency (in other policy dimensions). Thus, popular legislation may be opposed not only by legislators whose constituents oppose it, but by some whose lack of electoral risk allows them to withhold support strategically, in order to secure desired changes in the bill *or* support from other legislators on other bills. As a result, legislative decisionmaking moves further from the wishes of the median voter, and creates the opportunity for legislative amalgams of minority-favored provisions to become law (*i.e.*, pork-barrel legislation).

### 3. *Introducing Agenda Control*

What if legislators cannot freely propose policy alternatives for a floor vote? What if, instead, the party or a committee controls which proposals make it to the floor for a vote? If the party or a committee exerts control over the agenda, the result can be a policy choice that deviates from  $V$ , depending upon the location of the status quo policy. This is true *even if all members face electoral risk*.

Assume that the party or a committee can control which alternatives are considered on the floor of the legislature.<sup>121</sup> If the status quo is at  $R_4$  and the Republican leadership proposes a policy at  $R_{MDN}$ , that policy will command the votes of all the legislators except  $R_4$  (because for those legislators,  $R_{MDN}$  is closer to their own ideal points than is the status quo,  $R_4$ ).<sup>122</sup> Alternatively, a committee composed of ideological outliers with gatekeeping power could exert this same sort of control

<sup>120</sup> It is not difficult to see how the legislature's policy choice can stray further from point  $V$  when more legislators are free of electoral risk. If three of the members to the left of  $I_{CONS}$  face no electoral risk on a policy choice, and are persuaded to vote  $I_{CONS}$  preferences (say  $R_3$ ,  $R_2$ , and  $R_1$ ),  $I_{CONS}$  becomes the new median policy choice. Likewise, if  $D_2$ ,  $D_3$ , and  $R_1$  face no electoral risk on a vote and decide to vote with  $I_{LIB}$  on the issue in question,  $I_{LIB}$  becomes the new median policy choice.

<sup>121</sup> Of course, this could be accomplished through the imposition of a closed rule during floor debate, prohibiting amendments (including an amendment consisting of proposal  $V$ ). In this way, parties or committees can limit legislative alternatives to two: the proposal and the status quo.

<sup>122</sup> If we think of Figure 2 as an ideological spectrum,  $R_4$  is a very conservative status quo policy (say, the absence of regulation, where moving left in the policy space denotes increasingly stringent regulation). If the members of the Republican caucus vote to select the policy that will be considered on the floor and impose a closed rule (prohibiting amendments), the Republicans can propose any policy to the left of  $R_4$ , say  $R_{MDN}$ , and still command the votes of a majority of legislators on the floor, even if all legislators vote sincerely in the floor vote. How? In the caucus vote,  $R_1$ ,  $R_2$ , and  $R_3$  will prefer the policy at  $R_{MDN}$  to the status quo (the policy at  $R_4$ ); and when  $R_{MDN}$  is pitted against the policy at  $R_4$  on the floor, it will command the votes of all the legislators except  $R_4$ . In fact, the true median Republican position in this caucus vote lies to the left of  $R_{MDN}$ . Since three votes constitute

over the agenda. For example, if the status quo is at  $R_4$ , a liberal committee composed of  $D_1$  and  $D_2$  could command a majority for any alternative that lies closer to  $R_1$  than the status quo ( $R_4$ ). In that instance, the gatekeeping committee could secure a change in policy from  $R_4$  to  $D_2$ , for example.<sup>123</sup>

What happens if the status quo policy lies to the left of the majority party's preferred policy but to the right of  $V$  (at, say,  $R_2$ )? In that instance the party could use its ability to control the agenda to preserve the status quo by refusing to report a bill to the floor, since a majority of the party prefer the status quo to any alternative that would command a full legislative majority. Alternatively, if the status quo is to the left of  $V$ , the party may propose policy  $V$ , which will pass with the support of all the Republicans.<sup>124</sup>

When we relax the assumption of electoral risk for all members, the opportunities for producing a policy that deviates from  $V$  increase. Assume once again a status quo at  $R_2$ . If legislator  $R_1$  and at least one Democrat (say,  $D_3$ ) face no electoral risk, they have the option of cooperating with the remaining Republicans to control the agenda and secure passage of some policy to the right of  $R_2$ ; that policy could be  $R_{MDN}$ ,  $I_{CONS}$ ,  $R_3$ , or any policy that lies no further from  $R_3$  than  $R_2$  does.<sup>125</sup> Suppose instead that the status quo is at or to the left of  $V$ . In that case, there are many alternatives to the right of  $V$  that a majority of Republicans will prefer. In that case, if there is one member (any one member) to the left of  $R_2$  who faces no electoral risk, that electorally safe member may choose to cooperate with the Republican party members toward the passage of a policy at, say,  $R_3$ . That is,  $R_2$ ,  $R_3$ , and  $R_4$  can control the agenda, knowing that the fourth electorally safe member's vote will be sufficient to pass their preferred alternative,  $R_3$ , when it gets to the floor. One might imagine situations in which a member of the minority party who faces no electoral risk on a particular policy choice might engage in that sort of cooperation in return for support on some later policy choice.<sup>126</sup>

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a majority of this caucus, any policy that lies closer to  $R_2$  than does  $R_4$  will command that majority.

<sup>123</sup> This assumes committee gatekeeping and a closed rule on the floor.

<sup>124</sup> One might think of this kind of agenda control as a violation of another of Arrow's conditions of democratic choice because it involves restricting the domain of choice and prevents the group from considering particular policy alternatives at particular stages of the process.

<sup>125</sup> This is because  $R_4$  will prefer any alternative to the right of  $R_2$ , and  $R_3$  will prefer any alternative that is closer to her ideal point than is the status quo, including some policies to her right. The two electorally safe legislators can cooperate with  $R_3$  toward that goal.

<sup>126</sup> There is one possible recent example: some have speculated that Senator Russell Feingold's vote to confirm John Ashcroft as Attorney General represented a unilateral offer to trade his vote for any Republican votes on his campaign finance bill.



We can expect legislators to engage in this course of conduct without ascribing cynical motives to them. A vote that entails no electoral risk is a valuable asset, one that legislators can use to achieve valued policy goals (as in vote trading) or to enhance their job security (by catering to the wishes of a particular interest group). On some level, voters know that legislative policy choice is inherently unstable in this way, and not because legislators are corrupt or beholden to special interests. Rather, because electoral risk varies among legislators and policy choices, there are opportunities for well-meaning and not-so-well-meaning legislators alike to vote in ways that deviate from the wishes of their median constituents. When that happens, legislative policymaking can result in unrepresentative policy choices.

#### 4. *A Hypothetical Example*

How often is real legislative policymaking distorted in these ways? Political scientists seem split on this question,<sup>127</sup> and given the complexity and uncertainty of the real legislative decisionmaking environment, it is difficult to prove whether or how frequently these dynamics affect real legislative decisions. Like other public choice analyses, the relevance of this one is in the eye of the beholder.

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<sup>127</sup> Gary Jacobson reasons that while legislators pursue the twin goals of governing and seeking reelection, they feel the cost of neglecting the latter goal far more acutely than they feel the cost of neglecting the former. The way they attend to reelection is by spreading around the pork: something for everyone is more important than objective good sense. See JACOBSON, *supra* note 107, at 119–25. Other political scientists go so far as to argue that Congress is organized to facilitate the production of these gains from trade. See Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 143–48 (1988) (arguing that the committee system in Congress confers “property rights” to the control of policy to “high-demanders”—legislators whose preference intensities are higher for the issues within the committee’s jurisdiction, and who tend to be ideological outliers). We need look no further than recent sessions of Congress to find examples of attempts (some of them successful) to secure passage of unpopular policies by adding them to popular legislation. One such set of examples is the use of non-germane environmental “riders” by recent Republican Congresses, the most infamous and successful of which was the so-called “Emergency Salvage Timber Sale Program.” That rider, which permitted logging in old-growth forests over environmental groups’ objections, was attached as a rider to a popular budget bill. See H.R. 1158, 104th Cong. § 2001 (1995). The Defenders of Wildlife maintains a list of more recent environmental riders on its website. See DEFENDERS OF WILDLIFE, ANTI-ENVIRONMENTAL RIDERS, at <http://www.defenders.org/wildlife/riders/riders.html> (last visited Sept. 28, 2001). For further analysis of legislative choice in the context of multidimensional policy choices, see *infra* Part II.A.4. Other political scientists, like Keith Krehbiel, believe that analyses like Weingast and Marshall’s overstate the problem. See KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991) (arguing instead that Congress is organized to provide members with information, and serves the interests not of outliers, but of the median member).

Consider, however, the following plausible hypothetical.<sup>128</sup> Portions of the 1990 Amendments<sup>129</sup> to the Clean Air Act<sup>130</sup> focused on the need to reduce sulphur dioxide emissions from fossil-fueled power plants. Suppose that in 1990 there had been unanimous support for the general notion of mandating reductions, but disagreement over particulars. Suppose further that there was majority support in the country and in Congress for mandating larger (rather than smaller) emission reductions, and for allowing regulated plants to achieve those reductions by switching to cleaner-burning, low-sulphur coal. More specifically, assume that the legislative debate centered on two issues, each with two alternatives:

- On the primary issue of emissions reductions, legislators faced a choice between option *1a*, mandating larger emissions reductions (the more stringent option), and option *1b*, mandating smaller reductions (the less stringent option).
- On the secondary issue of how to achieve those reductions, legislators had to choose between option *2a*, under which power plant operators would be free to shift to low-sulphur coal (the flexible option), and option *2b*, which would actively discourage fuel switching (the inflexible option).

Assume further that legislators' preferences were divided evenly in thirds as described in Table 2, in which bold type signifies more intense preferences.

TABLE 2  
HYPOTHETICAL PREFERENCES OVER ACID RAIN CONTROL ISSUES

Conservatives (1/3)	Liberals (1/3)	Eastern Coal Representatives (1/3)
<i>1b 2a</i>	<i>1a 2a</i>	<i>1a 2b</i>

In this situation, despite majority support for larger emissions reductions and for allowing fuel switching (two-thirds support in both instances), it is easy to see how vote trading<sup>131</sup> could produce a statute calling for smaller reductions (option *1b*) and inflexibility on fuel switching (option *2b*). Eastern Coal representatives might withhold

<sup>128</sup> Since discussions of the Clean Air Act figure so prominently in discussions of delegation, I opted for a Clean Air Act hypothetical. See, e.g., Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. L. REV. 7 (2000); Farina, *supra* note 5; Schoenbrod, *Growing Up*, *supra* note 54. It is offered unapologetically as merely a plausible scenario, not a description of historical reality.

<sup>129</sup> Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 1676.

<sup>130</sup> 42 U.S.C. § 7401 (1994).

<sup>131</sup> As in the analysis of Figure 2, either vote trading or legislators' decisions to serve the interests of unrepresentative interest groups can yield similar results.

their support for larger reductions in return for conservatives' support for inflexibility. Each group would gain utility from such a trade,<sup>132</sup> and the two less popular policy options would become law with two-thirds of the vote in each case.<sup>133</sup>

Indeed, decisionmaking grows more unstable when legislators must vote on two or more issues simultaneously, even in the absence of agenda control and in the presence of electoral risk. Table 3 below details the legislators' preferences over all the possible combinations that could be included in the legislation, based upon the preference intensities described in Table 2.<sup>134</sup> These legislative alternatives assume: (1) that all legislators face electoral risk (and, therefore, vote sincerely and avoid vote trading); and (2) that legislators must address the primary issue,<sup>135</sup> the stringency of pollution control reductions, but have the option of delegating the secondary issue, fuel switching, to the agency. Of course, the secondary issue cannot be considered in legislation alone. Given this set of preferences, we can examine how the various alternatives perform in pairwise comparisons (head-to-head votes).<sup>136</sup> It is evident from Table 3 that when issues are considered simultaneously, differences in preference intensity alone allow alternative *1b 2b* (the less stringent, less flexible alternative) to defeat alternative *1a 2a* (the more stringent, more flexible alternative), even without vote trading.<sup>137</sup> This is true even though majorities prefer more stringent sulphur dioxide reductions and fuel-switching flexibility.

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<sup>132</sup> In this instance, differences in issue salience make the electoral risk of deviating from voters' wishes on the low-salience issue minimal, particularly if the trade is made to secure a better result on the high-salience issue.

<sup>133</sup> To make this agreement hold, the contracting parties would have to agree to vote together on any and all attempts to amend the *1b 2b* legislation.

<sup>134</sup> This set of preference orderings assumes that each group of voters values their ideal combination of policies (from Table 2) most highly. After that, each prefers legislation that includes their high-intensity preference alone (that option only exists for liberals and conservatives), followed by the combination representing their preferred policy on the high-intensity issue plus their less-preferred alternative for the low-intensity issue. After that, each group prefers first to avoid the unwanted outcome on the high-intensity issue, and to obtain (where possible) the preferred option on the low-intensity issue. For liberals and conservatives, this means that their next-preferred policies couple their preferred policy on the low-intensity issue with the less-preferred option on the high-intensity issue (which is unavoidable), followed by the low-intensity issue preferred policy alone. For the Eastern Coal representatives, they prefer legislation that does not address the fuel switching at all to legislation that includes the flexibility option (*2b*). For all three groups, their least-preferred policy combines both less-preferred policy options. Note that across these two dimensions, preferences are not single-peaked.

<sup>135</sup> In other words, assume that on the major issue—sulphur dioxide reductions—the no-action alternative is not a viable option for any legislator.

<sup>136</sup> See the Appendix for the full results of pairwise voting.

<sup>137</sup> This is because both the conservatives and Eastern Coal Representatives prefer this combination over the liberals' preferred combination.

TABLE 3  
HYPOTHETICAL PREFERENCES OVER ALL POSSIBLE COMBINATIONS

Conservatives (1/3)	Liberals (1/3)	Eastern Coal Representatives (1/3)
<i>1b 2a</i>	<i>1a 2a</i>	<i>1a 2b</i>
<i>1b</i>	<i>1a</i>	<i>1b 2b</i>
<i>1b 2b</i>	<i>1a 2b</i>	<i>1a</i>
<i>1a 2a</i>	<i>1b 2a</i>	<i>1b</i>
<i>1a</i>	<i>1b</i>	<i>1a 2a</i>
<i>1a 2b</i>	<i>1b 2b</i>	<i>1b 2a</i>

More generally, there is no Condorcet winner here; no alternative defeats all of the other alternatives. For example, while *1b 2b* would defeat *1a 2a* in a pairwise vote (because the conservatives and Eastern Coal representatives would favor it), the *1b 2b* alternative itself is vulnerable. Liberals and conservatives would support an amendment to permit fuel switching (producing alternative *1b 2a*), or an amendment to delegate that issue to the agency to decide (producing alternative *1b*). In fact, absent agenda control limiting the amendment process, the process of amending this bill could cycle indefinitely.<sup>138</sup> Furthermore, while agenda control will eliminate cycling, those who control the agenda can use it to produce any of these legislative outcomes.<sup>139</sup> If the leadership prefers the more stringent and more flexible policies, it can produce the *1a 2a* outcome by controlling the number of amendment opportunities and the order in which amendments are considered.<sup>140</sup> Unfortunately, however, the leadership could also use this procedure to produce the opposite outcome, enacting the less stringent, less flexible policies (*1b 2b*).<sup>141</sup> The routes to these results are detailed in the Appendix.

Of course, one might question how frequently situations like this arise. How often do leaders try to defeat majority preferences in this way? How often will legislators sit idly by and allow themselves to be manipulated by the leadership in this way? The former question is an empirical one, about which we could expect disagreement. One might surmise that the Republican leadership in the Senate has tried to defeat a majority that favors the McCain-Feingold campaign fi-

<sup>138</sup> For an explanation of how that might occur, see the Appendix.

<sup>139</sup> See the Appendix for a description of how agenda control could be used to produce several possible outcomes.

<sup>140</sup> See the Appendix for examples of how the agenda can be manipulated to produce this result given any of the other alternatives as a starting point.

<sup>141</sup> See the Appendix for an explanation of why this is possible.

nance bill,<sup>142</sup> and that they do so by controlling the agenda in these very ways. On the latter issue, it is true that legislators may try to vote strategically to defeat this kind of agenda manipulation. However, given the inherent instability of a situation like this Clean Air Act hypothetical, it would take an extraordinarily persistent and united group of strategic voters to produce a bill containing the two majority-preferred policies (the more stringent, more flexible policies, *1a 2a*) absent the cooperation of the leadership. Indeed, delegation to the agency might be an attractive alternative in that situation.

### B. Centripetal Forces in the Agency Policymaking Process

Now compare the voters' view of the agency as a potential policymaking delegate. Progressives attributed more selfless motives to bureaucrats than politicians, arguing that the former are less susceptible to the influence of private interests, less likely to be instrumentally rational in the pursuit of personal goals, and more likely to be guided by norms of duty and the like. But even if we make identical assumptions about the motives of agency bureaucrats and legislators, there are nevertheless good reasons for the median voter to prefer agency policymaking.<sup>143</sup>

Scholars of all stripes have long recognized that delegation to agencies is one way legislators "solve" some of the choice problems inherent in the legislative process. Cycling and agenda manipulation can paralyze the legislative process, and delegating important decisions to agencies can yield a decision when one would not otherwise be made. Of course, delegation can produce a policy choice when a legislative majority exists in favor of a general policy but not a specific one. Legislators may agree that the status quo must be changed, but cannot agree on exactly how. Slender majorities of both houses of Congress may favor legislation aimed at a new policy goal, but different subsets of those slender majorities may oppose some of the particulars in each potential approach to achieving that goal. Alternatively,

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<sup>142</sup> Opponents first tried to filibuster, and then decided to facilitate, the addition of "killer amendments" to the bill. See Matthew Tulley, *Riders to Tell if Campaign Finance Bill Flies or Dies*, 59 CONG. Q. WKLY. REP. 513, 522 (2001) ("They'll try and kill it with poison pills," [Senator] McCain said warily."). Referring to the House counterpart, the Shays-Meehan bill, a *New York Times* editorial said: "Today we urge lawmakers to watch out for another danger, which is the effort by opponents to try amending the bill to death." Editorial, *Reform's "Killer Amendments"*, N.Y. TIMES, July 10, 2001, at A18.

<sup>143</sup> In Spence & Cross, *supra* note 1, we focused on the values that guide policymakers' decisions, arguing that the values that guide politicians' decisions are more likely than those that guide agencies' decisions to deviate from voters' values. Our focus was on the operative values—those that were determinative in policy decisions. We did not argue that bureaucrats were more selfless than politicians, only that the absence of electoral pressures provided bureaucrats with fewer incentives to deviate from the goal of pursuing policy goals that matched the well-informed preferences of the median voter. See *id.* at 123–28.

legislators may agree on the general goal but are cycling on one of the particulars in a bill.<sup>144</sup> Rather than limit alternatives in order to produce a choice, legislators may instead decide to delegate the choice to an agency.

But is delegation really a solution to these problems? Arrow's Theorem and the other formal analyses of collective choice problems are general and, by their terms, applicable to any collective choice setting. Agency policymaking only "solves" these problems by violating the conditions of democratic choice on which those theorems are based.<sup>145</sup> In a variety of more or less formal ways, agency decision-making certainly violates some of Arrow's assumptions;<sup>146</sup> however, it does so in ways that are less susceptible to the kind of manipulation by minority factions that can infect legislative decisionmaking.<sup>147</sup> Whereas the legislative process produces centrifugal forces that push policy choice away from the center, agency policymaking is characterized by a kind of centripetal force that prevents individual policy choices from straying too far from the agency's core mission.

### 1. *Narrowing the Range of Choice*

Delegation narrows the range of policy alternatives considered in several ways. First, agencies are hierarchical, and hierarchical organization narrows the range of operative preferences in agency decision-making. While most agency decisions are produced with input from a wide variety of agency members and nonmembers, not all opinions carry equal weight. In executive agencies, a single cabinet secretary or

<sup>144</sup> One way cycling may occur is if there are three alternative proposals for inclusion in a bill (*a*, *b*, and *c*), and legislators' preferences are as follows:

- one-third prefer *a* to *b*, and *b* to *c*;
- one-third prefer *b* to *c*, and *c* to *a*; and
- one-third prefer *c* to *a*, and *a* to *b*.

Note that in this hypothetical, preferences are not single-peaked, as they are stipulated to be in spatial models. In other words, we cannot arrange these three choice alternatives in single-dimensional Euclidean space so that these three groups' policy preferences are single-peaked. In these circumstances, when the legislation can be freely amended, legislators will continue to amend it indefinitely, because there will always be a two-thirds majority in favor of a change. That is, two-thirds of the legislators prefer *c* to *a*, *a* to *b*, and *b* to *c*. Note that if the party controls the agenda, it can decide which of these minority-preferred policies will make its way into the bill.

<sup>145</sup> In particular, Arrow's Theorem assumed, among other things, the need for a decision process that (1) did not restrict the range of choice alternatives (Arrow's so-called "unrestricted domain" requirement), and (2) did not allow any one member of the decisionmaking group to act as a dictator (the "nondictatorship" requirement). Agency decisionmaking routinely violates both of these Arrowian conditions.

<sup>146</sup> Of course, legislative decision processes often restrict the domain of choice in various ways. See, e.g., Kenneth A. Shepsle, *Studying Institutions: Some Lessons from the Rational Choice Approach*, 1 J. THEORETICAL POL. 131 (1989) (discussing "structure-induced equilibrium" in legislative choice); see also *supra* Part II.A (describing how manipulation of the legislative process can pull the policy choice away from the median voter's preferences).

<sup>147</sup> See *supra* Part II.A.

agency administrator has the power to take decisive action, eliminating the problem of cycling and the paralysis it can cause. In an independent commission headed by a plural executive, cycling remains a possibility; however, the agency may not have the luxury of the no-action alternative in that instance. Statutes and courts often compel agencies to act, preventing cycling from producing paralysis.

Second, the range of preferences among agency bureaucrats will be relatively narrow in any event, because the agency will be populated by those who would be attracted to the agency's mission. If the median voter's ideal point lies within that range, delegation to the agency may be less risky from the median voter's point of view, in that it is less likely to produce an outlier policy. Indeed, many public choice models of delegation are cognizant of the importance of mission orientation in the delegation process. Some public choice scholars argue that legislators steer agencies toward particular outcomes by defining the agency's mission in this way.<sup>148</sup> Other models of legislative delegation assume that legislators take the distribution of preferences within the agency into account when deciding how much discretion to grant agency decisionmakers.<sup>149</sup> In any case, because legislators do not necessarily share the agency's mission orientation, the distribution of preferences among agency members is likely to be considerably narrower than it is among legislators, effectively narrowing the range of possible outcomes.<sup>150</sup>

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<sup>148</sup> See Bawn, *supra* note 56 (making the same argument); McCubbins et al., *supra* note 59 (describing these "structural" controls over agency action); Spence, *supra* note 59 (finding some empirical support for the notion that agencies adhere to their statutory missions).

<sup>149</sup> Bawn, *supra* note 56, and Epstein & O'Halloran, *supra* note 56, both discuss this facet of the delegation decision.

<sup>150</sup> Regardless of the distribution of preferences within the agency, the agency's range of choice is narrower than that of Congress. As a general matter, judicial review limits the range of choice to the agency's statutory mandate, however broad or vague that mandate may be. One could argue that if judges are mere policy-maximizers who impose their own policy preferences when reviewing agency action, then judicial review does not narrow the range of choice because judges' preferences may be as widely dispersed as legislators' preferences. However, even if judges try to maximize their policy preferences, they are more constrained in doing so when reviewing agency actions. While courts insist that both Congress and agencies act constitutionally, existing statutes do not constrain congressional choice the way they constrain agency choice, making the range of possible outcomes greater in the former setting. If we assume that judges do try to keep agencies within the broad boundaries of their statutory mandates, then judicial review does limit agency action. Of course, the larger, empirical question of what motivates judges generally is an especially thorny one, and is addressed by an enormous and complex literature in law and the social sciences. Many social scientists who study the courts subscribe to the view that judges are indeed policy-maximizers whose decisions reflect a desire to achieve particular policy results. Two judicial-politics scholars recently put it this way: "A half century of empirical scholarship has now firmly established that the ideological values and policy preferences of Supreme Court justices have a profound impact on their decisions in many cases." Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on*

But is narrowing the range of choice a good thing? The obvious objection to such a narrowing is as follows: if it is the agency's enabling legislation that effectively limits the range of agency choice (either through bureaucrats' mission orientation or judicial review), how can we be sure that the enabling legislation itself reflects the median voter's wishes?<sup>151</sup> How do we know that the delegation was not contaminated by the instability and manipulation described in Part II.A? Indeed, early public choice models condemned regulation in this very way, by emphasizing the ways in which rent-seeking interest groups, congressional committees, and agencies conspire to produce policies that represent the interests of those outlier groups at the expense of the median voter's interests.<sup>152</sup> However, the analysis of legislative choice in Part II.A suggests that while this risk exists, major regulatory legislation is less likely than other forms of legislative action to stray from the median voter's preferences.<sup>153</sup>

Consider Mancur Olson's argument that smaller, wealthier groups have resource and organizational advantages that facilitate

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*Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049, 1049 (1996). This characterization of Supreme Court justices' motives has been extended to other judges as well by political scientists and legal scholars alike. For a good summary of the evolution of the debate within political science, see Richard A. Brisbin, Jr., *Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1004, 1004-05 (1996). Many legal scholars share this view as well. See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998) (much "scholarship simply assumes the sincere application of legal doctrine without considering the possibility that it may at times be nothing more than a convenient rationalization for political decisionmaking"); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300 (ascribing judicial decisions primarily to policy preferences of judges).

This view is contrasted with the traditional legal model, which emphasizes interpretive techniques and legal reasoning as taught in law schools, and reference to higher principles (for example, *stare decisis*, constitutional doctrines, and the like) as key decision criteria. For the classic explication of this view, see, for example, BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921) ("My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law."). For a more recent and circumspect version of the traditional view, arguing that judges are constrained by these higher duties, see James L. Gibson, *Decision Making in Appellate Courts*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 255 (John B. Gates & Charles A. Johnson eds., 1991).

<sup>151</sup> This issue actually comprises two questions: one about the enabling legislation's consistency with the median voter's wishes when the statute was passed, and another about the legislation's consistency with the median voter's current wishes. I address the former issue here. See *infra* Part II.C for a discussion of the latter issue.

<sup>152</sup> See Kalt & Zupan, *supra* note 36; Peltzman, *supra* note 35; Stigler, *supra* note 35.

<sup>153</sup> Indeed, the stronger objection is the argument that while enabling legislation often reflects the median voters' preferences at the time of passage, those preferences change over time, while the agency's mission orientation makes agency preferences resistant to change. Part II.C, *infra*, addresses this argument.



rent-seeking in the legislative process.<sup>154</sup> Olson posed the question of why, then, Congress sometimes produces major regulatory legislation that burdens those groups. One commonly accepted answer is that voters sometimes exercise influence in ways that bypass interest groups. That is, politicians can help broader, less wealthy, mass interest groups to overcome Olsonian disadvantages, particularly in higher-salience policy debates.<sup>155</sup> In debates over the kind of high-salience issues that produce major regulatory legislation (the kind that establish an agency's general mission), politicians act as political entrepreneurs, recognizing the political benefits of rallying the unorganized supporters of public interest policy goals. This is the so-called "republican moment" explanation for major regulatory legislation,<sup>156</sup> one that echoes Anthony Downs's description of the "issue attention cycle"<sup>157</sup> in the context of environmental law. The analysis in Part II.A suggests that republican moments ought to produce policies that reflect the median voter's wishes; when an issue captures the public's imagination, legislators face greater electoral risk and have a strong disincentive to deviate from their constituents' wishes.<sup>158</sup> The same cannot be said of the kind of lower-salience, second-order decisions that legislators often delegate to agencies.

Finally, mission orientation aside, for some kinds of policy choices, the agency's information and deliberation advantages will further narrow the range of choices considered in beneficial ways. For some policy choices, information will be a strong determinant of

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<sup>154</sup> See *supra* notes 35, 48 and accompanying text.

<sup>155</sup> For general summaries of this literature in the public choice context, see Christopher H. Schroeder, *Rational Choice Versus Republican Moment—Explanations for Environmental Laws, 1969-73*, 9 DUKE ENVTL. L. & POL'Y F. 29, 33-56 (1998); and David B. Spence, *Paradox Lost: Logic, Morality, and the Foundations of Environmental Law in the 21st Century*, 20 COLUM. J. ENVTL. L. 145, 168-71 (1995).

<sup>156</sup> See Schroeder, *supra* note 155, at 31 & n.7 (noting, however, that this result may reflect the kind of legislative deliberation that I have here suggested is rare in Congress). Politicians can tap into latent public interest groups in an effort to win support and, ultimately, to gain or retain office. In this way, politicians absorb many of the costs of collective action on an issue-by-issue basis. Without incurring any collective action costs beyond voting, a latent group can exert policy influence through its elected representative. Two well-known examples include then-Representative Jim Florio's leadership in the passage of the 1980 Superfund law and Representative Henry Waxman's efforts on behalf of various clean air initiatives. For detailed discussions of political entrepreneurship, see HARDIN, *supra* note 48, at 35-37; see also Taylor, *supra* note 70, at 223-26 (discussing rational choice theory).

<sup>157</sup> Anthony Downs, *Up and Down with Ecology—The "Issue-Attention Cycle,"* 28 PUB. INT. 38 (1972).

<sup>158</sup> Of course, the analysis in Part II.A, *supra*, showed that legislators can deviate from the median voter's wishes even when issues are salient. But to the extent that salience tends to push legislative choices closer to the median voter's preferences, this argument holds.

preferences,<sup>159</sup> such that the development of greater expertise tends to cause formerly dispersed preferences to coalesce.<sup>160</sup> In these circumstances, then, agencies ought to be more likely than legislators (even in the absence of strategic behavior) to satisfy the goal of representing the median voter.

## 2. *Other Characteristics of Agency Choice*

The agency decisionmaking environment has other characteristics that make it less susceptible to the interest group influence and strategic behavior that accompany the legislative decisionmaking environment.<sup>161</sup> Of course, bureaucrats do not all have the right to vote on each decision the agency makes; therefore, even if individual bureaucrats represented distinct constituencies, they would not face the same incentive to vote-trade as do legislators. Furthermore, the agency's relatively narrow subject-matter jurisdiction not only narrows bureaucrats' preferences, it reduces the opportunity for strategic behavior to infect the decisionmaking process. For agency bureaucrats, most of the important policy choices that they face are salient to them. For legislators, whose subject-matter jurisdiction is broad, relatively few of the choices (read: votes) they make are salient to them, which creates an incentive for vote trading and can lead to legislative choices that lie far from the preferences of the median voter.<sup>162</sup> In other words, even if agency decisionmakers could trade votes (or make analogous bargains), they would be less likely to do so because there is less variation in salience among agency policy choices.

In addition, unlike legislators, agency decisionmakers have a national constituency. Legislative logrolling is only possible because Congress's constituency is heterogeneous: for every issue, there are members of the legislative decisionmaking group who represent minority interests. Coordination by those legislators across issues (logrolling) can produce a series of policy choices that deviate from the interests of the median voter. Agency bureaucrats, like the President, have a national constituency and do not face this incentive. This is

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<sup>159</sup> In Spence & Cross, *supra* note 1, we suggested that support for free trade might be very information-elastic: that as liberals and conservatives alike are exposed to more of the teachings of neo-classical economics, both groups will be more likely to support free trade, even though conservatives may have been more predisposed to do so in the first place.

<sup>160</sup> *See id.* at 124–29.

<sup>161</sup> In Arrow's world, any departure from conditions of democratic choice is problematic. My argument in this section is that in the real world, agencies depart from those conditions in ways that are less problematic than the ways in which legislators depart from them.

<sup>162</sup> Note that vote trading can help the trader better represent her constituents by securing policies on high-salience issues that are closer to her constituents' preferences. By definition, those policies will be further from the median voter's preferences as a result. This is policy logrolling.

not to say that agency bureaucrats' preferences are homogenous. One can imagine that bureaucrats, in regional offices might be more sympathetic to local concerns than headquarters' bureaucrats, for example. However, the agency decisionmaking process affords minority subsets of the agency little leverage to translate their preferences into policy. One cannot imagine the agency policymaking process producing something analogous to the salvage-logging rider,<sup>163</sup> for example, even if agency bureaucrats in the Seattle field office favored the idea. Furthermore, regardless of whether bureaucrats' preferences are heterogeneous, they do not *represent* distinct subsets of their constituency the way legislators do. Consequently, they are unlikely to view it as their *duty* to represent that subset, especially when doing so runs contrary to the interests of most of their other constituents.<sup>164</sup>

In addition, the legislative process offers more—and more effective—avenues of influence for private sector rent-seekers. The ability to influence legislators' reelection prospects through campaign contributions, issue advertising, and the like, offers well-heeled interest groups much greater leverage over legislators than over agency bureaucrats, thanks primarily to the electoral connection. These avenues of influence make legislators more responsive to specific subsets of their constituents, but only increase the temptation to serve those interests at the expense of the median constituent (and, therefore, the median voter) whenever possible. While earlier public choice scholars have stressed the ways in which rent-seeking private interests exert influence over agencies, those routes to influence seem both less effective and more transparent than the analogous routes to legislative influence. Whether or not industry exerts influence by virtue of its overrepresentation in the administrative process, it cannot contribute money to help bureaucrats keep or lose their jobs. Furthermore, contacts between interest groups and agencies are, for the most part, on the record because the Administrative Procedure Act requires agencies to explain their decisions and to base them on that record; not so for legislators.<sup>165</sup>

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<sup>163</sup> The salvage-logging rider was a non-germane rider attached to a very popular 1995 disaster relief bill by western Senators. The bill became law. The rider contained provisions which were opposed by environmentalists and which many believed could not have been passed but for their inclusion in an otherwise popular bill concerning unrelated matters.

<sup>164</sup> One strain of capture theory argues that agencies come to think of regulated industries as their clients, abandoning the regulatory mission in favor of protection of the client industry. In Spence & Cross, *supra* note 1, at 121–23, we suggested that there is little or no remaining support for capture as a general theory of regulation, and that evidence demonstrates that capture does not describe most agencies today.

<sup>165</sup> I do not mean to imply here that ossification is the first defense against capture, or that “collaborative governance” promotes capture. To the contrary, the administrative process retains these characteristics without relying exclusively on rules and rulemaking. Fur-

### C. From Static to Dynamic: Representation vs. Responsiveness

In sum, modern agency policymaking is designed to guard against the kind of manipulation to which the legislative process is inherently vulnerable. However, one might argue that there are at least two positive attributes to the electoral connection that this analysis overlooks. First, the electoral connection offers voters recourse against those who make bad policy choices; we can vote out legislators, but we cannot vote out bureaucrats. Second, it offers an avenue for expressing preference intensity, and preference intensity *should* count in the policymaking process.<sup>166</sup>

The latter argument goes as follows. When we define good policy in terms of the median voter's wishes, we implicitly reject the goal of maximizing cardinal utility. Vote trading increases voters' utility. If agency decisionmaking fails to facilitate these kinds of gains from trade, that is a defect of that process, not a virtue. By insulating agency bureaucrats from electoral pressure, we deaden their ability to sense differences in preference intensities. Therefore, they will be less likely to produce policies that maximize voters' utility; electorally accountable legislators, free to trade their votes, will be more likely to produce policies that maximize voters' utility. Logrolling, for lack of a better word, is *good*.<sup>167</sup>

There are two rejoinders to this argument. First, vote trading may produce efficiency improvements, but only in the Kaldor-Hicks sense.<sup>168</sup> Vote trading does not produce Pareto improvements over

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ther, as I explain *infra* at notes 169–72 and accompanying text, the agency's key advantage over Congress is its ability to deliberate. Jody Freeman, Laura Langbein, and others have demonstrated that deossification can promote deliberation without risking capture, because (1) the early inclusion of stakeholders in the decisionmaking process improves deliberation, and (2) agency bureaucrats retain ultimate decisionmaking power and remain subject to the various decisionmaking requirements that ensure transparency. See Freeman, *supra* note 65; Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000); Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599 (1998).

<sup>166</sup> In Spence & Cross, *supra* note 1, we addressed the argument that, whatever its democratic virtues, delegation is unconstitutional because it is inconsistent with the Founders' vision of the policymaking process as reflected in the Constitution. Our rejoinder was that delegation is not only consistent with the Founders' vision, it is unavoidable and necessary, and cannot be prohibited without restricting legislative choice in harmful ways. I will not repeat those arguments here. See *id.* at 131–40.

<sup>167</sup> This argument applies not only to vote trading aimed at benefiting the median constituent; it also applies to some cases where legislators facing little or no electoral risk deviate from the wishes of their median constituent in order to benefit powerful interest groups. When the issue is low-salience for most voters, legislators may attend to the wishes of those groups for whom the issue has higher salience, even if their preferences deviate considerably from those of the median voter.

<sup>168</sup> An outcome is Kaldor-Hicks efficient if the winner's gains exceed the losses suffered by the losers, thereby making the aggregate better-off. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13 (3d ed. 1986)

sincere issue-by-issue voting. When a few legislators swap their low-salience votes for another's high-salience vote, they decrease the utility of the majority of non-participants in the trade by producing a policy that lies further from their ideal points. The trade produces a net gain in cardinal utility enjoyed by a few, but at the cost of losses suffered by many. By adding three more unnecessary new military bases to the defense budget bill, legislators may make three members of the House of Representatives very happy at the cost of small decreases in utility for the other 432 members. While this is Kaldor-Hicks efficient if the three members' utility gain exceeds the 432 members' utility loss, it is certainly debatable whether it is a "better" outcome.

Second, and more importantly, this view ignores the role of information and deliberation in the process of representation. Logrolling may increase rationally ignorant voters' utility over outcomes, but that is not what voters want from government. The essence of representation is the ability to choose the policies voters *would* choose *if* they had full information and the opportunity to deliberate. This is what James Madison meant when he expressed a preference for government that would serve constituents' "permanent" or "true" interests rather than their "passions."<sup>169</sup> This idea also lies at the core of the classic Burkean concept of representation: "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion . . . . [G]overnment and legislation are matters of reason and judgment, and not of inclination . . . ." <sup>170</sup>

Burke's words draw the distinction between responsiveness and representation, one that highlights the static nature of some utility-maximizing models. The problem is that, often enough, legislators are responsive to voters' immediate and uninformed preferences over policy choices, not their well-informed preferences.<sup>171</sup> In other words, outcomes that maximize the utility of rationally ignorant voters may not be what voters want from government. Voters may conclude

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<sup>169</sup> *The Federalist* is replete with references to this idea. Government must not be too responsive to factions, even majority factions. See THE FEDERALIST NO. 10 (James Madison). It must avoid the "temporary errors and delusions" that come from that kind of responsiveness. Rather, it should respond to the "deliberate sense" of the community. See THE FEDERALIST NO. 63 (James Madison).

<sup>170</sup> BURKE'S POLITICS 115 (Ross J.S. Hoffman & Paul Levack eds., 1949) (Edmund Burke's speech to the Electors of Bristol, November 3, 1774).

<sup>171</sup> This is part of the reason why political scientist Gary Jacobson has described Congress as responsive, but not responsible. See JACOBSON, *supra* note 107, at 211-23. For a more detailed explanation of why the agency's information advantages can help it produce more representative decisions, see Spence & Cross, *supra* note 1, at 124-28.

that the agency's judgment is therefore a more valuable commodity than the legislator's judgment.<sup>172</sup>

It is not only voters who seem to sense this problem; Congress does too. It seems apparent that Congress does not like the results of logrolling, even if it cannot quite help itself from doing so. Hence, in statutes like the Line Item Veto Act<sup>173</sup> and recent base closure acts,<sup>174</sup> Congress seems to be saying "stop me before I logroll again." Congress may be tying its own hands out of a sense that voters would prefer to forgo their slice of pork *if* other voters will do the same.<sup>175</sup> In situations like these, delegation is one way to serve voters' better-informed preferences, and not just in the context of classic pork-barrel legislation. In the hypothetical Clean Air Act example summarized in Table 3, it seems entirely plausible that legislators might produce legislation containing the less popular policies (*1b*, *2b*); yet it seems much less plausible that the Environmental Protection Agency (EPA) would have produced that result if Congress had delegated those decisions to the agency.

Even if agencies are less inclined to deviate from the well-informed preferences of the median voter, does not the absence of electoral accountability make those deviations more risky when they do occur? The answer is: not necessarily; for reasons suggested by Figure 2, the policy process seems equally well equipped to address any such deviations by agencies or Congress. If a mission-oriented agency drifts away from the preferences of the median voter, politicians (and interest groups) have an electoral incentive to publicize that fact and to take action. In fact, the prospects for a legislative (or presidential) correction are a function of how successful those efforts to increase the issue's salience will be.<sup>176</sup> The good news is that it will be easier to increase the salience of an issue when the agency has deviated from

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<sup>172</sup> This is the essence of John Rohr's deliberation-based argument, and Mark Seidenfeld's "civic republican" justification, for agency autonomy. See, e.g., ROHR, *supra* note 97; Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512 (1992). In Spence & Cross, *supra* note 1, at 141-42, we noted that this view is entirely consistent with the *Federalist* papers' defense of the constitutional design. For a fuller argument to this effect, see Seidenfeld, *supra*, at 1514.

<sup>173</sup> See Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996).

<sup>174</sup> See, e.g., Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623 (1988).

<sup>175</sup> This is, of course, a collective action problem—one that Congress solves by placing the decision process in the hands of a third party.

<sup>176</sup> Note that this is true when the agency has drifted away from the median voter, not from politicians. When the agency drifts away from politicians, they will not try to publicize that drift unless it also represents a movement away from voters' preferences. Hence, politicians' ability to control agencies with which they are unhappy is a function of the relative popularity of the agencies' policy positions. For a discussion of this distinction between control of agencies by politicians and indirect control by voters, see Spence, *supra* note 59; and Spence & Cross, *supra* note 1.

the median voter's preferences, *particularly her well-informed preferences*. That is, interest groups and politicians make an issue more salient by educating voters about the issue, thereby creating better-informed voters. As we argued in *A Public Choice Case for the Administrative State*:

As voters acquire more information, they are increasingly able to judge for themselves whether [the agency's choice] is a good or a poor approximation of [their well-informed preferences]. . . . [I]n a world of scarce resources, it would be irrational for an interest group opposed to an agency policy to engage in a sustained lobbying effort against the agency choice if it suspects that [well-informed voters will not oppose it].<sup>177</sup>

Likewise, because politicians are responsive to voters' immediate preferences, they must make the same calculation before opting to spend political capital to overturn agency policy choices. Agencies know this, and given their information advantages, are often in the best position to estimate where the median voter's fully informed preferences will ultimately lie. This is not to say that this dynamic operates in a perfect, frictionless way; it can be slow and imperfect, but it nevertheless exists.<sup>178</sup> Thus, even if political control of agencies is difficult and costly,<sup>179</sup> the risk of a runaway bureaucracy is overstated *because* political control of agencies is limited, not in spite of it.<sup>180</sup>

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<sup>177</sup> Spence & Cross, *supra* note 1, at 129.

<sup>178</sup> In Spence & Cross, we cited examples in which this dynamic seemed to work relatively quickly and efficiently. *See id.* In one such instance—the unhappy tenure of Anne Burford in the early Reagan Administration—congressional Democrats persisted in their attempts to publicize the Administration's environmental policies, betting that better-educated voters would be outraged by them. Within two years, the Administration gave up the bulk of its efforts to relax enforcement of the hazardous waste laws, and Burford resigned in disgrace. *See id.* at 129–31. On other occasions, this dynamic works more slowly and less efficiently. Two other examples I have studied in depth—the Federal Energy Regulatory Commission's (FERC's) hydroelectric licensing program and the EPA's administration of the Superfund hazardous waste cleanup program—represent situations in which (i) critics of the agency suspected that the agency's choices would be unpopular with well-informed voters, but (ii) criticism produced change only slowly, and after a long period. In the former example, critics persisted in their efforts to change the agency's policy for decades, achieving steady but incremental gains throughout that time. *See* Spence, *supra* note 59 (describing slow but ultimately fundamental change at the FERC). In the latter example, the EPA has grudgingly but steadily changed the way it seeks to impose liability on private parties for hazardous waste site cleanups in response to steady complaints about the fairness of the system. *See* David B. Spence, *Imposing Individual Liability as a Legislative Policy Choice: Holmesian "Intuitions" and Superfund Reform*, 93 Nw. U. L. REV. 389, 434–47 (1999).

<sup>179</sup> *See* Spence & Cross, *supra* note 1, at 128; *see id.* at 129–30 (suggesting some examples of this dynamic at work).

<sup>180</sup> I have argued this point on at least two other occasions. *See* David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 438–46 (1997); Spence & Cross, *supra* note 1, at 129. In this view I am joined by many administrative law scholars, whose analyses of the merits of agency autonomy are many and varied. *See, e.g.,* SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* (1992); Yvette Barksdale, *The*

But isn't it true that politicians will face this very same dynamic? In other words, when politicians choose policies that deviate from the wishes of the public,<sup>181</sup> interest groups will mobilize to publicize that fact, increasing the electoral risks of that course of action for politicians. One might argue, therefore, that electoral risk gives voters a much more direct tool for controlling politicians' (mis)behavior. It is true that voters have this tool, but it is not an easy tool to use. For politicians, whose policy jurisdiction is broad and multidimensional, the relationship between any single policy choice and electoral risk is usually a weak one. At the same time, the incumbency advantage is potentially powerful.<sup>182</sup> A legislator does not create electoral risk each time she votes against the interests of her constituents, though too many such votes can create risk. Furthermore, legislatures can produce policies that poorly represent the median voter without creating electoral risk for individual legislators, for all the reasons described in Part II.A.<sup>183</sup> All of this makes the electoral connection an unreliable tool for ensuring that legislative choices represent the median voter.

#### CONCLUSION

By conceiving of policymaking and delegation in this way, I have attempted to show how public choice analyses can illuminate the normative side of what is an essentially procedural problem.<sup>184</sup> In my focus on procedure, I join a long list of scholars who assume that these procedural questions are important. Of course, there is a growing call within administrative law for shifting our attention away from procedure and toward a focus on "substance"—that is, on defining the proper objects of our regulatory attention.<sup>185</sup> This analysis addresses those arguments only indirectly: first, by offering the well-informed wishes of the median voter as the goal of policymaking; and second,

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*Presidency and Administrative Value Section*, 42 AM. U. L. REV. 273 (1993) (arguing that greater presidential control will produce inferior decisions for a variety of reasons).

<sup>181</sup> Part II.B.1, *supra*, explains why the risk of such deviation is small.

<sup>182</sup> See, e.g., FENNO, *supra* note 107; JACOBSON, *supra* note 107.

<sup>183</sup> A heterogeneous constituency can further complicate this relationship in ways that mirror the legislative issue salience/vote trading dynamic described in Part II.A.4. For example, a legislator may be able to maximize electoral support by attending to the high-intensity preferences of unrepresentative subsets of her constituency, rather than to the median voter's preferences.

<sup>184</sup> This is certainly a "proceduralist" analysis, in the Matthew Adler taxonomy. See Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. L. REV. 241 (2000). Because serving the interests of the median voter fails to identify an objective theory of the good, I assume that Adler would conclude that this analysis is an insufficient framework for evaluating agencies in the same ways other proceduralist analyses are. On the other hand, this analysis offers a kind of justification for "weak paternalism" that is not unlike Adler's.

<sup>185</sup> *Id.*; see Joseph P. Tomain & Sidney A. Shapiro, *Analyzing Government Regulation*, 49 ADMIN. L. REV. 377 (1997).



by showing that procedure matters. Thus, my argument here is mostly consistent with a variety of other proceduralist, neo-Progressive justifications for agency autonomy, such as Steve Croley's recent argument that agencies can provide "public interested regulation,"<sup>186</sup> Mark Seidenfeld's "civic republican" justification,<sup>187</sup> Jody Freeman's argument for "collaborative governance,"<sup>188</sup> and others that stress the value of agency deliberation in the policy process. By emphasizing the internal protections against capture that are built into the administrative process, my argument is quite obviously inconsistent with analyses that legitimate agency policymaking by way of politicians' control over that process, such as unitary executive/strong presidentialism arguments<sup>189</sup> or congressional dominance arguments.<sup>190</sup> For these same reasons, it is fundamentally different from traditional theories that emphasize the need for strong judicial oversight of the administrative process to guard against capture,<sup>191</sup> though perhaps not in direct conflict with weaker versions of that argument. At the same time, this analysis echoes those who claim that there is no "neat solution" to the problem of agency legitimacy.<sup>192</sup>

Nevertheless, even as public choice scholarship mocks the Progressives' faith in an apolitical public administration, it nicely illuminates the very problems of special-interest influence with which the Progressives were concerned. Thus, one need not be cynical to believe that policymakers are goal-maximizers, or to acknowledge that powerful centrifugal forces in the legislative process can facilitate the exercise of that influence. Nor does one need to be naïve to conclude that the administrative process is less susceptible to those dangers. It is true that public choice scholarship rejects as ill-defined and idealized such notions of representation as Rousseau's participatory democracy<sup>193</sup> or the pure Weberian state. However, public choice does not deny the importance of minimizing special-interest influence in the policy process; nor does it deny that policymakers pursue, and sometimes produce, policies that serve the interests of the median voter. To the contrary, as I have tried to demonstrate in this Article,

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<sup>186</sup> Croley, *supra* note 128. Croley also defends public choice analysis in ways consistent with this analysis.

<sup>187</sup> Seidenfeld, *supra* note 172.

<sup>188</sup> Freeman, *supra* note 65.

<sup>189</sup> See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, L. & CONTEMP. PROBS., Spring 1994, at 1.

<sup>190</sup> See *supra* note 59 and accompanying text.

<sup>191</sup> For a discussion of this literature, see *supra* notes 50–52 and accompanying text.

<sup>192</sup> See Farina, *supra* note 76, at 989.

<sup>193</sup> See RIKER, *supra* note 37, for the public choice response to Rousseau.

the public choice framework helps us to understand the ways in which policymaking processes can be more or less susceptible to the introduction of “impertinent considerations” to which Professor Landis referred so long ago. I have also tried to demonstrate that for many policy choices, a twenty-first-century version of public choice analysis shows us how the twenty-first-century administrative state helps to reduce that risk and to produce policies that represent the interests of the median voter.

## APPENDIX

EXPLANATION OF THE CLEAN AIR ACT HYPOTHETICAL<sup>194</sup>

Table A-1 contains the results of voting in pairwise contests between each of the possible policy combinations in Table 2 of the text. The alternatives in the matrix represent the combinations of more (*1a*) or less (*1b*) stringent sulphur dioxide emissions reduction policies, and more (*2a*) or less (*2b*) flexible approaches to permitting fuel switching by plants charged with achieving those reductions. The results reported (W=winner; L=loser) are for the row alternatives when paired against each of the column alternatives. Assuming sincere voting—that is, assuming voters cannot or do not act strategically with prior knowledge of the agenda and do not trade votes—we can trace any of a variety of outcomes given this set of alternatives and preferences.

APPENDIX TABLE A-1  
RESULTS OF PAIRWISE COMPARISON

	<i>1b 2a</i>	<i>1b</i>	<i>1b 2b</i>	<i>1a 2a</i>	<i>1a</i>	<i>1a 2b</i>
<i>1b 2a</i>		W	W	L	L	L
<i>1b</i>	L		W	W	L	L
<i>1b 2b</i>	L	L		W	W	L
<i>1a 2a</i>	W	L	L		W	W
<i>1a</i>	W	W	L	L		W
<i>1a 2b</i>	W	W	W	L	L	

*Cycling*

In the absence of agenda control, this set of preferences over alternatives could produce cycling for an indefinite period of time, regardless of which alternative is first reported to the floor. For example, it is clear from Table A-1 that if we begin with proposal *1b 2a* (the less stringent, more flexible alternative), then:

1. *1a* defeats *1b 2a*, because liberals and Eastern Coal representatives prefer the former;
2. *1a 2a* defeats *1a*;
3. *1b 2b* defeats *1a 2a*;
4. *1b* defeats *1b 2b*;
5. *1b 2a* defeats *1b*; and
6. the original proposal, *1b 2a*, defeats *1b*.

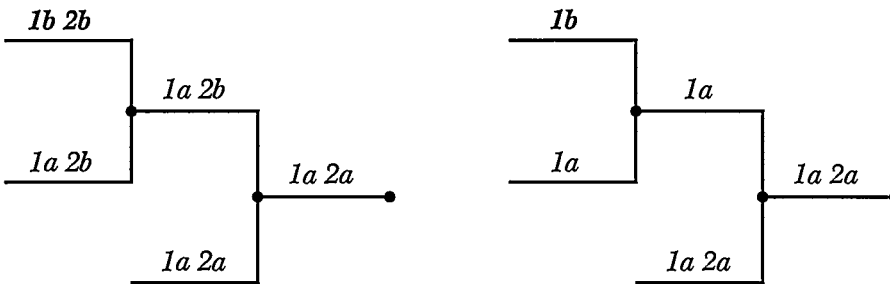
Of course, this cycle exists regardless of which alternative is initially reported to the floor.

<sup>194</sup> See *supra* Part II.A.4.

*Producing Outcome 1a 2a*

If the leadership controls the number and order of consideration of amendments and wants to produce the more stringent, more flexible legislative outcome *1a 2a*, it can do so regardless of which of the other alternatives is initially reported to the floor. Of course, it is evident from Table A-1 that alternative *1a 2a* would defeat three of the other alternatives (*1b 2a*, *1a*, and *1a 2b*) in direct head-to-head competition; however, there are paths to this same result when any of the other alternatives are proposed instead. The most direct of these other paths to passage is illustrated in Figure A-1.

APPENDIX FIGURE A-1  
PRODUCING THE MORE STRINGENT, MORE  
FLEXIBLE OUTCOME\*



\* The initially reported alternative is in bold type in this figure. The amendment process is diagrammed using a flow chart.

For example, in the first diagram in Figure A-1, alternative *1b 2b* (containing the less stringent, less flexible policies) is the starting point. The first amendment offered is to substitute the more stringent emissions reduction policy (*1a 2b*). As Table 3 in the text indicates, both liberals and Eastern Coal representatives prefer this alternative, and the amendment will pass. The next amendment in this diagram proposes to substitute the more flexible fuel-switching provision into the bill (yielding alternative *1a 2a*); that amendment passes with the support of both liberals and conservatives.

*Producing Outcome 1b 2b*

Leaders who control the amendment process could also produce the opposite outcome—the less stringent, less flexible outcome (*1b 2b*)—even though a two-thirds majority prefers more stringent emissions reductions and more flexibility on fuel switching. The *1b 2b* alternative defeats two of the others (*1a 2a* and *1a*) in a head-to-head vote. Note that of the three remaining alternatives (*1b 2a*, *1b*, and *1a 2b*), all are defeated by alternative *1a*; alternative *1b 2b*, in turn, defeats alternative *1a*. Figure A-2 illustrates this short route to the desired

outcome beginning with one of these three alternatives, alternative *1b 2a*. The process would be identical for the other two.

APPENDIX FIGURE A-2  
PRODUCING THE LESS STRINGENT, LESS FLEXIBLE OUTCOME

