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# FAITH, HOPE, AND RATIONALITY OR PUBLIC CHOICE AND THE PERILS OF OCCAM'S RAZOR

CYNTHIA R. FARINA*

*We do not know enough about the causes of variation to be rigidly bound by the law of parcimony.*[1]

Every community of believers has a set of creation myths to account for the existence of the universe and to explain the nature and motives of the entities who inhabit it.[2] Such creation myths have both descriptive and predictive functions. Initially, they help the community make sense of the world, imposing a comprehensible pattern on the chaos of external data. At least as important, they then allow the community to anticipate the course of future developments and to shape individual and communal behavior in ways designed to induce propitious outcomes and ward off bad ones.

This symposium is an opportunity for the community of those who believe in administrative law to reflect on the various creation myths of the administrative state. It is a chance to ask how well they serve us—that is, how accurately they describe modern regulatory institutions, and how useful they are as guidance for making the regulatory universe a more benevolent place, in which government power is wielded for the public good rather than private gain. Professor Croley's intriguing paper, *Public Interested Regulation*,[3] invites us to ask these questions about what is probably the most powerful of our contemporary creation myths: public choice theory.

In the genesis stories of the administrative state, public choice theory is to the nature of regulation what original sin doctrine is to the nature of humanity. The doctrine of original sin posits "the innate depravity [or] corruption . . . in all individuals of the human race, held to be inherited from Adam in consequence of the Fall."[4] In contrast to actual sin (which is the evil that men do as a matter of individual volition—and so can consciously strive to avoid) original sin is inbred, the evil tendency inevitable in human nature and irre-

* Professor of Law, Cornell Law School. For sharing suggestions, and reservations, about this paper, I am grateful to Stephen Garvey, Richard Geiger, Todd Rakoff, Edward Rubin, Peter Strauss, and Steven Shiffrin. I am especially indebted to my colleague Jeffrey Rachlinski, who offered not only a wealth of information about environmental regulation but also a patient and perceptive sounding board.

1. C. LLOYD MORGAN, ANIMAL LIFE AND INTELLIGENCE 174 (Boston, Ginn & Co. 1891).
2. *See* MARIE-LOUISE VON FRANZ, CREATION MYTHS (rev. ed. 1994).
3. Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7 (2000).
4. 10 OXFORD ENGLISH DICTIONARY 934 (2d ed. 1989).

deemable by mere human efforts. The theory of public choice posits the innate depravity or corruption in all regulatory programs. Regulation is conceived in the selfish interests of narrowly focused interest groups, born in the logrolling of legislative politics, and nurtured in the bosom of the third member of the iron triangle, captive agencies. At best, it is theft (the resources of some are redistributed to the pockets of others), at worst, inefficient (the costs imposed on the many outweigh the benefits accruing to the few).

As creation myths go, this is a pretty unpleasant one. It has none of the soap-operatic intrigues of gods and titans on Mt. Olympus, the solemn majesty of Osiris descending into the underworld and rising again to rule the living and the dead, or the awful grandeur of man rejecting the garden of innocence for a world filled with the knowledge of good and evil. Instead, it offers a bleak, even sordid, account of the institutions through which modern civic man attempts social progress. In an age that tends to be optimistic, if not hubristic, about the potential of human endeavor, what is the power of this dark, unlovely myth?

Professor Croley observes that public choice is "appealing in its parsimoniousness,"[5] and here, I think, he has put his finger on the answer. Public choice theory epitomizes the intellectual austerity of Occam's Razor: that is, the maxim that assumptions introduced to explain something must not be multiplied beyond necessity.[6] The maxim is alternatively phrased as the Law of Parsimony, "which forbids, without necessity, the multiplication of entities, powers, principles, or causes."[7] Public choice offers a versatile and ambitious explanatory system derived from one, simple proposition: human self-interest. Citizens act to acquire the biggest piece of the collective resource pie at the lowest cost to themselves; legislators act to acquire reelection; bureaucrats act to acquire more power (bigger budget, wider authority, and so on) while in government and lucrative opportunities via the revolving door when they leave. A single postulated entity, rational man, motivated by a single postulated principle, interest maximization, can explain the existence of the regulatory universe and account for the various regulatory failures that so occupy scholarly and popular attention.

Professor Croley's paper, with its general critique of the various elements of the public choice account backed up by three specific regulatory case studies, raises serious questions about the *descriptive* power of this creation myth. I want to continue that critical inquiry in this Comment. But first, I'd like to focus a bit on the power of pub-

5. Croley, *supra* note 3, at 15.

6. *See, e.g.*, 13 OXFORD ENGLISH DICTIONARY 245 (2d ed. 1989).

7. SIR WILLIAM HAMILTON, *Lecture XXXIX*, *in* 1 LECTURES ON METAPHYSICS & LOGIC 532, 546 (New York, Sheldon & Co. 1876).

lic choice theory to serve a *predictive* function—that is, its capacity to serve the community of those who believe in administrative law by helping us identify structures and processes that will enhance the likelihood of good regulatory outcomes and diminish the probability of bad ones.[8]

On this point, I offer a proposition the breadth and brashness of which matches the unvaulted ambition of public choice theory itself: Taken at its word and applied with logical rigor, public choice theory is utterly useless to us. When its adherents evaluate the modern regulatory state they find themselves in very much the same dilemma as strict-textualist originalists: If they remain faithful to the premises they espouse, then the only acceptable remedial strategy is universal, radical deregulation.[9] Indeed, public choice's dilemma may be uniquely intractable because nothing in the strict-textualist originalist analysis calls into question the theoretical possibility of such deregulation. By contrast, public choice insights seem to predict an inverse relationship between the need for the political process to act and its capacity to do so: as the self-interested investment of interest groups, legislators, and bureaucrats in existing regulation increases, the ability of the democratic process to dismantle that regulation decreases. Hence, radical deregulation is apparently as impossible to achieve as it is essential. Moreover, even if radical deregulation *is* theoretically possible within the public choice account, however plausible this solution may be for libertarian political theorists or Chicago-school economists, it is out of bounds for the community of those who believe in administrative law. Even if we had the ability to dismantle the entire national regulatory apparatus, we have neither the will nor the desire to do so.

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8. Professor Croley asked me, fairly enough, what I mean by "the community of those who believe in administrative law." Broadly, I mean those who believe in what Jerry Mashaw calls "the modern, activist administrative state." JERRY L. MASHAW, GREED, CHAOS & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 24 (1997). More particularly, I mean those who believe: (1) that collective public action to solve (or at least manage) complex social problems is—or at least has the capacity to be—both legitimate and effective; and (2) that the task of administrative law is to help discover the legal doctrines, administrative and judicial processes, and regulatory structures and strategies that facilitate a practice of regulatory government perceived by citizens as just, appropriate, and efficacious. Clearly, the community of believers I have thus defined is idealistic. I suppose a premise of my argument here is that idealism, while obviously incompatible with cynicism, is not the equivalent of naïveté.

9. "[T]he best and simplest way to avoid the rent-seeking problem is to avoid establishing the institutions that create rents, that is, the regulations and regulatory agencies that lead to rent-seeking." DENNIS C. MUELLER, PUBLIC CHOICE II 245 (1989); *see also* Edward L. Rubin, *Public Choice in Practice and Theory*, 81 CAL. L. REV. 1657, 1666 (1993) (book review) ("Th[e] underlying premise implies a basic pessimism or fatalism about any meliorist project for public governance."). For the best illustration of this dilemma in the originalist literature, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

But what about the significant body of work by those who deploy public choice theory to suggest improvements to regulatory policy and institutions? Such proposals, I suggest, cheat. To phrase it less contentiously, these scholars invoke public choice principles selectively and incompletely. Rarely, if ever, however, do they openly acknowledge this heterodoxy.[10] By characterizing it this way, I do not mean to dismiss the value of such scholarship. Indeed, one of the earliest and most interesting examples is the work of my colleague, Jon Macey, on statutory interpretation. Professor Macey has urged courts to be mindful of the public-choice perils of legislating and to antidote its evils by employing an interpretive presumption of public interestedness.[11] Unless the rent-seeking, interest-group payoff character of the legislation is blatant and unavoidable, judges should deliberately construe a regulatory statute so as to realize whatever pretense of public interestedness they can find within it. This is an ingenious and highly appealing proposal. It is also, within the canons of public choice theory, either heresy or intellectual irresponsibility. The proposal proceeds on the premise that judges desire to pursue public-regarding objectives and will do so once they are educated in how to recognize, and remediate, private deals masquerading as public purposes.[12] Yet, the behavior of judges is subject to the rule of interest-maximization in just the same way as the behavior of ordinary citizens, legislators, or bureaucrats. To assume otherwise is as heretical, within the premises of public choice theory, as it would be, within the premises of original sin doctrine, to assume a purely human act of redemption.[13] One might attempt to finesse this fundamental depar-

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10. For a rare example, from the originalist literature, of a scholar candidly acknowledging that pragmatism leads him to sacrifice purity of principle and propose a second-best solution, see Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1 (1994).

11. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). The theme is picked up and developed more extensively (with varying conclusions) in DANIEL A. FARBER & PHILIP P. FRICKEY, LAW & PUBLIC CHOICE (1991), and MASHAW, *supra* note 8, at 50-105.

12. *See* Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1399-1400, 1405 (1996) (noting public choice's "somewhat Panglossian view of judges" as "public-oriented decisionmakers").

13. *Compare* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 60-65 (1995) (arguing that federal judges, like federal legislators, are "regionally and geographically biased" and therefore likely to "carry out their duties with state and local political preferences as their main concern"), *with* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 885 (1975) (arguing that "the self-interest of independent judges is promoted by enforcing legislation according to its original tenor," rather than "according to the ever-shifting preferences of successive legislatures"); *see also* Richard A. Posner, *What Do Judges & Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 1, 40 (1993) (modeling the "judicial utility function" to offer an alternative to the "view of judges as Prometheans or saints" that "domesticates them for economic analysis"). *See generally* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1314-22 (1999) (arguing that judicial review favors special inte r-

ture from public choice premises by hypothesizing some set of individual incentives and/or group dynamics that, through happy coincidence, aligns the self-interest of the rational judge with rendering interpretive decisions that further the public interest. However, if such a set of incentives and dynamics could be discovered, what is the point of introducing public-interest motivation into the analysis? At best, advocating a jurisprudence of public-regarding interpretation is superfluous (judges will simply do what they would do anyway—pursue their self-interest); at worst, it violates Occam's Razor by unnecessarily multiplying behavioral postulates.[14]

In the end, the very characteristic of public choice theory that generates its intellectual power—that is, its parsimoniousness—destroys its utility to those who would improve regulation. The first principle of self-interested motivation is universal and inexorable. No one can be trusted to transcend it, whether for the purpose of constructing, or of operating, public-regarding institutions—*no one*, not even legal academics and other scholars, for of course it is unpardonably egotistical to proceed as if *our* behavior were a neutral search for truth motivated by benevolent disinterestedness. This would be the sort of logical error fallen into by those who unmindfully sport bumper stickers peremptorily commanding, "Question Authority!" Perhaps we don't have to admit membership in the Borkian school of academic purpose (that is, scholars are free to propound theories they would not act on because, in academic exercises, no one gets hurt).[15] But the powerful caustic of public choice theory should dissolve any illusions that the product of the scholarly process is any more immune from the effects of self-interested behavior than the product of the legislative, administrative, or judicial process. So pub-

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ests at the expense of the public interest); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991) (same).

14. The otherwise perplexing approbation the judiciary tends to receive in law-and-economics scholarship may be explained by the latter's normative preference for the market. Given the self-interest-maximizing Hobbesian man at the center of this world-view, public choice theory cannot be antilaw. Some regime of public order is required to minimize what Geoffrey Miller describes as the "costs of private expropriation, domination, and strife." Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, SOC. PHIL. & POL'Y, Spring 1991, at 196, 215. More particularly, the judiciary plays a pivotal role, in even the night watchman state, because "public enforcement of private agreements is required for the smooth operation of the market." Rubin, *supra* note 12, at 1405. Hence, my earlier assertion that "radical deregulation" is the inevitable prescription of orthodox public choice theory might justly be challenged for uncritically accepting the premise of law-and-economics scholarship that dismantling the administrative regulation imposed by statute would return us to the "natural" (i.e., unregulated) state of the market. More properly, I ought to have described orthodox public choice's remedial prescription as a return to the 19th century regulatory scheme in which a particular set of property and contract rights was established and protected by the common law. I am grateful to Todd Rakoff for reminding me of this.

15. 1 *Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 129, 130-31, 464-65 (1987) (testimony of Robert H. Bork).

lic choice theory requires us to ask about the likely characteristics of the work produced by rational, interest-maximizing actors competing for the most desirable positions at the most prestigious academic institutions. Once again, I will credit Jon Macey with an interesting and helpful observation: American academia, in palpable contrast to European academic institutions, rewards risk-taking. Highly regarded scholarship in Europe tends to be intellectually conservative, prudently building by small, carefully-tested increments on the meticulously elucidated foundation of what has come before. By contrast, in intellectual performance—as in other aspects of our culture—Americans value entrepreneurial boldness. Our approach is summed up crudely, but with a fair degree of accuracy, in the familiar tag that there are two kinds of articles: those that are boring and right, and those that are interesting and wrong. The recent trend towards ranking scholarly contribution according to frequency of citation reflects, and further entrenches, this conception of value by rewarding the controversial and aggressive argument that provokes widespread reference and response.

And so I come back to my starting proposition: Taken at its word and applied with logical rigor, public choice theory is useless to those seeking guidance for improving regulatory government. No category of public or private actor can be trusted to transcend self-interest in order to pursue the responsible and care-taking use of public power. Indeed, in our self-appointed role as students and evaluators of administrative law and institutions, we scholars cannot even trust ourselves.[16]

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16. At first blush, my thesis sits uneasily with a provocative article by David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO L.J. 97 (2000). Positing that "[v]oters want government to do what they would have done if they had the time and resources to devote to the problem," Professors Spence and Cross construct an ingenious model, involving information and value variables, to demonstrate why rational voters could regard agencies as more likely than elected officials, or the judiciary, to make policy choices that would mirror their own ideal (i.e., fully informed) preferences. *Id.* at 106.

The authors situate their work squarely within the public choice tradition. At the same time, however, they candidly acknowledge a desire to establish the democratic legitimacy of the administrative state, and they comfortably observe that their analysis complements the civic-republican case for administrative agencies. *See id.* at 97-101; *see also* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992). These are not the typical aims or fellow travelers of public choice scholars. *But cf.* Christopher H. Schroeder, *Rational Choice Versus Republican Moment—Explanations for Environmental Laws, 1969-73*; 9 DUKE ENVTL. L. & POL'Y F. 29, 32 n.8 (1998) (questioning "the sharp dichotomy that is often drawn between" rational choice and republican theories). The unusual catholicity of the Spence-Cross theory is possible, I believe, because it uses a particularly supple conception of rational man. The authors describe their approach as "characterized by methodological individualism, the assumption that individuals are goal maximizers, and deductive logic." Spence & Cross, *supra*, at 100. Significantly, the analysis does *not* depend on assumptions about *which* goals the individual seeks to maximize. Even the crucial premise that "[v]oters want government to do what they would have done if they had the time and resources to devote to the problem," *id.* at 106, does not in-

Unless we are prepared to understand ourselves as trapped in a regulatory universe that can be neither improved nor dismantled because of embedded self-interest, the only rational course is to have faith in the possibility of disinterested critique and hope in the capacity of human actors to develop and implement regulatory practices that serve public, rather than private, ends—in other words, to follow the course of Jon Macey and others and invoke public choice principles only selectively and incompletely. I'll call this approach (with apologies to Martin Flaherty[17]) "public choice lite."[18] This is what is happening when, as Professor Croley chronicles, scholars invoke public choice principles while conceding that individual citizens may engage in collective political activity out of a sense of fairness, for ideological reasons, or to show solidarity;[19] that legislators may be driven by ideology;[20] that administrators may be motivated by ideology or their own sense of what constitutes the public good;[21] and that some forms of regulation may be relatively more immune to rent-seeking than others.[22] But in offering a justification for this resort to a species

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sist that voters would pursue their own self-interest, rather than some more altruistic or ideological conception of the common good. *See* Schroeder, *supra*, at 39 (describing such motivation-independent use of rational choice theory as "thin-rationality").

In other words, the Spence-Cross analysis makes a case for the rationality of citizens in a democracy choosing administrative agencies to be their policymaking agents, *whatever* goals they desire to maximize. *See generally* note 93 *infra*, and accompanying text (noting that some components of positive political theory can be employed regardless of particular assumptions about motivation); Schroeder, *supra*, at 36-37 (same). Indeed, the authors explicitly take no position on the "considerable normative public choice literature, which argues that government regulation is ineffective or counterproductive or both," Spence & Cross *supra*, at 135, insisting that "[i]f [the normative literature] is accurate, [the position] needs to be presented in a straightforward manner that would stop Congress from passing regulatory statutes, rather than through the backdoor of nondelegation doctrine." *Id*. Hence, they do not squarely contest the claim, advanced for example in Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982), that broad regulatory delegations are undesirable because the ability to delegate increases the amount of legislation in a world in which virtually all legislation is designed to produce private goods at public expense.

Although I haven't the temerity to suggest that Professors Spence and Cross aren't *really* doing public choice analysis, their favorable assessment of regulatory delegation seems linked to the fact that their conception of "rationality" is far more congenial to what administrative law scholars mean by the term than is the conception typically employed in the public choice literature. As Peter Strauss has reminded me, a "rational" action in our world is one that sensibly implements the stated (or reasonably inferred) objectives of the organic statute; an action taken to further the self-interest of the agency or its employees would (if detected as such) promptly be rejected as *irrational*, an arbitrary and capricious misuse of power.

17. *See* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

18. Compare Ed Rubin's distinction between the "optimistic" and "pessimistic strand[s]" of public choice literature, Rubin, *supra* note 9, at 1659 n.6.

19. *See* Croley, *supra* note 3, at 21.

20. *See id*. at 22 & n.45.

21. *See id*. at 23.

22. *See id*. at 48.

of second-best reasoning—in which public choice principles play a significant but not exclusive role—haven't I now contradicted my initial proposition that public choice theory is utterly useless to those who believe in administrative law? I think not, for two, related reasons.

This first is theoretical. The structural integrity of public choice hinges on self-interest being the universal motivator. Within its understanding of human behavior, to say that *some* people act out of a rational conception of self-interest *some* of the time is as incongruous as saying, within our understanding of human reproduction, that a woman is a little bit pregnant. If we are going to be theoretically rigorous, we have to insist that one cannot really do just a little bit of public choice. As Occam's Razor warns, once the possibility of a more complex palette of human motivation is introduced, the power of the theory sharply declines, for unless public choice lite can specify *when* self-interest will trump ideology (or a sense of fairness, or professional socialization, or whatever other motive) it will prove of little use either descriptively or prescriptively.[23] And if it *were* to propose a coherent theory of human behavior that ascribes a role to motives other than self-interest maximization, it will no longer be public choice theory.[24]

Now at this point you may object that I have descended into the academic gamesmanship of logic-chopping and rhetorical nitpicking. Surely I am not suggesting that the community of those who believe in administrative law can, or should, ignore the dynamics of self-interested individual and group behavior. Public choice theory systematically focused our attention on these dynamics, giving them names and modeling their operation. Is it not unreasonably rigid, even unfair, to suggest that administrative law scavenge what we can use from public choice and then junk it in favor of some new account that builds on the old while purportedly repudiating it?

This brings me to my second reason for challenging the utility of public choice theory to the community of those who believe in administrative law. This reason is rooted in observed practice, although it relates to my first, theoretical, reason.

Public choice theorists have brilliantly exploited the power of parsimony. Trading aggressively on the intellectual austerity of their theory in its pure, undiluted form, they have not only asserted hegemony over the legal landscape—*any* substantive area can be suc-

23. For analogous criticism of civic republican theory, see Croley, *supra* note 3, at 25-26.

24. "As a grand theory, public choice contains no principle that can control its own major premise. Its univalent version of human behavior, faced with no opposing force, roars onward to its ultimate, extreme result." Rubin, *supra* note 9, at 1669; *cf.* GEORGE J. STIGLER, THE CITIZEN & THE STATE: ESSAYS ON REGULATION 137 (1975) ("There is, in fact, only one general theory of human behavior, and that is the utility-maximizing theory.").

cessfully analyzed, explained, and critiqued using public choice[25]—but they have also, in a variety of subtle ways, succeeded in achieving hegemony. Consider the principal paper we are discussing here. Professor Croley begins by conceding that "confidence in public regulatory institutions—the modern administrative state—risks dismissal as idealistic and uninformed."[26] He proceeds quite cautiously in suggesting that the three regulatory initiatives he examines may indeed be as public regarding in substance as they appear. And having offered a careful critique of the various elements of the public choice account, an unusually detailed case study of each of the three initiatives, and a thoughtful set of hypotheses for what might account for the outcomes, he still hastens to disarm criticism by admitting that all this might sound naive.[27] In the fifteen years since James Buchanan won the Nobel Prize,[28] public choice theory has shifted the burden of proof. Anyone who seriously suggests that regulatory policy and institutions are designed or operated to serve the public interest is presumptively either too intellectually unsophisticated to appreciate the temerity of his claim, or too gullible to ferret out the private interests behind the public-regarding facade. Nowadays, prudent administrative law scholars always spill a little wine to honor the public choice gods: deploring the inevitability of interest group dominance; reciting the formulaic account of venal legislators (particularly in oversight committees); and praising the virtues of faction-control. No wonder Professor Croley is nervous.

We have succumbed to the appeal of parsimoniousness while allowing public choice scholars to violate the rule of parsimony. Stated somewhat differently, by failing to hold public choice theory rigorously to the logic of its premises, we have lost the skeptical edge with which we would otherwise approach a claim that the extraordinary complexity of the regulatory state can be usefully understood through a story with such a simple template of human behavior. In saying we have lost the skeptical edge, I have in mind three specific sorts of errors that we tend to make, or tolerate others making, in the contemporary intellectual pressure to be "PC." And at this point, I want to speak to the descriptive power, as well as the prescriptive utility, of the public choice account of regulation.

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25. Ed Rubin aptly describes public choice as "as grand a theory as one is likely to find in the deeply divided and self-doubting world of modern legal scholarship." Rubin, *supra* note 9, at 1664.

26. Croley, *supra* note 3, at 7.

27. *See id.* at 24.

28. "For many people, [public choice theory] was a relatively obscure field until 1986, when James Buchanan was awarded the Nobel Prize in economics . . . ." FARBER & FRICKEY, *supra* note 11, at 1.

*1. Conflating Fallibility and Corruption.*—First, we too readily allow bad policy to be equated with bad motives. A lack of ability, or competence, to perceive which regulatory policy best serves the public interest must be sorted out from a desire to feather one's own nest at the public expense. At least, it must be sorted out if we are interested in understanding and remedying regulatory failure rather than simply racking up another "I told you so" on the public choice hit list of regulatory disasters. Let me give you a very homely personal example, and then link it to a more national one.

When my husband and I found ourselves with the unexpected good fortune of adopting two very young infants, we faced a difficult moral dilemma: Could we responsibly use disposable diapers or should we, as progressives with a self-declared concern about the environment, use a diaper service? Disposables were undoubtedly appealing—no diaper pails filled with sodden, smelly diapers awaiting pick-up—but they had a nasty reputation as a particularly notorious contributor to landfill problems, both because of their nondegradable, plastic-sheathed bulk and because of their contents (which include the E. Coli bacteria from which, given a leaky landfill access to ground water, epidemics are born). The prevailing "green" position on the issue was definitely anti-disposable. But it turned out that the case in favor of the diaper service was not so simple.[29] The environmental costs of transporting and laundering diapers depend on a number of variables including the frequency of, and distance traveled during, the trips made by a petroleum-consuming, air-polluting delivery truck; the temperature used in washing and drying, and the manner in which the water is heated; the type of detergent; the degree and method of water recycling; and perhaps even the composition and quality of the diaper fabric.[30] And then there were the harder to quantify health issues: Disposables credibly promise less diaper rash and other bacterially-caused infections and diseases, with a consequent decrease in the physical, economic, and emotional resources diverted to unhappy babies and doctors' visits. I found analyses giving widely divergent estimates of the relative costs and

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29. *See, e.g.*, Peter Passell, *The Garbage Problem: It May Be Politics, Not Nature*, N.Y. TIMES, Feb. 26, 1991, at C1 (describing, inter alia, the contention of the National Association of Diaper Services that disposables make up 2% of the nation's garbage stream and the countering argument of a Procter & Gamble study that although disposables generate 90 times as much solid waste as reusables, they consume three times less nonrenewable energy and generate 10 times less water pollutants). For a contemporary version of the case for disposables, see LYNN SCARLETT, A CONSUMER'S GUIDE TO ENVIRONMENTAL MYTHS & REALITIES (National Center for Pol'y Analysis, Reason Foundation Policy Report No. 165, 1991), http://www.ncpa.org/studies/s165/s165.html (last visited May 25, 2000).

30. Not surprisingly, many of the factors that correlate with higher environmental costs also correlate with "better" (i.e., more convenient and safer) diaper service from the perspective of parents: more frequent pickups, hotter laundry temperatures, less recycled water, and more effective detergents.

benefits of disposables and diaper services. None seemed to address every dimension relevant to the comparison. In the end I gave up. The information I had was too incomplete and too contingent; the variables were too many and too incommensurate. And so we used disposables. I have little doubt that, with hindsight, a persuasive case could be made that: (1) our decision in fact imposed a net social cost, and (2) it was perfectly predictable that we would place our self-interest ahead of the broader public good. But this case would not accurately describe what happened.

The national version of this story is curbside recycling. Some calculations of the resources used to transport and process the array of recyclables now collected curbside in many communities conclude that common recycling practices are not only significantly more costly than waste disposal, but in fact represent a net environmental loss for many categories of material.[31] One wants to ask a lot of questions about those calculations, but let's assume that they are both accurate and exhaustive. The public choice explanation for how we would find ourselves saving, sorting, and hauling out, at weekly or biweekly intervals, unwieldy containers of newspaper, cardboard, paper, bottles, and cans in order to make the environment worse rather than better is obvious: Recycling is yet another instance of discrete interest groups (that is, scrap haulers and professional environmentalists) manipulating the political process to accomplish a socially nonoptimal, but privately lucrative, government regulatory initiative.[32] But that's not how it happened—or, at least, it is such a radically reductionary account as to be more misleading than accurate. In my community and in communities around the nation, regular curbside recycling has been implemented, and expanded, because of a belief by private individuals and groups, and some public officials, that it is an environmentally sounder practice than putting all domestic trash in a landfill or incinerator.[33]

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31. *See, e.g.*, John Tierney, *Recycling is Garbage*, N.Y. TIMES, June 30, 1996, at 24; Scarlett, *supra* note 29. For a more balanced examination, in that it notes the several components and uncertainties in the recycling cost-benefit ledger in general, and for glass and different varieties of paper in particular, see Harvey Black, *Rethinking Recycling*, 103 ENVTL. HEALTH PERS. 1006 (1995), http://www.heartland.org/earthday96/recyclin.htm (last visited May 25, 2000).

32. Tierney has observed:

> The leaders of the recycling movement derive psychic and financial rewards from recycling. Environmental groups raise money and attract new members through their campaigns to outlaw "waste" and prevent landfills from opening. They get financing from public and private sources (including the recycling industry) to research and promote recycling. By turning garbage into a political issue, environmentalists have created jobs for themselves as lawyers, lobbyists, researchers, educators, and moral guardians.

Tierney, *supra* note 31, at 12.

33. *See, e.g.*, Black, *supra* note 31.

This belief about socially desirable environmental policy might indeed be wrong. To some extent, it might be "reasonably" wrong: In an increasingly complex and interdependent society, it is extraordinarily difficult to discern, *in advance*, the full ramifications of a shift in public behavior and to capture those ramifications in reliable cost-benefit analysis. Introducing even a small change into a chaotic system often does not produce the effect one would reasonably have expected. When this difficulty complicates even such "simple" choices as disposable diapers versus a diaper service, or paper versus plastic bags at the grocery store,[34] or paper or ceramic versus foam coffee cups in the faculty lounge,[35] how could we possibly expect omniscience in such obviously multivariate problems as the appropriate regulation of toxic but useful substances[36] and the best strategies for overcoming dependence on fossil fuels.[37] To the extent that making the wrong regulatory choice reflects the virtual impossibility of exhaustive and accurate advance calculation of regulatory effects, the message to be learned by the community of those who believe in administrative law is two-fold. *First*, we should work towards reconceptualizing regulatory programs—in the political, as well as the scholarly, arena—as explicitly and unapologetically works-in-progress, rather than as "done deal" solutions that merely require implementation. In other words, we ought to admit, from the outset, that regulation is a process of learning and adapting, in which getting it exactly right the first time is an aspiration rather than a promise. *Second*, consistent with this reframing, we should routinely build into regulatory schemes the resources for systematic data collection and analysis, as well as incentives for undefensive practices of periodic policy reevaluation. Of course, to some extent, mistakes about optimal regu-

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34. For the argument that plastic grocery bags are in fact more environmentally responsible than paper, see Scarlett, *supra* note 29, at 10. *See also* Tierney, *supra* note 31, at 5 (citing research that 12 plastic grocery bags fit in the landfill space occupied by one paper bag, which in fact does not degrade when buried in an airless landfill).

35. *See* Tierney, *supra* note 31, at 10 (citing research that a ceramic mug would have to be used 1000 times before its energy-consumption-per-use would equal that of a foam cup); *see also* Passell, *supra* note 29 (citing research that manufacturing a paper cup consumes 36 times as much energy and generates 580 times as much waste water as the manufacture of a foam cup).

36. *See, e.g.*, Robert A. Frosch, *The Industrial Ecology of the 21st Century*, SCI. AM., Sept. 1995, at 178, 180-81. (describing how zinc from automobile manufacturing wastewater was reclaimed by smelting until designation of zinc as a hazardous substance resulted in such stiff regulatory requirements that this material is now landfilled).

37. Some policy analysts have suggested that our efforts in this area are counterproductive. *See, e.g.*, ROBERT J. BRADLEY, JR., RENEWABLE ENERGY: NOT CHEAP, NOT "GREEN" (Cato Inst. Pol'y Analysis No. 280, 1997), http://www.cato.org/pubs/pas/pa-280es.html (last visited Sept. 21, 2000) (analyzing the debate over the use of fossil fuels); NATIONAL CENTER FOR POL'Y ANALYSIS, BRIEF ANALYSIS NO. 238: THE GLOBAL WARMING TREATY: FOR U.S. CONSUMERS—ALL PAIN, NO GAIN, http://www.ncpa.org/ba/ba238.html (last modified Aug. 20, 1997) (studying the impact of the Global Warming Treaty on U.S. citizens).

latory policy will be "unreasonable," at least in the sense that they were predictable. Perhaps, for example, in pushing to expand recycling from metal and paper to an ever-wider array of plastics, those concerned about the environment have fallen victim to a cascade effect.[38] To that extent, the message to be learned involves the importance of identifying paradigms of expectable errors (such as cognitive biases) and developing particularized strategies for recognizing their presence and at least offsetting, if not preventing, them.[39]

In a strange perversion of Enlightenment rational humanism, public choice has made us more comfortable attributing the course of human events to human greed than to human fallibility. Consider one of the stories that has become legend in the public choice account of regulation, the new-source-performance-standards provision of the Clean Air Act Amendments of 1977. The part of the story we remember, and regularly retell, is that, through a series of backroom legislative-history manipulations, congressmen from West Virginia and other Eastern coal states ruthlessly protected the jobs of their high-sulphur-coal mining constituency at the expense of the national benefits of switching to cleaner Western coal.[40] The part of the story that tends to get lost is that the Sierra Club, the National Resources Defense Council, the National Clean Air Coalition, the Center for Environmental Policy, and the Navaho Nation were on the same side of the issue as the dirty-coal industry.[41] Their reasons included the following: concern that an alternative regulatory strategy would permit degradation of cleaner-than-required Western air;[42] fears

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38. *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999) ("An availability cascade is a self-reinforcing process of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception increasing plausibility through its rising availability in public discourse.").

39. My colleague, Jeffrey Rachlinski, who has worked on such problems in the private law context, describes this as the challenge of discovering optimal institutional design in the face of cognitive biases. *See, e.g.*, Jeffrey Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998). Cass Sunstein has been working on such questions in the public law context. *See, e.g.*, Cass R. Sunstein, *Cognition and Cost-Benefit Analysis* (U. of Chi. Law School, John M. Olin Law & Economics Working Paper No. 85, Sept. 1999), http://papers.ssrn.com (last visited May 25, 2000); Kuran & Sunstein, *supra* note 38; *see also* Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions* (U. of Chi. Law School, Public Law & Legal Theory Working Paper No. 01) (forthcoming 2000), http://papers.ssrn.com (last visited May 25, 2000).

40. *See generally* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981).

41. *See id.* at 21-22, 28-29, 36, 46. Indeed, Ackerman and Hassler's introduction makes clear their view that error, rather than corruption, was the primary reason that (as they put it in the alternate title) "[t]he Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers." *Id.* at 2 (criticizing the regulatory program as both unnecessarily expensive and "so inept" that air quality will actually decline in some areas, but describing "Congress's well-intentioned effort" and characterizing "the people who shaped the 1979 decision" as "remarkable for their high intelligence and conscientiousness").

42. *See id.* at 21-24, 28-29.

about the environmental costs of strip-mining and transporting Western coal;[43] and worries that the utility industry planned to subvert sulphur standards by simply raising the height of smokestacks.[44] Let us assume that these groups were indeed mistaken in their environmental calculus. The mere fact of their (erroneous) presence on the "wrong" side of the issue significantly complicates any genuine effort to understand why this regulatory policy initiative went astray. Ackerman and Hassler's account of the legal and political history of the 1977 amendments gives the environmentalists a crucial role in shaping the reactions of both Congress and the White House.[45] At a minimum, their signaling power—that is, their capacity, merely by announcing a position on an issue, to affect how the issue is perceived by other actors—was deliberately exploited by dirty-coal advocates.[46] How far would Eastern coal interests have succeeded in perverting federal clean air policy if some of the country's most respected environmental organizations had gotten the environmental calculus right and weighed in on the opposite side?

Professor Croley reminds us of the political science cliche "that there are essentially but two theories of government, the corruption theory and the incompetence theory."[47] From the perspective of the public getting bad environmental policy, maybe it doesn't make a difference whether the cause is deliberate selfishness, good-faith fallibility, or some unfortunate synergy of the two. From the perspective of those with a strong ideological commitment to minimal government interference with the market, it certainly doesn't make a difference whether regulatory mistakes are attributable to knaves or fools. However, from the perspective of the community of those who believe in administrative law, and who seek to understand regulatory history in order to avoid the curse of repeating it, such distinctions make all the difference in the world.

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43. *See id.* at 78 n.*.

44. *See id.* at 21-24.

45. *See, e.g., id.* at 27-32, 43-46, 59. In fact, in their account, environmental concerns were the original driving force of mandating scrubber technology:

> The House subcommittee had originally turned to scrubbing as an ancillary environmentalist measure in support of [preventing the significant deterioration of clean air regions] and viewed the coal lobby as a convenient ally in the battle for clean air. But once the attention of the coal lobby had been engaged, the scrubbing issue took on a life of its own in the service of regional protectionism.

*Id.* at 31-32.

46. *See id.* at 46 (quoting the Congressional Record in which Senator Metzenbaum, for the Eastern coal interests, cites the support of the Sierra Club, etc., to allay his colleagues' expressed concerns about environmental impact); *see also id.* at 44 ("The environmental lobby had proved a congressional power, and [Carter Administration support for] scrubbing was an easy way of converting a dangerous opponent [to the Administration's comprehensive energy plan] into a formidable ally.").

47. Croley, *supra* note 3, at 106.

*2. Confusing Causation and Opportunism.*—The second sort of error is similar to the first, and so I will treat it briefly. We fail to insist on a careful distinction between initiating cause and opportunistic response. A good example is CERCLA.[48] The Superfund program is a highly significant regulatory initiative that seems, on its face, difficult for public choice to explain. It imposes enormous concentrated costs on identifiable interests—producers of hazardous waste, landfill owners, and disposal companies—in order to produce diffuse environmental and health benefits. Under public choice premises, such legislation is impossible to enact.[49] Hence, there must be something else going on. The "something else" is discovered to be the enormous concentrated benefits that the massively expensive site cleanup process confers on engineering consultants, analytical testing laboratories, environmental lawyers, and hazardous waste construction contractors.[50] One might be hard pressed to deny that these groups play a powerful role in current political debates about the program. But, except for the lawyers, these groups did not exist in anything like their current form twenty years ago when CERCLA was enacted. As for the lawyers, it would have taken a mind with truly demonic cunning to scheme to extract rents by constructing a

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48. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 § 103, 42 U.S.C. § 9612 (1999).

49. Stigler notes:

> It is of course true that the theory would be contradicted if, for a given regulatory policy, we found the group with larger benefits and lower costs of political action being dominated by another group with lesser benefits and higher cost of political action. Temporary accidents aside, such cases simply will not arise: our extensive experience with the general theory in economics gives us the confidence that this is so.

STIGLER, *supra* note 24, at 140.

Several scholars have observed that the passage of federal environmental legislation, as a general matter, poses grave explanatory difficulties for public choice theory. *See, e.g.*, Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992); Richard Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 542 (1997); Peter H. Schuck, *Against (And For) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 566 (1997). *See also* JERRY L. MASHAW, GREED, CHAOS & GOVERNANCE 33 (1997). *But see* Schroeder, *supra* note 16.

50. Critics' estimates of lawyers' and consultants' costs range from 35%-88% of the total dollars expended on Superfund sites. *See, e.g.*, NATIONAL CENTER FOR POL'Y ANALYSIS, SUPER FUND FOR LAWYERS, http://www.ncpa.org/ea/eaja92a.html (last visited June 14, 2000); NATIONAL CENTER FOR POL'Y ANALYSIS, *No Cleanup in Site for Costly Superfund Mess*, *in* NCPA POL'Y DIG., MAR. 24, 1997, http://www.ncpa.org/pd/weekly/pd32497.html (last visited June 14, 2000); Gregg Easterbrook, *Beyond Politics as Usual*, WASH. POST, Apr. 9, 1995 at W20; H. Sterling Burnett, *The 104th Congress's Environmental Record: What Was Accomplished and What Remains*, http://www.ncpa.org/oped/sterling/record.html (last visited June 14, 2000). *Cf.* Lloyd S. Dixon, *The Transaction Costs Generated by Superfund's Liability Approach in* ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW 171, 184 (R. Revesz & R. Stewart, eds. 1995) (analyzing several RAND studies and concluding that "Superfund transaction-cost shares appear to fall in the range observed for common types of tort litigation").

statute that closes off many of the most common avenues of regulatory litigation and decreases parties' incentives to use the ones that remain.[51]

To understand the operation of the food chain on the African plains you have to distinguish between predators and scavengers; to understand the birth and evolution of a regulatory program, you have to distinguish between initiating causes and adaptive entrepreneurial behavior. Of course those concerned about Superfund policymaking must take account of the cadre of environmental professionals who now have a high stake in maintaining and extending the cleanup ambitions of the statute. African park management has to take account of the hyenas as well as the lions. But the signs of an impending problem and the appropriate responsive strategies are likely to be very different. Perhaps more accurately, the responsive strategy is likely to be different so long as the objective is making a complex system work, rather than dismantling it. Presumably, African park management would not need to distinguish lions from hyenas if it were prepared to respond by destroying the zebra population upon which both feed. If one starts from the ideological presumption that the only good regulation is no regulation, one has no need to sort out regulatory programs that are born in rent-seeking from those whose original public-regarding nature is perverted over time. If I may switch metaphors in mid-stream, from that perspective the Darth Vaders of the Evil Empire cause as much mischief as the Darth Mauls.[52] But, for the community of those who believe in ad-

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51. As originally enacted, CERCLA blocks preenforcement challenges to the EPA's cleanup orders. *See* CERCLA § 113(h), 42 U.S.C. § 9613(h) (1999). In other words, the agency can issue unilateral orders specifying how the costly site cleanup process is to occur, and these orders are not judicially reviewable until the work has been completed. *See id*. Failure to comply with such an order permits the EPA to undertake the work itself and then charge the resulting costs to the potentially responsible parties (PRPs). *See* CERCLA § 104, 42 U.S.C. § 9604 (1999). This is an extremely risky option for PRPs because they lose all ability to control cleanup costs during the process and, if their failure to comply with the order is ultimately found to be without "due cause," they become liable not only for what the EPA spent but also for severe penalties. Because the statute imposes strict liability, jointly and severally, on those who generate, handle, or store hazardous wastes, the range of possible legal defenses to compliance with a cleanup order is quite limited. *See generally* Cross, *supra* note 13, at 1315-18 (arguing that special interest groups consistently favor broad and readily triggered judicial review of agency action).

CERCLA became lucrative for environmental lawyers not because of litigation, but because of their role in the long-lived and intensely active PRP groups that undertake the cleanups, and hence squabble among themselves about allocating the resulting costs. Because the issues here tend to be technical and financial, one might reasonably have expected engineers and financial officers to play the primary role in these negotiation and monitoring activities. That lawyers emerged as the principal representatives of PRPs even on these largely nonlegal matters is an example of opportunistic response.

52. For those readers unfamiliar with the Star Wars saga, some explanation is in order. Darth Vader was once a virtuous Jedi Knight who was corrupted by the "dark side" to become the evil empire's chief agent. In contrast, Darth Maul appears to have been evil from the moment of creation.

ministrative law, it is essential to learn whether, and how, a good program was turned to the dark side of private gain, for in that knowledge lies the hope of redemption.

*3. Grasping Simplistic Solutions in a Complex World.*—These first two sorts of errors arise from a common cause: Because public choice theory, rigorously applied, leads ineluctably to the policy prescription of radical deregulation, its orthodox practitioners have little incentive, when examining particular regulatory programs, to tease out complex strands of causation or to chart the critical stages in a program's evolution. Discovering that self-interest has operated in some significant way at some point in the course of a suboptimal regulatory program is enough to prove that government intervention cannot be trusted to maximize social welfare. By contrast, when the community of those who believe in administrative law turns to public choice principles, we do so with the objective of improving, rather than discrediting, regulatory government—and then public choice's reductionary tendency simply to verify the operation of self-interest can obscure the discovery of other causes and the recognition of program degradation over time. In other words, the tendencies to conflate fallibility with corruption, and to confuse causation with opportunism, are errors that we inherit from orthodox public choice, but they matter more to us given our objectives.

By contrast, the third sort of error is one we have created ourselves *because* of our objectives. When we selectively and incompletely invoke public choice principles in thinking about how to improve regulatory government—that is, when we engage in public choice lite—we tend to swallow quite readily some very simplistic assertions about political actors and institutions. Sometimes these assertions are invoked merely to buttress policy proposals rooted in some other ideological position.[53] More often, I think, their appeal lies in the genuine desire of those who believe in administrative law to find solutions for regulatory failure and in the comfort we take from discovering remedial strategies that even the cynical science of public choice seems to approve.

The clearest example of this sort of error is the emergence of the President, in much contemporary administrative law literature, as the white knight of public-regardingness. Enhanced presidential control over regulatory policymaking is advocated as the means through which the interests of the nation can triumph over the geographical parochialism and special-interest pandering that drive the rest of the

53. *See, e.g.*, Calabresi, *supra* note 13 (invoking public choice principles to demonstrate the wisdom of the strong presidential control over regulation that is, assertedly, required by a textualist-originalist reading of the Constitution).

political process.[54] The vision of the President as the sole true voice and champion of the whole American people is at least as old as Andrew Jackson, who insisted, "We are *one people* in the choice of President and Vice-President. . . . The people . . . are represented in the executive branch."[55] The migration of self-serving executive political rhetoric into scholarly good-government arguments has occurred because the Jacksonian claim now appears provable by the application of public choice principles. We've all seen, and maybe even used, the following argument: The legislature is susceptible to the narrow, factional pressures of parochial concerns and special interests because members of Congress must stand for frequent reelection by geographically discrete populations who vote, from rational self-interest, to reward those members most successful at bringing home the pork. By contrast, the President's electoral constituency is the entire nation. When choosing their President, voters (perhaps) tend to identify their self-interest with the larger welfare of the country. But even if presidential voters retain their narrowly self-interested focus on their own situation, the President has to satisfy a national electoral majority, and so the President has every incentive to support regulatory policy that maximizes aggregate social welfare and reject policy that extracts rents for the benefit of a small group. Hence, the incidence of regulatory failure will predictably be lowered by remedial strategies that broaden and deepen White House control over regulatory policymaking, particularly in opposition to Congressional control.

The difficulty is that, even *within* public choice principles, this assessment is flawed.[56] Put aside questions about whether we get a sufficiently rich description of the behavior of public officeholders by assuming they always act to maximize their chance of election and reelection.[57]

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54. *See, e.g.*, *id.*; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 93-106 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

55. ARTHUR BERNON TOURTELLOT, THE PRESIDENTS ON THE PRESIDENCY 35 (1964). Compare the more recent assertion by Wendy Gramm, during her tenure as Administrator of the Office of Information and Regulatory Affairs (OIRA): "'The job of the bureaucracy is to take care of special interests. The president, in contrast, is elected to represent the people.'" NATIONAL ACADEMY OF PUB. ADMIN., PRESIDENTIAL MANAGEMENT OF RULEMAKING IN REGULATORY AGENCIES 26 (1987).

56. There has been remarkably little modeling of presidential behavior by rational choice theorists. "The hallmark of modern U.S. government is presidential leadership. Yet positive theorists have never known quite what to do with presidents. . . . [T]hey typically are left out—a datum so well known among positive theorists that they informally refer to presidents as 'the P-word.'" Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 1-2.

57. *See, e.g.*, FARBER & FRICKEY, *supra* note 11, at 33; DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 47-71 (1994); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV.

Put aside questions about why people vote,[58] what voters desire from the holders of various public offices,[59] and how voters resolve the problem of issue bundling.[60] Put aside questions about whether, even if the President himself is motivated to act as the champion of all the people, proposals to enhance "presidential" control over regulatory policymaking take sufficient account of behavioral incentives in all the little fiefdoms in the Executive Office of the President through which such control is actually implemented.[61] All these questions

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199, 217-23 (1988); Abner J. Mikva, *Foreword* to *Symposium on Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

58. Because no rational voter could assume that her vote will make a difference—at least in any but the most local elections—the act of voting per se poses a serious problem for rational choice theory. *See* FARBER & FRICKEY, *supra* note 11, at 24-27; Jon Elster, *Introduction* to RATIONAL CHOICE 1, 24 (J. Elster ed. 1986); Douglass North, *A Neoclassical Theory of the State*, *in* RATIONAL CHOICE, *supra*, at 248.

> In their resolute determination to declare some variant of rational choice theory victorious over the evidence . . . rational choice theorists have trotted out an astonishing variety of conjectures about the costs and benefits of voting, in the process generating an enormous literature, possibly larger in terms of academic citations and sheer bibliographic length than any other rational choice literature in American politics.

GREEN & SHAPIRO, *supra* note 57, at 47-48.

59. Literature questioning the proposition that citizens desire, and reward at the ballot box, politicians who pander to voters' short-term, material, individual self-interest includes the following: David O. Sears et al., *Self-Interest vs. Symbolic Politics in Policy Attitudes and Presidential Voting*, 74 AM. POL. SCI. REV. 670 (1980), and Donald R. Kinder & D. Roderick Kiewiet, *Economic Discontent and Political Behavior: The Role of Personal Grievances and Collective Economic Judgments in Congressional Voting*, 23 AM. J. POL. SCI. 495 (1979). *See also* GEORGE C. EDWARDS III & ALEC M. GALLUP, PRESIDENTIAL APPROVAL: A SOURCEBOOK 138 (1990) (citing literature).

60. Even if one assumes that the median voter typically engages in issue voting and that issue voting is a single phenomenon, *cf.* Edward G. Carmines & James A. Stimson, *The Two Faces of Issue Voting*, 74 AM. POL. SCI. REV. 78, 78 (1980) (distinguishing unsophisticated "easy issue" voting from the rarer sort of "hard issue" voting that entails "conscious calculation of policy benefits for alternative electoral choices"), candidates for national political office present voters with a limited choice among prepackaged, multifaceted policy platforms.

> In order to get the policy "sticks" they value most highly, voters have to take whatever other sticks come in the bundle. . . . The point is not that policy bundling is democratically illegitimate, but rather that it precludes any facile translation of election results into "the people's will" on specific policy issues . . . .

Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 998 (1997).

61. The Executive Office of the President employs more than 1500 persons and comprises the White House Office, the Office of the Vice President, the Council of Economic Advisers, the Council on Environmental Quality, the National Security Council, the Office of Administration, the Office of Management & Budget (containing, inter alia, the very significant Office of Information & Regulatory Affairs), the Office of National Drug Control Policy, the Office of Policy Development (comprising the Domestic Policy Council and the National Economic Council), the Office of Science & Technology Policy, and the Office of the United States Trade Representative. *See* OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 2001, at ch. 10, 257-261 (2000), http://w3.access.gpo.gov/usbudget/fy2001/pdf/spec.pdf (last visited Sept. 21, 2000).

aside, the rational candidate for election or reelection to the office of President knows perfectly well that he does not have to satisfy some hypothetical "national majority consensus."[62] Presidential politics can be conducted quite successfully with the support of considerably less than an electoral majority. Bill Clinton was elected in 1992 with 43% of the popular vote, a percentage that he shares with first-termer Richard Nixon and that exceeds the percentage achieved by first-termer Woodrow Wilson and by Abraham Lincoln.[63] Moreover, as the rational candidate knows, only about half of eligible voters typically cast presidential ballots. Bill Clinton won reelection in 1996 on the support of about 24% of the national electorate.[64] In fact, the rational presidential candidate recognizes that he can achieve a "landslide" victory—with all the political payoff this characterization provides—based on the electoral support of as few as 27% of eligible voters. That's the percentage that gave Ronald Reagan his celebrated 1980 victory which, because of its perception as a landslide, provided his legislative agenda with momentum that a Democratic Congress found hard to resist for at least a year after the election.[65]

Moreover, even before the 2000 election gave the rest of us a hard lesson in basic civics, the rational presidential candidate would fully appreciate the significance of the fact that the President is not elected by the voters of all the states (despite what popular and even legal literature suggests), but rather by the Electoral College. More precisely, he is elected by 270 votes of the Electoral College. The beauty of the Electoral College is that it allows him to identify the geographical areas of the country in which it is most rational for him

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Not surprisingly, these assorted units exhibit diverse patterns of political behavior. For example, one empirical study of contacts between interest groups and the Reagan Executive Office found that, while the Office of Public Liaison (within the White House Office) interacted frequently with a broad cross-section "of the interest group world," a "significant majority" of the groups "interacting frequently" with the OMB were "trade associations and other organizations representing the profit sector of society" while "[c]itizens groups were hardly counted at all among the groups interacting frequently with the budget office." Mark A. Peterson, *The Presidency and Organized Interests: White House Patterns of Interest Group Liaison*, 86 AM. POL. SCI. REV. 612, 621 (1992).

62. *See generally* Farina, *supra* note 60, at 993-1007.

63. Wilson had 42%, Lincoln, a mere 40%. *See* HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 111-15 (4th ed. 1994). Presidents elected with between 45% and 50% of the popular vote include Buchanan, Garfield, Cleveland (twice), Wilson (1916), Truman, and Kennedy. *See id.* George W. Bush recently took his place on this list as well.

64. Clinton received about 49% of the votes cast; in turn, only about 49% of those eligible to vote did so. *See* FEDERAL ELECTION COMMISSION, VOTER REGISTRATION AND TURNOUT—1996, http://www.fec.gov/pages/96to.htm (last visited May 25, 2000) (reporting that about 74% of those of voting age registered; about 66% of those registered voted).

65. *See* NELSON W. POLSBY & AARON WILDAVSKY, PRESIDENTIAL ELECTIONS 176 (7th ed. 1988). As the next paragraph explains, the Electoral College system contributes significantly to the landslide phenomenon.

to build support.[66] Victory can be had by obtaining the electoral votes of a mere eleven states.[67] Of course, it will be hard to tailor his behavior perfectly to the preferences of the top eleven states, but some states carry such a heavy electoral vote payoff that the rational candidate must at least attempt to discover a cost-effective strategy that will win him the state.[68] "Winning a state" is made easier by the fact that every state but two (which offer quite modest numbers of electoral votes[69]) uses the winner-take-all system for allocating its electoral votes. Hence, the rational candidate knows that he can win without obtaining a majority popular vote in all the states, or even in any of the states, within his electoral college package. To get the state's entire electoral complement, he need only build a coalition that can deliver *more* popular votes than those delivered by the coalition supporting his closest opponent.[70]

In sum, the rational candidate for election or reelection as President does not see his constituency as the broad melting pot of Americans stretching from sea to shining sea. Rather, he sees a patchwork of potential interest coalitions, whose utility to him depends upon a combination of their geographical location and concentration, and their marginal value in assembling a plurality within the state. The decline of the major political parties as vehicles for reliably securing the long-term allegiance of large blocs of voters only enhances this perspective, for the national political entrepreneur needs now, more than ever, to be alert for opportunities to broker support from among

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66. To play the game of rational presidential candidate crafting a campaign strategy to maximize electoral college efficiency, go to the wonderful site, *The U.S. Electoral College Calculator, at* http://www.jump.net/~jnhtx/ec/ec.html (last visited May 25, 2000).

67. These states are as follows: California, New York, Texas, Florida, Pennsylvania, Illinois, Ohio, Michigan, New Jersey, North Carolina, and either Georgia or Virginia.

68. California, the El Dorado of the Electoral College, can deliver more votes (54) than the lowest 15 states combined. Not surprisingly, this translates into incentives for both candidates and "incumbent presidents with an eye on the next election" to give "disproportionate weight" to voters in states like California. Steven J. Brams & Morton D. Davis, *The 3/2's Rule in Presidential Campaigning*, 68 AM. POL. SCI. REV. 113, 133-34 (1974). One analysis concludes that, on a per capita basis, "voters in California are 2.92 times as attractive campaign targets as voters in Washington D.C.," while the state of California as a whole is "8.13 times as attractive per electoral vote as Alaska." *Id.* at 134. Another calculates that "a citizen of California is over 20 times more likely to determine the outcome of a modern presidential election than is a citizen of Rhode Island. Even eliminating California and Rhode Island, we find ratios above 13 between the power of the most and least advantaged citizens." George Rabinowitz & Stuart Elaine MacDonald, *The Power of the States in U.S. Presidential Elections*, 80 AM. POL. SCI. REV. 65, 80 (1986).

69. Nebraska, five; and Maine, four.

70. This method of allocating electoral votes helps create "landslides." Ronald Reagan's 1980 victory rested on a bare majority (50.9%) of the popular vote, but he "won" all but five states in the Electoral College, for a resounding 489-49 vote victory over Michael Dukakis. *See* LYN RAGSDALE, VITAL STATISTICS ON THE PRESIDENCY tbl. 8-1, 370-72 (1996); Robert A. Dahl, *Myth of the Presidential Mandate*, 105 POL. SCI. Q. 355, 355 (1990).

shifting coalitions.[71] Lynn Baker nicely articulated the question of presidential incentives to alienate a discrete interest group in order to secure diffuse, general benefits: If the President has the choice of signing an agricultural subsidy bill and proclaiming his commitment to protecting the future of American farmers, or of vetoing the legislation and trumpeting his saving American consumers $1.50 on their grocery bills, what does rational self-interest counsel him to do?[72]

But wait a minute, you may be thinking, this critique is too simplistic. What about the second-term President? *His* motives can't be modeled as a single-minded determination to ensure electoral success—or at least to ensure his *own* electoral success.[73] And how does this picture of the President as national interest-group entrepreneur *par excellence* fit with Professor Croley's three case studies in which the White House supported major regulatory initiatives that were deeply unpopular with powerful interest groups? My response would have to be: "Of course it's too simplistic. But so is public choice lite's rush to embrace the President as the defender of public-regarding regulation from the corruption of rent-seeking interest groups and their Congressional allies."[74]

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71. *See, e.g.*, Martin P. Wattenberg, *From a Partisan to a Candidate-Centered Electorate*, *in* THE NEW AMERICAN POLITICAL SYSTEM 139, 154-67 (Anthony King ed., 1990) (observing that coalition-building among interest groups has become increasingly important to presidential candidates as a result of the declining importance of parties, and describing the key role of Christian fundamentalists, upper-income voters, and white southerners to the Republican party in the 1980s); John C. Green & James L. Guth, *Who Is Right and Who Is Left? Activist Coalitions in the Reagan Era*, *in* DO ELECTIONS MATTER? 52-53 (B. Ginsburg & A. Stone eds., 1991) (noting the "large and diverse" groups in the Republican "activist base," in which "no one group dominates prospective coalitions," such that the "serious political and demographic differences" among these groups require adept political leadership "to maintain order among competing factions").

72. Lynn Baker, Remarks at a Faculty Workshop at Cornell Law School (Feb. 11, 2000).

73. Peter Strauss reminds me of the growing importance of the Vice President in the area of regulatory policy "coordination" and observes—in what would surely be relevant to a public-choice modeling of Executive behavior—that the Vice President is *never* a lame duck while he holds his office.

74. The deep appeal of the President as faction-proof champion of the people's interests is evident in Professor Croley's conclusion that one of his case studies shows "how the White House can foster agency independence from Congress in ways that allow an agency better to pursue general interests." Croley, *supra* note 3, at 101. Without denying the political importance of the White House imprimatur, we might examine more closely whether these case studies indeed reveal the President functioning to shield agencies from an interest-group-driven legislature.

Most obviously, the President might protect public-regarding regulation from a hostile Congress through the veto power, which enables him to raise the level of legislative support that interest groups must purchase from 51% to 67% in *each* chamber. However, in none of the case studies did overruling legislation get far enough to generate even a meaningful *threat* of veto. (Death by appropriations cutoff is a different problem, for which the veto is far less useful; but this legislative tactic did not eventuate in any case either. *See infra* note 78.)

Short of thwarting an actual statutory overruling, the President might make the course of public-regarding regulation considerably smoother for an agency. As leader of his party,

In the end, the good guys are not as good as we hope—and the bad guys are not as bad as we fear. Take Congress, the institution of government about which no public choice theorist (orthodox or lite) seems to have anything good to say. Here, I'd like to suggest to Professor Croley that even he, with his clear-eyed and well-argued skepticism about public choice and its premises, has been induced to swallow a considerable amount more of the public choice line than is healthy. Do the stories of the ozone, tobacco, and banking reform rules indeed reveal, as he says, that "Congress was on the whole extremely critical of each agency's efforts"?[75] Or do these accounts show that *Congress* permitted each agency to go forward, after allowing its individual *members* the freedom to engage in some politically necessary plumage display? At the end of the day, Congress did not act to block any of these regulatory initiatives. Bills targeting the new rules made virtually no headway through the normal legislative process.[76] Even procedures designed to make it easier to control wayward agencies, such as the fast-track Corrections Day process[77] and the sixty-day moratorium on new major rules,[78] were not used to thwart the agencies here.[79] *Members* of Congress were undoubtedly, genuinely,

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he could invoke some combination of moral suasion and political discipline to curb the critical rhetoric of his own party members. This clearly would have been helpful to the agencies in at least the ozone and tobacco cases, but Clinton seems not to have managed it for either Carol Browner or David Kessler. *See* Croley, *supra* note 3, at 62-65 (describing the vocal opposition to the ozone rule by Democratic governors and mayors and congressional moderates); *see also id.* at 71-72 (describing similar opposition to the tobacco rule by Democratic Members and governors and even the Senate Minority Leader). As head of White House policy-analysis operations, the President could dispatch witnesses to support the agency's position in oversight hearings. Again, the case studies are not remarkable examples of this sort of protection. In particular, Browner was often left conspicuously on her own through difficult hearings. *See id.* at 64-65. And when the Administrator of OIRA finally did testify in her support, the revelation of White House internal division over the ozone policy gave additional fuel to her critics. *See id.* at 62-63, 65.

In sum, while the case studies persuasively suggest that presidential approval was indispensable to the agency's going forward—had the White House publicly condemned the proposal, the agency would almost surely have given up, or at least significantly curtailed its efforts—they are far less convincing support for the proposition that presidential protection helped these regulatory initiatives survive the legislative arena.

75. Croley, *supra* note 3, at 87.

76. Indeed, as Professor Croley notes, the only legislation actually enacted in the three case studies *affirmed* the agency's regulatory initiative. *See* Croley *supra* note 3, at 83-84 (describing the financial services reform legislation following the Office of Comptroller of Currency's regulatory action).

77. *See* H.R. Res. 168, 106th Cong. (June 20, 1995) (now codified as House Rule XV(6)); WALTER J. OLESZEK, CONGRESSIONAL RESEARCH SERV., THE HOUSE'S CORRECTIONS CALENDAR (Report No. 97-301GOV, 1999), http://www.house.gov/rules/97-301.pdf (last modified Sept. 21, 1999).

78. *See* Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, sec. 251, § 801(a)(1)(B), 110 Stat. 857, 868-69.

79. Even threats to use the appropriations process to defund enforcement action—a politically far easier method of blocking politically unpopular agency policy than overt substantive amendment—remained only that, threats. *See, e.g.*, Croley, *supra* note 3, at 92-93.

hostile; *Congress the institution* did not come to heel at the call of the powerful constituencies opposing these regulations.

We are accustomed to seeing proof, from Kenneth Arrow and others, that the aggregate rational actions of rational individuals can produce irrationality. Sobered by game theory, we find it hard to imagine that the outcome of the political whole could ever be better than the sum of its parts. But it does, sometimes, seem to happen. The most dramatic examples are when Congress uses the Ulysses strategy: when it passes statutes like the Base Closing Act[80] or the Gramm-Rudman-Hollings Act,[81] in which it aims the ship of state at a public-interested goal and then ties itself to the mast to prevent diversion. Note that in these instances, Congress (like the original Ulysses) does not attempt either to silence the voice of the sirens or to stifle the pleading that their music evokes from vulnerable humans. As a result, the decibel level on the legislative deck—the sirens' song, combined with the course-change demands of those bewitched by it—can get pretty loud. Think about how members of Congress from affected districts behaved whenever a new list of potential base closings was announced. But this venting is harmless *so long as* the noise does not in fact translate into instructions that turn the ship onto the rocks.[82]

Ordinary regulatory statutes can offer less dramatic but equally significant examples. Congress the institution passed Superfund long before the special interest calculus looked anything but hostile to its enactment. The existence of such interest group-unfriendly regulatory programs cannot simply be written off as the death-bed conversion to public-regardingness of a lame-duck Congress and Presi-

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80. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808 (1990) (charging an independent commission with the duty of identifying military bases that should be closed or realigned, and providing that Congress and the President could approve or disapprove the recommended list only in its entirety, in order to prevent "cherry-picking" individual, politically favored bases off the list). *See generally* Dalton v. Specter, 511 U.S. 462 (1994) (rejecting various challenges to the scheme).

81. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (creating an automatic mechanism for across-the-board spending reductions whenever the Comptroller General estimated that the budget deficit for the coming year would exceed a statutorily specified level). *See also* Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating the scheme to the extent that it involved the Comptroller General).

82. Indeed (as my earlier metaphor of plumage display implies), allowing for such public venting behavior by individual members may serve a useful function for Congress the institution. Professor Croley perceptively recognizes this early in his paper. *See, e.g.*, Croley, *supra* note 3, at 27 (suggesting that "legislators might [secretly] not mind . . . so much" that procedural moves like delegation to agencies provide insulation from interest group demands); *see also id.* at 46-47. However, he does not carry this suggestion into his analysis of the case studies. Given public choice's thoroughgoing condemnation of Congress, one can hardly blame him for hesitating to assert not only that some regulation might indeed be as public regarding as it seems, but also that Congress might actually be capable of strategies for institutional self-discipline.

dent.[83] Consider the Endangered Species Act (ESA),[84] another Congressionally enacted regulatory program that pursues diffuse and broadly shared benefits by imposing significant particularized costs on farmers, developers, and industries such as logging. (Remember the distinction between fallibility and corruption; you don't have to agree that these benefits are in fact worth the societal price tag.) The remarkable thing about the ESA from the public choice perspective is not that a Republican Congress responded to powerful private interests by giving the logging industry a lucrative timber salvage exception through a rider to an emergency appropriations bill,[85] and by effectively shutting down crucial aspects of the program through a year-long funding moratorium.[86] As we know, the appropriations process can be particularly susceptible to dispensing special-interest favors because it disguises logrolling and facilitates other sorts of tradeoffs more effectively than does substantive legislation.[87] The remarkable thing is that the program had been receiving funding from several congresses in spite of those powerful interests, and is now being funded again.[88]

One might also consider the procedures that Congress the institution is responsible for enacting and maintaining. Professor Croley ef-

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83. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, Pub. L. No. 96-510, 94 Stat. 2767, was passed in December 1980, in the final days of the Carter presidency.

84. Endangered Species Act of 1973 § 35, 16 U.S.C. § 1531 (1994).

85. *See* Emergency Supplemental Appropriations for Additional Disaster Assistance Act of 1995, Pub. L. No. 104-19, 109 Stat. 194.

86. *See* Emergency Supplemental Appropriations and Recissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, tit. II, ch. IV, 109 Stat. 73, 86.

87. If you regard the ESA as a monumentally wasteful and stupid program, and you consider the actions of the 104th Congress a principled vindication of the true public interest, we share important common ground: Neither of us is persuaded by the public choice account that self-interested response to interest-group pressure is a sufficient explanation for legislative action.

88. To be sure, from the environmentalist perspective, one could argue that the program has always been significantly underfunded. *See, e.g.*, Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 303 (1993). The Fish & Wildlife Service has a substantial backlog of petitions to list species as endangered or threatened; it has designated "critical habitat" for only a small fraction of the species that have been listed; and it has not yet promulgated "species recovery plans" for a significant number of species denominated endangered. But few regulatory programs are funded at a level sufficient to permit full accomplishment of their stated missions. Statutes perennially promise citizens more than appropriating legislatures supply the resources to deliver. *See generally* Frank H. Easterbrook, *Substance & Due Process*, 1982 SUP. CT. REV. 85 (noting several ways, including underfunding, that statutory promises often are not fully performed). The better question is how the ESA has historically fared relative to the "normal" distribution of regulatory underfunding. Although this question does not seem to have been addressed empirically, the anecdotal impression is certainly that the 104th Congress was unique in using appropriations cuts to debilitate the program to a degree that could not politically have been accomplished through substantive statutory amendment.

fectively makes the case that the rulemaking process can provide agencies some insulation from interest-group pressure; this process is, of course, a creature of statute. To be sure, the federal courts of appeals in the late 1960s and early 1970s have to take a great deal of credit (or blame) for embroidering on the basic APA framework. Still, Congress not only provided the initial, invitingly capacious structure, but also has refrained from unraveling this insulating embroidery—even when the ossification literature of the early 1990s offered the cover of disinterested academic commentary that attacked its utility.[89] Even in the case of the arch-villain of public choice accounts, the congressional oversight committee, the story may be more complex than public choice suggests. Current congressional procedures create the potential for considerable competition among oversight committees. According to its General Counsel, the Environmental Protection Agency (EPA) answers to seventy different House and Senate committees and subcommittees.[90] Obviously, some of those committees will be more significant players than others, but shouldn't such oversight competition dilute the influence of the legendarily powerful committee chair? And if dilution is the effect, then Congress is again behaving in ways that help it institutionally transcend the self-serving temptations of its individual members.

## CONCLUSION

> *Perhaps Ockham's razor isn't a valid scientific principle. Perhaps entities sometimes ought to be multiplied beyond the point of the simplest possible explanation. For the world is doubtless far odder and more complex than we ordinarily think.*[91]

My purpose is not to suggest that the President is really a villain, or that Congress is an oft-misunderstood innocent. That would simply be countering the reductionism of public choice with a different sort of hyperbole. Rather, I want to warn of the power of myth. In their thoughtful critical introduction to the public choice literature, Dan Farber and Phil Frickey suggest that public choice, even with its shortcomings, "deserves to be taken seriously" because "even one-sided and simplistic theories have their uses."[92] I want to suggest

89. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1985); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995). *See also* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

90. Gary S. Guzy, Address to Administrative Law Class at Cornell Law School (Oct. 20, 1999).

91. Letter from Aldous Huxley to Dr. Humphry Osmond (July 17, 1960), *in* LETTERS OF ALDOUS HUXLEY, 1953-1963, at 893-94 (Grover Smith ed., 1969).

92. FARBER & FRICKEY, *supra* note 11, at 5.

that simplistic theories, in particular, have their dangers—particularly when they promise so much to a community trying to comprehend and improve a social practice as complex and controversial as the modern administrative state. Who doesn't long for simple solutions in a complicated world?

I want to encourage us not to give public choice so much power over how we perceive the regulatory universe. I want to encourage us to resist its invidious insistence that self-interest is the only motivation a sophisticated observer could take seriously. It's easy to scoff at faith; it's easy to demonstrate the illogic of hope. That's why these qualities come under the heading of "virtues" rather than "intellectual accomplishments." But I don't see that we, the community of those who believe in administrative law, have much choice but to choose virtue. For us, it's despair in the capacity of humans, to create and to sustain public regarding institutions of government, that would be irrational.

Thus, I fully agree with Jerry Mashaw's formulation of our goal: "The idea is to attempt to grasp some middle way between a naive faith in the public interest and a cynical campaign to eliminate collective action wherever it rears its ugly head."[93] Clearly, there are components of positive political theory that are logically capable of being severed from public choice's premise of universal self-interest, and applied regardless of assumptions about human motivation.[94] These components may be precisely the sorts of things that ought to be scavenged by administrative law scholars.[95] But, the failure rigorously to distinguish predictions about behavioral patterns and organizational dynamics that function *regardless* of a particular motivational assumption from propositions that *depend on* the premise of self-interest as the universal motivator, leads to the sorts of problems I have discussed here. And so where Professor Mashaw and I, perhaps, part company is at my conviction that administrative law will not find the "middle way" between naïveté and nihilism until we undertake to construct a self-consciously *post*-public choice theory.

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93. MASHAW, *supra* note 8, at 31.

94. I have suggested that the Spence-Cross model for rational, democratically legitimate delegation to agencies is an example of this. *See supra* note 16. In the same vein, Ed Rubin points out that "[c]ollective choice issues (e.g., aggregated preferences) would arise even if people's preferences were motivated by altruism or ideology; they would be eliminated only if preferences were identical. Similarly, interest groups would form even if voters were all altruists or ideologues." Rubin, *supra* note 9, at 1666 n.25; *see also* Schroeder, *supra* note 16, at 36-37.

95. Caution, however, is warranted. *See, e.g.*, GREEN & SHAPIRO, *supra* note 57, at 11 (arguing "that to date, the empirical work that is alleged to provide support for rational choice models is deeply flawed and that the empirical work that has been done well tends to undermine the rational choice approach"). *See generally* THE RATIONAL CHOICE CONTROVERSY: ECONOMIC MODELS OF POLITICS RECONSIDERED (J. Friedman ed. 1996).