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TEMPORARY ACCIDENTS?

*M. Elizabeth Magill**

REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT. By *Steven P. Croley*. Princeton: Princeton University Press. 2007. Pp. xii, 379. Cloth, \$65; paper, \$27.95.

INTRODUCTION

There is no hidden agenda in Steven Croley's¹ new book. Franklin D. Roosevelt's words appear in the book's concluding pages. Administrative tribunals, Roosevelt claimed in 1940, leveled the playing field between "a powerful and concentrated interest" and "a diversified mass of individuals" (p. 304). Croley's book likewise defends regulatory agencies from their modern-day public choice critics. And it does so for the reason Roosevelt identified: agencies are able to resist the demands of special interests and regulate on behalf of the public. Croley's book is careful and scholarly, but it is also a spirited defense of regulatory government.

But there is an irony here. Roosevelt issued that statement in 1940 as he vetoed the Walter-Logan Bill. That bill, a precursor to the 1946 Administrative Procedure Act, would have imposed additional procedural requirements on agencies and subjected their actions to more intensive judicial review.² Roosevelt saw this bill as an effort to undo his legacy by crippling New Deal agencies.³ Where Roosevelt saw a threat, Croley finds the possibility of public-interested regulation. Administrative process and judicial review actually provide agencies freedom to regulate in the public interest.

Croley's book has two agendas. Agenda number one is to identify the crucial elements of public choice theory and systematically critique them. Croley argues that regulatory agencies do not play the role that public choice theories assign to them: agencies do not systematically deliver rents to concentrated interests. Agenda number two is to construct and defend an alternative theory that he calls the administrative process account. Croley asserts that, under certain conditions, agencies will regulate to advance social welfare (p. 295). More specifically, agencies will use their autonomy to promote the interests of diffuse majorities at the expense of well-organized,

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1. Professor of Law, University of Michigan Law School.

2. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. REV. 1557, 1593-1632 (1996).

3. President's Message to Congress Vetoing the Walter-Logan Bill, 86 CONG. REC. 13942, 13943 (Dec. 18, 1940).

concentrated interests, such as industry groups. George Stigler, the principal expositor of public choice theory, admitted that agencies might regulate in the way Croley asserts they can. In Stigler's memorable words, however, such occasions were "[t]emporary accidents."⁴ To Croley, they are not accidents.

One is struck at first by the breadth and rigor of this book. Croley's critique, his alternative account, and his case studies are careful and analytically rigorous. He considers arguments and counterarguments; he traces their origin and shows the reader their flaws. There is nothing here that is casual or tossed off. These features, along with the book's clear, jargon-free, and engaging writing, make it an especially helpful book for those of us who teach in public law fields. I have not read a clearer description than those contained here of Mancur Olson's classic *The Logic of Collective Action*,⁵ or of Russell Hardin's extension of the theory.⁶ Nor have I read a better description of Stigler's seminal work, *A Theory of Economic Regulation*.⁷ For someone new to public law, or students in advanced classes and seminars, Croley's book is an invaluable resource.

Croley has done much more than write a lucid and learned book. His analysis of the behavior of agencies is an important contribution to our understanding of government regulation. Croley's foundational argument is that agencies have a great deal of autonomy. The argument is sophisticated, creative, and compelling. The existence of agency autonomy, Croley argues, undermines public choice theory (which treats agencies as agents of the legislature), and it supports his alternative administrative process account of administrative action (agencies can use their autonomy to regulate in the public interest) (p. 73). In the end, I argue that Croley's conclusions about what agencies do with their autonomy are in some respects unpersuasive, but, even so, his argument that agencies possess autonomy stands as a lasting contribution to our grasp of regulatory action.

In Part I of this Review, I will summarize Croley's book, focusing on his powerful critique of public choice theory and the alternative account that he develops and defends. Part II assesses the book, arguing that Croley is successful in demonstrating agency autonomy but less successful in showing that either administrator motivations or the administrative process tend to make agencies regulate in welfare-enhancing ways. As is often the case, the critique is more powerful than the construction of the alternative account. Even so, Croley's book should alter debates over the possibility of good government by placing the agency and how it does its business at the center of our understanding of government regulation.

4. GEORGE J. STIGLER, *The Theory of Economic Regulation*, in *THE CITIZEN AND THE STATE* 114, 140 (1975).

5. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

6. RUSSELL HARDIN, *COLLECTIVE ACTION* (1982).

7. George J. Stigler, *The theory of economic regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971).

I. REGULATION AND PUBLIC INTERESTS: A GUIDE

Start first with a brief overview of *Regulation and Public Interests*. The book is divided into four parts. In Part I, Croley sets out the public choice account and identifies a variety of objections to it. In this part, he also considers alternative theories of regulation, including a sketch of his own theory, which he calls the “administrative process” account. Part II is devoted to establishing the foundations of the administrative process theory and offering a complete description of it. In Part III, Croley offers extended case studies of several regulatory initiatives, studies that, he argues in Part IV, defy the predictions of public choice theory and support his administrative process theory.

A. *The Public Choice Account and Croley's Critique*

The story is familiar. The state has benefits it can distribute and burdens it can impose. Anyone who can convince the state's decision makers to do what he wishes has a lot to gain. Present members of the coal industry, for instance, would like to have no new competitors or to raise the price of natural gas. Such measures would benefit them, but they might cost the rest of us more. But that doesn't matter to the coal industry, because their interest groups organize to pursue the selfish interest of their members.

Everyone can be in a group and lobby state decision makers, so why can't the many defeat the few? In theory, everyone can organize, but some groups are (a lot) better at it than others. As Mancur Olson taught us, there are powerful barriers to collective action.⁸ We all have limited time and resources. Joining a group and lobbying eats up those scarce resources and we'll only do it if it is worth the costs. Small (industry) groups can more easily overcome these barriers because each member of the group has *much* to gain and doesn't have to share those benefits with anyone else. Larger groups, by contrast, may have more votes, but they will have trouble organizing. The large aggregate cost is spread out over so many people that the cost to each is small and those who work to change the policy cannot keep the benefit for themselves.

Asking for benefits is one thing and getting them another. Why would politicians—who are after all elected by all of us paying more for (for example) coal-fired power—give the interest group what it wants? The politician has his own interest too: getting reelected. To achieve that goal, he needs resources. So if the interest group can provide enough resources and those of us paying for what the interest group wants are not complaining too loudly, the politician will supply what the organized group wants.

One final step: most statutes are turned into on-the-ground reality by bureaucrats who fill in the details, and those details can be critical. There are two ways that the picture of the exchange between interest groups and politicians converts into a similar story about agency action. Politicians can

8. OLSON, *supra* note 5, at 22–36.

control the bureaucrats—by, for instance, controlling the bureaucrats' budgets or jurisdiction, which bureaucrats want to maximize—and hence make sure that agencies deliver on the promises made in the legislation. Alternatively, even if the politicians cannot completely control the bureaucrats, the bureaucrats, for their own reasons, may give interest groups what they want.

Familiar, insightful, influential, and depressing. But is it true? Many people—perhaps most importantly Nobel Prize winner George Stigler—have devised and defended elements of this theory.⁹ Regulations that contradicted this theory were, in Stigler's words, merely "[t]emporary accidents."¹⁰ Perhaps as many people have devoted themselves to refining, rethinking, or criticizing it.¹¹

It is this description of regulation, which Croley labels the public choice account, that is his target in *Regulation and Public Interests*. Croley starts by identifying the four central claims of the public choice account (p. 27). First, interest groups seek regulation that advances the selfish interests of their members. Second, some groups—small, narrowly focused groups with a lot to gain—are able to overcome the collective action problems that inhibit organization. Third, legislators provide such groups regulatory favors in exchange for the resources needed to get reelected. Finally, when agencies implement statutes, they assure that those concentrated interests receive the rents, either as a result of legislative control or bureaucrats' own interests.

9. Stigler's original work focused on interest group formation and their capture of state power. See Stigler, *supra* note 7; see also STIGLER, *supra* note 4. Later work associated with Barry Weingast and others developed the idea of legislative control of agencies. Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); Barry R. Weingast, *The congressional-bureaucratic system: a principal agent perspective (with applications to the SEC)*, 44 PUB. CHOICE 147 (1984); Barry R. Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships*, LAW & CONTEMP. PROBS., Winter 1981, at 147.

10. STIGLER, *supra* note 4, at 140.

11. There are entire fields of study that can be understood as refining, extending, or criticizing the basic story of interest groups and capture. For important criticisms and refinements, see Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Theories of economic regulation*, 5 BELL. J. ECON. & MGMT. SCI. 335 (1974); and James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357 (James Q. Wilson ed., 1980).

For subsequent criticism or refinement of the theory of legislative control of bureaucracy, see MURRAY J. HORN, THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION (1995); Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475 (1987); Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 171 (1994); Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 213 (1990); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson eds., 1989); Terry M. Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, in ORGANIZATIONAL THEORY 116 (Oliver E. Williamson ed., 1990); and Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1.

Croley not only lays out these claims, he discusses their underlying theoretical foundations and systematically critiques them (pp. 29–52). His most important arguments involve agency behavior. These arguments constitute both his most original critique of public choice theory and the essential building blocks of his own administrative process account of regulation. Croley identifies a series of difficulties with the role agencies play in public choice theory (pp. 47–48). Croley first argues that the legislature does not dominate agencies. To the extent that agencies have motivations independent of their budget or the scope of their authority—and there is reason to think that they do—the legislature may not easily control them. One reigning theory about legislative control is that the administrative process is a mechanism by which Congress controls agencies, but Croley argues that administrative process actually facilitates administrator independence. Suggestions that Congress seamlessly controls agencies also assume away the agency problems inherent in any principal-agent relationship. And Congress is far from the only player supervising agencies. Agencies also answer to the president and the courts. Judicial review of administrative action, in particular, is not likely to facilitate the delivery of regulatory rents. As for the claim that administrators, for their own reasons, deliver regulatory rents, Croley rejects this point at length when he develops his alternative account.

Croley's attack on public choice theory, however, goes beyond a critique of the internal logic and plausibility of its core claims. He also looks for external evidence that would confirm its claims. If public choice theory is correct, according to Croley, certain things should be true about the world. Substantively, regulatory outcomes should favor concentrated interests. Conversely, it would be a surprise if regulation delivered benefits to citizens at the expense of organized interest groups. Indeed, these are Stigler's "[t]emporary accidents" (pp. 22–23). More controversially, Croley argues that, if the public choice account is correct, the process by which agencies implement their statutory mandates should take a particular form (pp. 23–25). Croley argues that neither of these predictions is true. As he argues through a series of in-depth case studies discussed below, regulatory outcomes sometimes favor broad-based interests at the expense of concentrated interests. And, as he develops while defending his own theory, the administrative process does not look anything like it should if regulatory agencies are in the business of delivering rents to concentrated interests.

B. Croley's Administrative Process Theory of Regulation

Croley's critique of public choice theory and his development of the administrative process theory are intertwined. The public choice account fails for many reasons, he argues, but one important reason is that its advocates have only the most glancing understanding of agencies and administrators. Public choice theorists pay little attention to agencies, and, when they do, they cast agencies as cogs in a rent-delivery machine. But as everyone pretty much agrees, and Croley clearly establishes in Chapter Six, agencies formulate a large amount of the government's regulation. Thus the

public choice account ignores an important link in the chain that produces government regulation. This would be fine—a parsimonious theory is the best theory—as long as it does not sacrifice the accuracy of the theory’s predictions.

Croley thinks it does, so he opens this “black box” and peers in. What he sees inside is the foundation for his alternative theory of regulation. At its most fundamental level, Croley’s theory is founded on the claim that one cannot understand regulatory outcomes without paying close attention to the regulatory decision-making process. In other words, treating the agency as a black box is a simplifying assumption that sacrifices the validity of the theory. When the box is opened, different outputs emerge.

More specifically, Croley’s theory involves several discrete claims about agency action (pp. 73–74). First, administrators are often motivated by concerns for public-oriented interests. Second, the environment in which agencies operate allows them to promote those interests. The processes they are obligated to follow and the institutional environment in which they act give agencies independence from legislative preferences and allow them to resist the claims of narrow interests. Special interests, which may have a great deal of power in the legislative arena, have far less power in the arena of administrative decision making. Finally, agency decision-making processes allow agencies to identify socially beneficial regulatory outcomes. Croley’s approach does not predict that all regulatory outcomes will advance social welfare; it instead identifies the possibility that socially beneficial regulation can occur under certain conditions. Through a series of in-depth case studies, he argues that these conditions are often met.

Administrative motivation is central to Croley’s account (pp. 92–96). According to Croley, administrators have a great deal of discretion. What drives them is thus an important determinant of regulatory outcomes. And what does drive them? Croley argues that administrators are not beholden to the legislature and that they have benign or public-regarding motivations. Administrators self-select into their careers, he notes, and they are not well compensated. This, he suggests, means that they are likely to be either ideologically committed to the agency’s mission or more generally committed to the promise of government regulation—a prediction that he argues is more likely to be true the longer the person is at the agency. As for political appointees, Croley argues that they are most likely to be motivated by an ideological commitment to the party of the president who appointed them and least likely to be concerned about future employment opportunities. Finally, Croley dismisses the idea that a desire for lucrative employment with regulated parties—the revolving door—tilts administrators toward satisfying those interests.

Fine, administrators may have benign motives. Being *motivated* to advance the agency’s mission or the public’s interest and *being able to do so* are two different things. But Croley argues that agencies *are* able to advance broad-based interests. Croley articulates a complicated and overlapping series of arguments to advance this important claim, but all of these arguments rest on two important facts about the world that agencies inhabit: the admin-

istrative process by which agencies implement their statutory mandate and the decision-making environment within which they work. In a nutshell, agencies have a great deal of autonomy—including independence from the legislature—and, as important, they are in a position to use that autonomy to resist the demands of concentrated interests.

Start with the processes by which agencies make decisions, which are fairly standardized across agencies. Croley discusses these processes at length in Chapter Five. He introduces readers to the processes associated with legislative rulemaking, adjudication, informal agency action, and agency litigation enforcement strategy. Croley emphasizes the discretion agencies have in relying on these procedures and also the many other procedural statutes—NEPA,¹² FACA,¹³ FOIA¹⁴—that require agencies to consider particular matters as they go about their business or generally operate to impose transparency and good government requirements.

Then there is the institutional environment within which agencies operate (pp. 96–101). Agencies answer not just to Congress, but to the White House and the courts. Executive oversight of agency decision making has been steadily growing since the early 1980s.¹⁵ Judicial review is likewise an important feature of the environment that agencies inhabit. Agency action takes place in the shadow of judicial review, so the possibility of review is important even where it does not occur. And judicial review forces agencies to follow the procedural requisites and also substantively determines whether the agency acted arbitrarily, a requirement with actual bite. An agency must persuade a court that it has considered the important issues associated with its action and resolved them in a reasonable way.

These two realities—process and institutional environment—underpin Croley's relatively optimistic theory about government regulation. He starts by arguing that administrators have autonomy—especially from the legislature (p. 142). For one, legislative dominance cannot be complete given the institutional environment. The president appoints the senior leaders of an agency; the White House leads a priority setting process for all executive branch agencies; and the Office of Information and Regulatory Affairs reviews major rules (pp. 139–40). Important agency actions also occur in the shadow of judicial review (pp. 140–42). With this level of involvement of other institutional actors, Congress hardly has a clear shot at control over the agency.

The processes by which agencies implement their agendas also give them autonomy from their many principals. Sometimes, few procedural

12. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified in scattered sections of 42 U.S.C.).

13. Federal Advisory Committee Act, 5 U.S.C. app. (2000).

14. Freedom of Information Act, 5 U.S.C. § 552 (2000).

15. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 821 (2003); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3–11 (1995); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 965–68 (1997).

obligations apply. Even if they do, agencies often have the ability to choose which of the procedures they will use, and, more importantly, how they will carry out those procedures. Thus an agency will determine the form that a rulemaking will take, “when comments will be due, to whom they should be directed, what issues they should address, and how many rounds of notice and comment there will be” (p. 90). To the extent that the agency is constrained in its use of administrative procedure, it is often in the direction of requiring open processes and balanced membership on advisory committees (pp. 89–92).

But agencies are more than just autonomous. These elements of the administrator’s environment actually facilitate the production of socially beneficial regulation. In some of the most creative and original theoretical parts of Croley’s book, he argues that administrative decision making is fundamentally different from legislative decision making and that the differences operate to mute the power of narrow, specialized interests (Chapter Eight). Some of these differences are straightforward. In many contexts of agency decision making, participation is a statutory entitlement, and the decision makers who determine how the comments should be weighed and considered often have job security.

Another important difference is that information—not voting—is the currency in administrative decision making (pp. 135–39). According to Croley, it is the value of the information that is important in a rulemaking, not the number of people making the point (p. 136). Thus, ten thousand people saying the same thing will be less effective than one person making a better, more supported point. According to Croley, this has important implications for the logic of collective action. In terms of the theory of collective action, the “group good” that must be produced in order to influence the agency is information (not resources). But, unlike resources, information has a steeply diminishing marginal utility. This means that the collective action problems are not as severe as they would be in other contexts. As Croley explains, “once one group member supplies information,” other group members “will benefit without ongoing cooperation. Indeed, once one member provides an agency with information or advocates a particular point of view about that agency’s proposal, there is not much value to other group members doing the exact same thing” (p. 137). This means that groups that are successful because of their ability to overcome collective action problems will have less of an advantage than they might in other spheres. In order to succeed in this arena, it takes one party with a good argument—cooperation and contribution, in short, are much less important.

In a similar vein, Croley argues that judicial review blunts the effectiveness of concentrated interests or, as he puts it, works to “level the interest-group playing field” (p. 140). A single dissatisfied group can force judicial review of an administrative decision. That single group might be underfunded and without many political resources, but it can still challenge agency action in court. If a procedurally valid challenge is filed, judicial review might test whether the agency followed the proper procedures and acted in a reasonable way. It is not the resources or the political sway that

matters; the quality of the argument does. Once again, the resource-rich interest group has fewer advantages in this arena.

In Croley's hands, the picture of administrative decision making that emerges departs quite radically from the picture of legislative decision making that is the centerpiece of the public choice account. Agencies are not only autonomous from Congress in important respects, but the environment within which they act allows them, indeed even encourages them, to advance social welfare.

In fact, Croley takes the point even further. In the most provocative part of the book, he suggests that this might be by congressional design. Processes that Congress has in part designed, and in any event tolerates, insulate agencies from Congress, freeing them to pursue their own vision of the public interest. Croley then argues that there are reasons to think that Congress wants it this way (p. 152). That is, Congress cuts a deal with the powerful, concentrated interests who hold the cards in the legislative arena, but then—because members of Congress would like to see public-regarding actions—sends the key decisions off to an agency that is relatively free to regulate in the public interest (pp. 152–153). How can Congress get away with this? According to Croley, Congress can evade responsibility for the agency's public-interested actions by claiming that the agency is not doing as it would have wished (p. 153).

C. Case Studies

Concede this much: some facts about the world create the possibility that agencies might regulate to advance general welfare. But do they? Croley devotes the second half of the book to arguing that they have. The first case study is of the Environmental Protection Agency's ("EPA") ozone (smog) and particulate matter (soot, haze) rules (Chapter Nine). Croley turns in Chapter Ten to the Food and Drug Administration's ("FDA") tobacco initiative. The United States Forest Service's ("USFS") roadless policy for national forests is Croley's last chapter-length case study (Chapter Eleven). In Chapter Twelve, Croley looks in less depth at three more examples. He describes the Federal Trade Commission's ("FTC") "do not call" registry; the Securities and Exchange Commission's ("SEC") Attorney Conduct Rule, aimed at preventing attorneys from either facilitating or concealing corporate misconduct; and a series of decisions by the Comptroller of the Currency to increase competition in financial services markets by permitting national banks to enter those markets. The examples, he argues, fail to provide support for the public choice account, but instead provide support for Croley's administrative process theory.

The critique of the public choice account arising from the examples is straightforward (Chapter Thirteen). According to Croley, neither the process nor the substantive expectations of the public choice theory are vindicated by these examples. Judicial review, presidential pressure, or agency initiative got the ball rolling in each of these cases; concentrated interests did not prompt the agency to act. The agency in each case regulated through a

remarkably open process, and the procedures the agency used neither favored concentrated interests nor bound the agency to Congress. Indeed, agencies in several of the cases proceeded despite strenuous objections from many members of Congress.

Croley argues that, in each case, regulation advanced broad-based interests at the expense of concentrated interests. In nearly every case, the agency advanced diffuse interests by requiring concentrated interests to take action that they resisted: polluting industries ordered to reduce emissions for reasons of public health (EPA's rule); tobacco products comprehensively regulated to reduce the health effects of tobacco (FDA's rule); timber companies' road building limited in the name of protecting wild areas for those who enjoy them (USFS's rule); telemarketers forced to limit their behavior in the name of dinner-time peace for millions of households (FTC's rule); attorneys required to take action to prevent fraud on shareholders (SEC's rule); and financial service providers forced to face new competitors in order to promote consumer interests (Comptroller's rule).

None of these decisions are the stuff of public-choice inspired descriptions of government action. Croley argues that the rules were socially beneficial from a variety of perspectives. Each rule was justified in cost-benefit terms; their distributive consequences were defensible or even desirable; and their policy choices were supported by a consensus of experts as well as the public. It is true that in some cases the regulation also advanced concentrated interests—the Comptroller's decisions about the financial service markets, for instance, benefited banks—but Croley argues that the regulation also benefited consumers by increasing competition in the financial services markets. It is also true that in some cases concentrated interests won concessions. For instance, after intense lobbying by the organized bar, the SEC dropped its "noisy withdrawal" proposal (pp. 251–53). But Croley argues this does not straightforwardly support the public choice account for a variety of reasons, including the fact that neutral experts were critical of the noisy withdrawal proposal as well.

But the story here is not simply negative. Croley shifts from critique to construction in Chapter Fourteen, arguing that the case studies provide support for his own theory. He starts with the role of administrative process in these cases. According to Croley, the examples show that agencies use procedure in a sophisticated way in order to promote their own autonomy (pp. 258–67). Agencies use processes to generate information in support of agency proposals and to measure opposition and identify objections to agency proposals as well. Perhaps most importantly, agencies use processes to *generate* public support for their proposals. The public meetings, toll-free numbers, and congressional testimony featured in the case studies are all ways of reaching out to bring people on board—and, sometimes, ways of reaching out above the heads of the usual suspects who linger in the powerful corridors in Washington. The USFS, for example, held hundreds of public hearings in local communities across the country and those hearings helped identify and mobilize support outside Washington for its roadless policies (p. 262).

Croley also argues that the case studies support his theory's claim that administrators are public-interested. Carol Browner (EPA), David Kessler (FDA), Michael Dombeck (USFS)—these are independent, strong-willed administrators who took on well-organized industry groups to advance public health and to protect the environment. Say what you will about them; they were not in the business of delivering private rewards to concentrated industry groups. Finally, Croley argues that the case studies demonstrate the significance of an agency's institutional environment in promoting agency autonomy, thus muting the effect of powerful interest groups and their friends in Congress. With support from the White House (the EPA and FDA case studies) or from Congress (the USFS case study), or with prodding from the courts (the EPA case study), the agencies enacted welfare-enhancing regulation.

In the end, Croley argues that the administrative process theory is a better description of the regulatory state than is the public choice account. The public choice account, he admits, possesses two qualities of a superior theory. It is elegant and yields abstract predictions—that is, predictions that do not depend on the facts of particular cases. Croley argues that the public choice account has those qualities only because it assumes certain empirical premises that are not true. In contrast, Croley freely admits that his theory yields only contingent predictions. That is, it states conditions under which public-interested regulation can occur, and those conditions are determined by the facts of particular examples. As he states the theory, “agencies enjoy considerable autonomy which they *may* exercise to advance social welfare *if* they are motivated to do so and *provided that* they are not opposed by every branch of government” (p. 295). While contingent, his theory does yield predictions—regulatory outcomes will advance social welfare when the conditions of the theory hold—and therefore can be disproven.

II. REGULATION AND PUBLIC INTERESTS: AN ASSESSMENT

This book has an unlikely star—the administrative agency. Usually cast in a bit part, as a minion of the *real* political heavyweights, in Croley's story the agency emerges as the primary antagonist to the public choice account and the primary protagonist of Croley's alternate, much more palatable, account of what our government can do. It is Croley's investigation, analysis, and arguments about the behavior of administrative agencies that will stand as this book's most important contribution to our understanding of what government produces.

A. Agency Autonomy

Croley's starting and foundational argument is that agencies have autonomy, autonomy that is inconsistent with the public choice account and autonomy that frees them, if certain conditions hold, to promote public welfare. This argument is counterintuitive. Agencies are, after all, *agents*. Not only that, they are agents with too many principals telling them what to

do—the president, the Congress, and the courts. The presence of many meddling bosses should be especially constraining, but Croley argues persuasively that it creates an opportunity, too. An administrator can take advantage of the space created by multiple principals to pursue his own agenda.

It may take a political scientist to see the space created for agencies by the environment within which they work, but it takes a lawyer to identify the other factor that gives agencies some autonomy: administrative process. The details of that process—which are a product of statutory and judge-made law—are known by few outside the lawyers' guild and not so many inside it. Croley uses his deep knowledge of administrative process to persuasively demonstrate—again somewhat counterintuitively—that procedural constraints actually give the agency autonomy.

This is an important point, and it is persuasively made. It challenges prominent, if not dominant, views of agencies, which treat agency decisions as the product of other actors—Congress, the president, or the “client” industries that the agency regulates. Croley shows that agencies have more autonomy than any of these models suggest.

B. *Welfare-Enhancing Regulation*

But autonomy to do what? Freedom to exercise government power can cut both ways—for good or for ill. Croley is at his most creative when he argues that agencies can use their autonomy to advance broad-based interests at the expense of concentrated interests. This argument has two ingredients. The first is that administrators are benignly motivated; the second is that the administrative process mutes the power of concentrated interests. Each of these arguments is inventive, but neither is entirely persuasive.

1. *Administrator Motivation*

The reach of Croley's argument about administrator motivation seems to shift throughout the book. Early in the book, he seems to assert that—owing to the structure of their employment relationship—administrators are benignly motivated systematically (pp. 92–96). But by the end of the book he argues that they *may* be benignly motivated (p. 295). The first of these arguments is implausible, and the second is insufficient to support Croley's conclusions.

Start first with “real” bureaucrats. They select into careers that have long tenure and limited compensation, and Croley suggests this means they are likely to be either specifically committed to the agency's mission or generally committed to government. That does not necessarily follow. Those same features of the job may attract those who are risk averse, not terribly competent, or both. Their motive might be described as seeking leisure. If the bureaucrat is risk averse or incompetent, there is no particular reason to think that he would use his autonomy to promote broad-based interests. The

easiest course may be to concede the field to those concentrated and well-organized interests that lobby the agency. Here, there are two contradictory explanations available from a set of factors, and Croley chooses the optimistic one instead of the pessimistic one. Indeed, he does not even entertain the pessimistic possibilities.

But what of the appointed administrators? These folks are a different kind of “bureaucrat,” and Croley claims they are pivotal (p. 94). Appointed officials are unlikely to be risk averse or incompetent, but they *are* likely to have loyalty to the president and his party and perhaps strong views about what the agency should (or should not) be doing. Again, these motives do not translate into a desire to advance broad-based interests. Imagine, not implausibly, that the administrator’s view of what the agency should do is to advance the interests of an important national industry, one that employs thousands of Americans and is the lifeblood of many communities. One would expect the administrator to promote regulatory choices that will accomplish that, perhaps even if the cost is greater than the benefit it provides (or is inconsistent with other measures of socially beneficial regulation). Or imagine, again not implausibly, that the appointed official came from the regulated industry and plans to return to the regulated industry. What would we expect from that administrator except special sympathy for the interests of the industry?

Once again, Croley reveals a sunny view of government when he dismisses pessimistic stories about administrative motivation. Here he does address the pessimistic take on administrator motivation—that administrators would be motivated to assist industry while in government in order to maximize their shot at a lucrative position when they leave government (p. 95). An agency official, Croley says, would not favor industry in hopes of winning a post-government position. He argues that political appointees are not worried about future job prospects (p. 94), which seems a stretch. More than that, an industry group would not even have an interest in hiring such a government official because, once out of government, the official could not help the industry. This too is implausible. Of course an interest group would want to hire such an official. The appointee may have come from an industry and plan to return. But even if that is not the case, that official succeeded in achieving something the industry wanted; the ability to do that is worth its weight in gold—and doesn’t entirely disappear when the official leaves the agency. He can continue to rely on his know-how and contacts to obtain such benefits even when appointees of his ilk are not in charge of the agency.

The difficulty here may be that Croley is attempting to do two things when he discusses administrators’ motivations. He is refuting a picture of administrators as puppets of Congress. At that he succeeds. But in order to support his own administrative process theory, he must do more than that. He must articulate a theory that holds that administrators are motivated to use their autonomy to regulate in a way that is welfare enhancing, even if that involves advancing broad-based interests at the expense of concentrated interests. Croley identifies some factors suggesting that administrators have

motives different from pleasing Congress, but it does not follow that they are motivated to advance broad-based interests.

Croley might reply that these factors and the case studies show that administrators are *sometimes* motivated to advance broad-based interests. But why? Without a theory about when that will be the case, Croley cannot generate a testable hypothesis. And none of the mechanisms one can extract from the book are sufficient to achieve what Croley is trying to achieve—a qualified defense of regulatory government.

Start again with the real bureaucrats. Some may be ideologically committed to the mission of the agency; some may be risk averse, incompetent, or leisure seeking. Assume the more attractive motive. Ideological commitment to the mission of the agency does not necessarily mean that the bureaucrat will regulate in a welfare-enhancing way. The mission of some agencies is actually to support the industry at the expense of the rest of us—agricultural policy is a good example. Or consider agencies that do not administer programs like agricultural policy. Ideological commitment to the mission of agencies like the EPA, the FDA, and the Consumer Product Safety Commission may rule out advancing the interests of concentrated groups (Croley's critique of public choice theory), but it doesn't demonstrate by itself that these agencies make welfare-enhancing decisions. To do so, Croley must defend these units of the regulatory state as welfare enhancing. In other words, the argument that administrators committed to the mission of the agencies make welfare-enhancing decisions reduces to a defense of such regulatory programs on their own terms. But this is not something that Croley systematically takes on in the book. He generally takes the welfare-enhancing capacity of agencies as a given.

One can make a similar point about appointed administrators. Appointed administrators may be motivated to promote the industry they used to represent or obtain a lucrative position after government; administrators may be motivated to advance the agenda of the president and his party. Assume the more optimistic story. Getting from an administrator's commitment to the president's party's agenda to an administrator making welfare-enhancing decisions reduces, in the end, to a defense of political party positions. Croley may show his hand here. The three heroes of the case studies are Clinton appointees, making one suspect that Croley thinks Democrats are likely to regulate in a welfare-enhancing way. But Croley does not state or defend such a proposition. Without such a defense, he cannot conclude that commitment to such principles translates into welfare-enhancing regulatory choices.

Put these points aside for a moment. Take as a given that administrators are sometimes motivated to advance social welfare. Go further: they are more than motivated, they are sometimes actually able to succeed and change policy in that direction. It is still not clear what that demonstrates. The claim that agencies may sometimes advance the public welfare is not a defense writ large. If agencies advance public welfare only rarely and more often adopt regulations whose costs exceeds their benefits because the ad-

ministrators are overzealous regulators, or because they cater to private interests, on balance they are not a positive good.

2. *Administrative Process*

Croley does have an out. Perhaps if his claims about administrative motivation don't carry the administrative process theory, then the claims about the nature of administrative decision making can. Croley argues, very inventively, that administrative decision making is distinctive, and distinctive in ways that mute the power of concentrated interests (Chapter Eight). Judicial review plays a role here, as does Croley's claim that information is the key currency in administrative decision making. The central insight is that, in this context, one does not need a well-organized, resource-rich group to succeed. Good arguments, presented to the agency or to a court, can influence the agency's behavior, and it takes little cooperation and contribution to produce good arguments. This means that well-financed and well-organized interests have less of an advantage in this arena than they do in others. Like the point about administrative autonomy, this is a neat and important point, and it takes a sophisticated student of administrative process to see it.

But this claim cannot fully overcome the weaknesses in Croley's arguments about administrator motivations. Even if these features diminish the power of concentrated interests compared to the power those interests have in other contexts, they do not demonstrate that an administrator primed to assist concentrated interests would not be able to do so. That is to say, Croley demonstrates that administrative decision making is distinctive in ways that diminish the pathologies that may be evident elsewhere, but he does not go so far as to demonstrate that the process *compels* the agency to make welfare-enhancing decisions. Administrator motivation, in other words, remains critical.

But leave this aside for a moment. On its own terms, does the argument about the distinctiveness of agency decision making succeed? To this reader, the arguments have a strong appeal and seem to capture administrative decision making in a way that few other accounts do. But, ultimately, Croley's conclusions are too optimistic.

Consider Croley's discussion of information as the currency of administrative decision making (pp. 135–38). In Croley's hands, agency decision making is described as the compilation of information that leads to a conclusion. As Croley puts it, "in rulemaking and other administrative procedures, agencies depend upon information to do whatever they aim to do. Those with the most information, with the most credible and verifiable information, will have a greater opportunity to influence administrative decisionmakers" (p. 135).

But no one who has watched many agency decisions up close thinks the process is one that is fueled solely by information. This description scrubs political considerations and all that comes with them out of the picture of agency decision making. Agency decisions are generated from a mix of factors that one might, in an effort to simplify, label politics and substance.

Most agencies can only make their way by navigating the politics associated with their regulatory arena, so they must take that into account. And most are committed to some substantive views, views that sometimes conflict with the other factors that agencies must consider. Sometimes substance wins, and sometimes politics does.

Croley's case studies themselves reveal this. When he discusses information as the currency in administrative decision making, the administrators sound like graduate students pursuing a Ph.D.s. But when he turns to the case studies, and highlights administrators like Carol Browner, David Kessler, and Michael Dombeck, the administrators are savvy politicians who play the press, do battle in Congress, and use whatever political support they have to their advantage. To be sure, the substantive considerations that animate the agency's decision play a role here—the science of ozone, the consequences of roads on the environment—but they are not the only important factors in these case studies.

Few would doubt the assertion that agency decision makers must often think about political as well as substantive considerations as they make policy. To the extent that agency heads must be savvy politicians to succeed, they must make political calculations that are not so dissimilar to the ones that politicians make. To the extent that the White House and Congress can and will weigh in, the dynamics of those institutions will come into play in agency decision making. And the interests that support or oppose what the agency is doing must be able to play in all of these arenas if they expect to achieve their goals. With these political considerations come some of the pathologies associated with political arenas.

What about the courts, though? An interest group seeking to alter or stop agency action that appeals to the White House or the Congress is appealing to a straightforwardly political actor, where the well-financed and well-resourced may do especially well. But appealing to a court is a quite different matter—or is it? Filing a challenge to agency action does take only one party, and the judge behind the bench thinks differently than the congressman up on the dais.

But Croley has a bit of an idealized view here too. It is true, theoretically, that it takes only one successful challenger to have a court force the agency through its paces and thus that agency will listen more carefully to all in the first place. But the well-organized and well-financed can, in many cases, hire the best lawyers to file the most plausible challenge in court. Industry groups have definitely used judicial review to their advantage, including in Croley's case studies: some lower courts invalidated the Forest Service's roadless rule (pp. 206–07), and the Supreme Court invalidated the FDA's tobacco rules (pp. 193–94).

Even if Croley is right that judicial review levels the interest-group playing field, does that mean it will benefit broad-based interests? It is hard to know. The fact that courts will take seriously arguments that have been rejected in other arenas helps *both* broad-based interests and concentrated interests. It is a separate question whether, overall, judicial review advances

the cause of welfare-enhancing regulation. That is not, of course, the metric by which courts judge what agencies do.

Whether judicial review advances the cause of concentrated or diffuse interests all depends on the baseline state of the world. Judicial review is inherently conservative. A court entertaining a timely challenge to agency action will require the agency to explain its action in a reasoned way—that is, the agency must justify as well-reasoned its departure from the status quo ante. This gives an advantage to those who do not want to change the status quo. So the kind of interests that stand to benefit from judicial review will depend on whether the status quo is a place where welfare-enhancing regulation exists or not. If one assumes that agencies generally regulate to advance public welfare at the expense of concentrated interests, then judicial review favors those who resist that regulation. If one assumes that agencies generally (as the public choice account would have it) favor regulation that benefits concentrated interests at the expense of broad-based interests, then judicial review helps the broad-based interests. How this cashes out over the longer haul is not clear, but it is not self-evident that the existence of judicial review—and its take-all-comers quality—advances the cause of welfare-enhancing regulation.

In the end, whether the administrative process facilitates the production of socially beneficial regulation is hard to know. Croley wants to independently draw a positive connection between administrative process and beneficial regulation. The process certainly does not compel such regulation. And whether it facilitates such regulation cannot be proved without comparison to the outcome in a world that does not have such administrative process. That is, if one could compare agencies that made decisions with typical administrative process and those that did not, and one could draw conclusions about which generally made more welfare-enhancing decisions, one could reach a conclusion about the role of process.

Obviously, this is not possible, so we are left with thought experiments and intuitions. The connection between process and good decision making is a difficult one to prove. It all depends on where you think the errors in decision making occur and then on suppositions about whether a certain administrative process would detect and eliminate those errors. In the context of administrative agencies, does non-socially beneficial regulation result from bad administrative process? Perhaps so, but it seems just as plausible that it results from wrong-headed statutes or administrator motivation. That is, no matter the process, an agency could make a non-welfare-enhancing policy choice or a welfare-enhancing policy choice. If that's true, we are back where we started: the theory rises or falls on the motives of administrators.

C. Case Studies and Their Limits

Case studies are a critical part of this book. For now, take it as true that Croley has presented several important cases of public-interested regulation. That is, by whatever measure one chooses, the rules the agencies produced

advance the interests of large and diffuse groups while imposing costs on concentrated industry groups. These case studies serve two purposes. One is to offer a critique of public choice theory; the other is to provide support for the administrative process account of regulation. But the case studies cannot bear the weight placed on them.

The case studies do not defeat the public choice account of government regulation. One oddity is that Croley tests for the existence of public-interested regulation at the moment the agency produces its rules, even though in some of the important cases, subsequent events undermined the agency's action. Such examples may support the claim that agencies can regulate in the public interest, but they cannot support the claim that *government* regulates in the public interest. Congress passed a statute that limited the EPA rules in some ways (p. 176). The FDA's rule was ultimately invalidated by the Supreme Court.¹⁶ The Forest Service's roadless rule was significantly limited by the Bush administration (pp. 204–05, 210). Croley opens the black box and holds up what comes out of the agency as evidence against the public choice theory, but a wider frame of reference shows that the agency's action was short lived. Thus, the predictions of the theory (although perhaps not much else) still stand.

But there is a deeper problem. Alongside these case studies any student of government regulation can point to a long list of regulatory actions that are consistent with the public choice account. There are of course the examples that gave rise to Stigler's original account, the economic regulation that protected present market participants from future competition.¹⁷ But there are more. The Federal Communication Commission's regulation of broadcast in the first twenty years of cable technology was widely viewed as protecting the broadcast industry from this new competition.¹⁸ The FDA's food standards of identity limited product innovation and thereby limited competition.¹⁹ The federal land management agencies set pricing for the use of federal lands by ranchers, mining companies, and water users at such low rates that they constitute a massive subsidy to those industries and users.²⁰ The U.S. Department of Agriculture ("USDA"), by itself, provides many examples. Commodities programs subsidize producers at the expense of consumers.²¹ The USDA produces marketing orders that manage the market-

16. Pp. 192–94. *See also* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

17. For a discussion of one example, the licensing of interstate common carriers, see Stigler, *supra* note 7, at 7–10.

18. Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, *LAW & CONTEMP. PROBS.*, Winter 1981, at 77, 78.

19. *See* Christopher Chen, *Food and Drug Administration Food Standards of Identity: Consumer Protection Through the Regulation of Product Information*, 47 *FOOD & DRUG L.J.* 185, 197–98 (1992).

20. *See* Charles Davis, *American Federal Lands and Environmental Politics: Politics as Usual or a New Ball Game?*, 19 *PUB. LAND & RESOURCES L. REV.* 5, 7–10 (1998).

21. *See* David E. Adelman & John H. Barton, *Environmental Regulation for Agriculture: Towards a Framework to Promote Sustainable Intensive Agriculture*, 21 *STAN. ENVTL. L.J.* 3, 11–12

ing of agricultural commodities, eliminating variation and therefore limiting competition.²² The EPA has recently revised its New Source Review program in a way that provides a competitive advantage to certain existing electric utilities operating large coal-fired units in the Midwest. The rules facilitate this by permitting the existing plants to avoid certain pollution controls that new entrants would be required to have.²³

What is one to do with these examples? Croley's case studies of public-interested regulation provide an important critique of public choice theory only if public choice theory predicts that government will *never* regulate in the public interest. Croley, addressing this very objection in Chapter Fifteen, argues that the challenge that Stigler put forward did indeed state that government would never regulate to advance broad interests—"temporary accidents" aside. But despite the memorable phrase, those who followed Stigler and wrote in the public choice tradition have allowed for the possibility that agencies will sometimes regulate to promote broad-based interests at the expense of well-organized industry groups. Among other things, as Croley acknowledges and others noted within a decade of Stigler's article, Stigler's theory could not explain the deregulatory actions that occurred in the 1970s and 1980s.²⁴ And subsequent important work that built on Stigler retreated from his "temporary accidents" point. Sam Peltzman, James Wilson, and Gary Becker all argued that sometimes concentrated interests would lose to broad-based interests.²⁵ Whether they had a convincing explanation for when and why they would is another matter, but post-Stigler work did not assert that government could *never* advance the cause of broad-based interests at the expense of concentrated interest.

Croley is surely right that the account has had enormous influence, including in legal scholarship, and it has now become a casually invoked shorthand. It is often invoked in contexts that have little to do with Stigler's model case, where concentrated interests persuaded government to, for instance, erect barriers to entry and thus limit competition while consumers paid the bill in higher costs. It is instead often used to explain an interest group winning a legislative or regulatory battle—*any battle*. Croley is right then to look past the casual references and carefully set out what the expositors of the theory actually say, as well as to examine the empirical support for the theory. But it is not right to ignore subsequent refinements of the

(2002); Jesse Ratcliffe, Comment, *A Small Step Forward: Environmental Protection Provisions in the 2002 Farm Bill*, 30 *ECOLOGY L.Q.* 637, 648 n.76 (2003).

22. See Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 *SAN JOAQUIN AGRIC. L. REV.* 3, 3-4, 7-8 (1995).

23. See Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 *Fed. Reg.* 80,186 (Dec. 31, 2002) (codified at 40 *C.F.R.* pts. 51, 52).

24. Wilson, *supra* note 11, at 359-60.

25. Becker, *supra* note 11, at 371-73; Peltzman, *supra* note 11, at 211-13; Wilson, *supra* note 11, at 372-75; see also Terry M. Moe, *The Positive Theory of Public Bureaucracy*, in *PERSPECTIVES ON PUBLIC CHOICE* 455, 462-63 (Dennis C. Mueller ed., 1997).

theory. Croley's close examination of the empirical evidence supporting the theory can and does show the theory to be weakly supported empirically. His case studies cannot, however, defeat the empirical predictions of the theory given that, after Stigler, the theory allows for the possibility of socially beneficial regulation.

Perhaps more important, the case studies cannot provide empirical support for Croley's administrative process theory. Unequivocally calling his case studies welfare-enhancing regulation is contestable in all sorts of ways. For one, it depends on the baseline. In each of the cases, industry groups won concessions, in many cases very important ones. That is to say, the regulations did not end up being as welfare-enhancing as they might have been without the power of concentrated interests. So pronouncing them a success depends on comparing the regulation to the status quo ante rather than to some better regulation that might have been possible without concentrated interests.

There is an obvious problem in showcasing only six regulatory decisions out of the many thousands Croley might have picked. As Croley acknowledges, there is a selection bias problem. Assuming these regulations do advance social welfare, how representative are they? What, if any, generalizations can we take from them? Further, the case studies cannot provide support for the theory because they are all examples of welfare-enhancing regulation. The theory claims that administrative process gives agencies autonomy with which they, under *certain conditions*, advance social welfare. But without some case studies where agencies do not advance social welfare, those claims cannot be tested. The reader cannot evaluate the conditions that play a role in producing that socially beneficial regulation. One cannot empirically test a theory, in short, by selecting a few cases and having no control.

CONCLUSION

My complaints and criticisms aside, Croley has written an important and creative book. Agenda number one of this book—a serious critique of public choice theory—is successful in many ways. With great care, Croley lays out the elements of the theory and systematically critiques it. Such a comprehensive corrective is long overdue.

Croley's central contribution to our understanding arises from what he, as a trained student of politics and law, knows best: the administrative agency. Croley's effort to develop and defend his administrative process theory is, while in some ways successful, not ultimately persuasive. Nonetheless, the building block of that theory—the existence of agency autonomy as a result of institutional location and administrative process—is both persuasive and important. By turning our attention away from what he has shown to be wrong, and in the direction of the central and (as he has shown) relatively autonomous player in regulatory activity—the agency—the work counts as a great success.