

## INTEREST GROUPS AND PUBLIC INTERESTED REGULATION

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Steven Croley's scholarly project develops an alternative vision of administrative process, the model of public interested regulation,<sup>1</sup> and applies that new framework to a series of real world examples to test its explanatory power.<sup>2</sup> Croley's work is consistent with much of the most promising legal and political science literature, particularly with a body of scholarship often referred to as institutional theories of the political process or the "new institutionalism."<sup>3</sup> The institutions through which individuals must act, whether singly or as members of groups, profoundly affect their behavior and the outcomes they achieve. Different institutions have different characteristics and operate under different rules and procedures.<sup>4</sup> Moreover, each policy is considered and affected by several different institutions, sometimes simultaneously and sometimes consecutively. Understanding this, players in the political arena will behave strategically, working within and among institutions to align the ultimate policy as closely as possible with their preferences.

Institutions do not appear magically. They are created and shaped by individuals, usually acting in groups. To the extent possible, political actors will try to adopt rules and procedures that allow them to achieve their preferences in most cases and that place obstacles in the way of those who are likely opponents. Procedures are not immutable; they can be changed by the current political players.<sup>5</sup> Change in institutional design can be difficult, of course, and the difficulty varies according to the durability of the procedures.<sup>6</sup> Constitutional rules are relatively durable, requiring supermajority votes at the

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1. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 152-56 (1998).

2. See Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 54-84 (2000).

3. E.g., WILLIAM N. ESKRIDGE, JR., PHILIP P. RICEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 97 (2000).

4. See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 7 (1994).

5. See JOHN B. GILMOUR, RECONCILABLE DIFFERENCES? CONGRESS, THE BUDGET PROCESS, AND THE DEFICIT 230 (1990) ("Congress determines its own rules, and it is fully capable of eliminating procedures and arrangements that do not serve its members' purposes.").

6. See Elizabeth Garrett, *A Fiscal Constitution with Supermajority Voting Rules*, 40 WM. & MARY L. REV. 471, 502-03 (1999) [hereinafter Garrett, *A Fiscal Constitution*] (describing variance in the durability of different procedures shaping the legislative environment).

state and national level to amend; legislative rules can be changed only after meeting several constitutional requirements, such as bicameralism and presentment. Rules set forth by the judiciary can be changed through judicial opinion, although norms like *stare decisis* can limit flexibility. The Administrative Procedure Act,<sup>7</sup> the procedural law that Croley studies, is a combination of legislation (arguably, of the quasi-constitutional type but changeable by subsequent legislative action), judicial decision, and agency practice.<sup>8</sup>

Furthermore, although institutions can change, they cannot change in infinite ways. There is an element of path dependency that affects the possible permutations; new actors are limited by what has occurred in the past and what is accepted by society and other players. Sarah Binder makes this point in her study of the differences between procedures governing the House of Representatives and the Senate.<sup>9</sup> Although policy preferences of the relevant actors affect procedural decisions, “[a]t any given time in a chamber’s history, a set of inherited rules marks the contours of a legislative body.”<sup>10</sup> Changing inherited rules is possible, but there must be both the will to act and a political environment that makes action possible. Both conditions are not always satisfied. For example, stringent budget rules adopted during periods of large federal deficits make it more difficult for lawmakers to enact new spending programs.<sup>11</sup> Although many legislators might prefer a world with different budget rules or no procedural constraints, Congress found it difficult to amass majority support to repeal these rules, even in an era of budget surpluses.<sup>12</sup> Lawmakers feared that voting to repeal budget caps or other disciplining institutions could be portrayed in the next election as symbolic of support for big government or imprudent fiscal policies.<sup>13</sup> Thus, the

7. 5 U.S.C. §§ 551-559, 701-706 (1994 & Supp. V 1999).

8. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 126 (1997) (“[J]udicial review and central executive branch controls often proceduralize in ways that both are unanticipated by legislators at the time of enactment and have general effects across a huge number of policy domains.”).

9. See SARAH A. BINDER, MINORITY RIGHTS, MAJORITY RULE: PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS 13 (1997).

10. *Id.*

11. See Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 503 (1998) [hereinafter Garrett, *Harnessing Politics*].

12. See, e.g., Daniel J. Parks, *Even GOP’s Toughest Budget Hawks Perceive Fiscal Caps’ Time Has Passed*, CONG. Q. WEEKLY, Jan. 29, 2000, at 176 (discussing the difficulty Congress has had in repealing budget caps set in different economic conditions). At the end of the 106th Congress, legislatures did raise the spending caps significantly, but they tried to limit any political fallout by slipping the change into a large appropriations bill. See Daniel J. Parks, *Ballooning the Bottom Line: Blame Enough for Two Parties*, CONG. Q. WEEKLY, Oct. 28, 2000, at 2530.

13. See sources cited *supra* note 12.

political climate made a vote to eliminate inherited rules somewhat costly for elected officials.<sup>14</sup>

Lawmakers and other political players who find particular institutional arrangements inhospitable to their policy goals and who believe that straightforward change is politically impossible have other alternatives. They can seek to manipulate rules and procedures so that they do not operate as roadblocks. Again, the budget process provides a compelling example of interest groups and lawmakers resorting to gimmicks and timing tricks so that they appear to comply with budget rules while still passing laws providing federal benefits to important constituencies.<sup>15</sup> Circumvention may entail costs and may not allow legislative actors to meet their preferences perfectly, but, under certain political conditions, such strategies may be more successful than modification of the institutions themselves.

In some cases, political actors succeed in co-opting institutions and procedures so that they actually facilitate outcomes that the drafters may not have envisioned.<sup>16</sup> Croley notes that the Administrative Procedure Act and related statutes establish a rulemaking procedure that is relatively open to public scrutiny.<sup>17</sup> All things being equal, he asserts, interest groups seeking self-interested outcomes prefer to operate in the shadows.<sup>18</sup> I am not sure this argument is necessarily convincing. If only one interest group is involved in legislation or if all interest groups can coordinate by logrolling, secrecy might benefit them. But if a policy affects many interest groups with adverse or inconsistent interests, groups might prefer relatively open procedures so that they can monitor legislative action, learn of regulatory proposals that might harm them, and work to defeat them. Croley's case study of the regulation of financial services provides an example of an environment of active and antagonistic interest groups.<sup>19</sup> The banking, insurance, and securities industries found the

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14. See Garrett, *A Fiscal Constitution*, *supra* note 6, at 482.

15. See Garrett, *Harnessing Politics*, *supra* note 11, at 526-30.

16. See, e.g., Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUM. L. REV. 702 (2000). The budget process has provided an example of this phenomenon:

In other cases, procedures are adopted in response to public outcry concerning a high-profile issue or for other reasons, but particular members or groups in Congress learn that a byproduct of the new framework is an increase in their clout relative to other congressional players. Thus, they will work to retain and extend the procedures, thereby augmenting their own power and serving their self-interest.

*Id.* at 705; see also Cynthia R. Farina, *Faith, Hope, and Rationality: Or, Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 123-25 (2000) (discussing the difference between causation and opportunism).

17. See Croley, *supra* note 2, at 39-42.

18. See *id.* at 41-42, 46-47.

19. See *id.* at 75-84.

openness of the administrative process conducive to their efforts both to change regulations and to block proposals that would harm them.<sup>20</sup>

Even if Croley's conclusion is accurate and organized groups generally prefer closed policy-making institutions, they may be able to manipulate the more open system to their advantage. In a comparable institutional arena, that of congressional committees, rules requiring public decisionmaking and deliberation increased the influence of organized interests over policy outcomes. "Sunshine-in-government" reforms are ostensibly designed to empower ordinary citizens who can participate more easily in public hearings and can monitor the behavior of their representatives when votes are recorded and public.<sup>21</sup> At the same time, however, interest groups can also obtain better information to ensure that lawmakers are acting consistently with their promises to support legislation that benefits the groups.<sup>22</sup> Because interest groups are organized and often have financial resources, they can monitor lawmakers more easily than citizens, inform other interested persons of relevant votes or behavior, and discipline representatives who do not follow their directives. When committees did much of their work behind closed doors, members could more often diverge from the preferences of powerful interest groups without fear of punishment. Ironically, maximizing opportunities for participation has also maximized the opportunity for strategic behavior.<sup>23</sup>

This example is not the only one that suggests interest groups can manipulate procedures that might not have been designed to empower them. To use a different example that is familiar from administrative law, scholars have argued that the aggressive judicial review of notice-and-comment rulemaking has allowed organized interests to delay and block regulatory initiatives, arguably leading to ossification of the regulatory state.<sup>24</sup> It seems unlikely that the judges

20. See *id.* at 85-87.

21. See, e.g., Government in the Sunshine Act § 3(a), 5 U.S.C. § 552b (1994 & Supp. V 1999) (requiring that every meeting of an agency be open to public observation).

22. See Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1343 (1994) ("The APA, the Freedom of Information Act, the Government in the Sunshine Act, and the extensive provisions for judicial review all ensure that factions have many points of access and influence. Factions monitor intensively; agency space given to public officials has become a point for objection."); see also Dale Bumpers, *How the Sunshine Harmed Congress*, N.Y. TIMES, Jan. 3, 1999, at W9 ("Before government was conducted out in the sunshine, senators could vote as they pleased, good or bad, with little voter retribution on individual issues.").

23. See Easterbrook, *supra* note 22, at 1344 (stating that "[f]actions have ensured . . . that regulations therefore reflect interest groups' strength rather than benefits to the public").

24. See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 95-103 (1990) (explaining how interest groups thwarted efforts to establish auto safety testing guidelines); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483,

who adopted a robust notion of arbitrary-and-capricious review intended to strengthen the position of groups that could remain organized long enough to contest agency decisions and that had the resources to fund litigation. Nonetheless, the process has been used in that way time and time again.

Like institutional scholars, Croley focuses on process and the way that institutional design determines the range of possible policy outcomes. He argues that much of administrative process may work to the disadvantage of organized interests,<sup>25</sup> contrary to the conclusions of some writing in the public choice tradition.<sup>26</sup> Furthermore, he contends that modern administrative procedures insulate agencies from strict congressional control, which may also reduce the clout of organized interest groups if they have disproportionate influence over elected lawmakers.<sup>27</sup> He does not disagree that organized interests are key players in the policy-making game; rather, he argues that they are not the entire story. In that sense, I view his work as consistent with the best scholarship analyzing the legislative and administrative processes. Rather than dismissing this scholarship as “public choice lite,” as Cynthia Farina does in her comment,<sup>28</sup> we can more accurately characterize it as sophisticated analysis of an extraordinarily complex process affected by dozens of players with varied motivations working within and among many different institutions to achieve a variety of objectives. Some public choice literature is reductionistic, in part to focus our attention to one particular feature of the political landscape, but a more complete understanding requires us to use insights from institutionalists, civic republicans, public and social choice theorists, and scholars in other disciplines and fields. The resulting scholarship may be messier than economic analysis relying on extremely simple models, but it more closely captures the reality of the process.

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485-90 (1997) (outlining arguments on both sides of the proposition that judicial review creates ossification); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 760, 766 (1996) (discussing the origins of ossification and effects of modern judicial and administrative developments); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 626 (1994) (giving examples of fear of judicial invalidation as reason that regulatory agencies do not adopt hard and fast rules).

25. As I will discuss later, until Croley articulates his view of the public interest, it is hard to determine the baseline against which to measure any disadvantage suffered by organized interests. Moreover, as the banking case study reveals, interest groups often pursue conflicting agendas. Thus, an outcome that harms one interest group may benefit a different one.

26. See Croley, *supra* note 2, at 12-14 (describing public choice literature).

27. See *id.* at 33-45.

28. Farina, *supra* note 16, at 115; see also Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 9 MICH. L. REV. 1746, 1774 (1998) (using, in a review of Jerry L. Mashaw, *supra* note 8, the term “public choice lite” (in a neutral rather than derogatory sense) for the approach Mashaw favors).

Moreover, Croley's articles should be seen as part of a larger project to construct procedures to channel interest group activity in ways that produce positive outcomes and reduce rent-seeking. Because interest groups are ubiquitous in the policy arena and because organization and financial resources often lead to political clout, it is naïve to design institutions that rely on public-spirited and altruistic individuals in order to work well.<sup>29</sup> Institutions can be designed, however, to shape interest group activity in particular ways and ameliorate its negative consequences. For example, the public comment proceedings during informal rulemaking require interested parties to present vast amounts of technical data to agency administrators, along with reasoned arguments on policy outcomes.<sup>30</sup> A business or organized group may adopt a particular position for selfish reasons—to eliminate or reduce competition, for example—but it cannot successfully present arguments of that type during public deliberation. Instead, it will have to make arguments acceptable under the norms of public discourse. Indeed, because of judicially imposed requirements that shape agency deliberation and decisionmaking and executive orders requiring particular analyses to accompany traditional rulemaking, interested parties must present certain kinds of reasoned arguments with compelling evidence to support them. Thus, the procedures and institutions that shape administrative deliberation produce positive externalities from interest group activity, namely, the production by private entities of information useful to government officials.<sup>31</sup>

Although *Public Interested Regulation* makes a significant contribution to our understanding of the complicated administrative process, it is not a complete story. First, Croley understates the influence of organized interest groups in his three case studies.<sup>32</sup> One of the examples, the Office of the Comptroller of the Currency's (OCC's) decisions interpreting federal statutes liberally to allow banks to enter various nonbanking activities,<sup>33</sup> is best understood as an accommodation of the competing objectives pursued by influential and organized

29. See THE FEDERALIST NO. 10, at 60-62 (James Madison) (Jacob E. Cooke ed., 1961).

30. See CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 195-99 (1994).

31. Cf. Garrett, *Harnessing Politics*, *supra* note 11, at 556-61 (making a similar point about certain budget rules and information about tax expenditures).

32. Professor Croley uses three case studies of recent regulatory initiatives to explore Congress's relationship with the agencies. He considers "the motivations for agency behavior, the role of the administrative process in constraining or liberating agencies, and extra-legislative influences on agency behavior." Croley, *supra* note 2, at 9. The case studies include a discussion of the OCC and the demands of national banks to enter complementary financial service industries, a discussion of the Environmental Protection Agency's decision to create stricter regulations of ozone and particulate matter, and the Food and Drug Administration's decision to regulate tobacco products.

33. See *id.* at Part IV.C.

interest groups. Although the outcome may be in the best interests of consumers and the economy, it also represents the triumph of banks over their competitors. In the other two cases,<sup>34</sup> organized interests may be unhappy with the policies pushed aggressively and successfully by policy entrepreneurs leading the regulatory agencies, but the losing interests have continued to fight the regulations in court. So far, the judicial challenges have succeeded, although in one case it is not yet clear whether the interests of the diffuse and relatively unorganized public will finally prevail over those of narrower business interests.<sup>35</sup>

Second, Croley notes that he has saved for another day the question of how to determine whether particular regulatory policies serving broad-based rather than narrow interests are socially beneficial or socially wasteful.<sup>36</sup> He is right to point to this question as the next puzzle for his project. Thus far he has declined to answer perhaps the most fundamental questions: What is the public interest? Against what baseline should we judge regulatory outcomes to determine whether they are normatively desirable or not? Although the lesson Croley draws from his case studies is that administrative procedures insulate regulators from congressional pressure and allow them to implement public interested regulations, the most we can currently conclude from his work is that procedures appear to empower regulators to implement regulations consistent with their preferences. Whether those preferences mostly, or even usually, align with the public interest remains an open question.

## I

The three case studies presented by Croley concern highly salient issues that caught the attention of all three branches of government, a variety of policy entrepreneurs<sup>37</sup> and, at times, substantial portions of the public. In that sense, they are atypical of most regulatory decisions and may well exhibit unusual characteristics.<sup>38</sup> As Croley continues with his project to determine the prevalence of public inter-

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34. See *id.* at Parts IV.A, IV.B.

35. [Editor's Note: On February 27, 2001, the Supreme Court reversed in part *American Trucking Associations v. EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999) (per curiam). *Whitman v. American Trucking Ass'ns*, 121 S. Ct. 903, 911-14 (2001).]

36. See Croley, *supra* note 2, at 107.

37. A policy entrepreneur is someone "in or out of government who, through adroit use of the media, can mobilize public support by appealing to widely shared values such as a concern about health, safety, or environmental preservation and by making opponents seem self-serving and careless of the public interest." KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 84 (1986). Douglas Arnold refers to these political players as "instigators." R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 30 (1990).

38. Croley acknowledges that "these three [case studies] are not offered as a random selection of regulatory cases." Croley, *supra* note 2, at 54.

ested regulation, he should also describe and assess more commonplace regulatory proceedings. I am unsure what conclusions such studies will support. It may be the case that interest groups are more active when regulatory decisions provoke less publicity, although the notice-and-comment procedure of informal rulemaking works to construct an environment of relatively robust pluralism where the presence of competing and diverse interest groups may minimize the ability of any one to capture the process. Similarly, it is unclear whether congressional control over regulators will be more or less effective in lower profile contexts. The plethora of recent legislative proposals designed to provide Congress with more information about pending regulations and to allow more frequent and less costly congressional interference<sup>39</sup> suggests that lawmakers do not believe that they currently have the ability to conduct aggressive oversight.

However, Croley's focus in *Public Interested Regulation* is directed toward three of the most controversial and well-known recent regulatory initiatives. He concludes that the regulatory outcomes in all three serve the public interest, rather than private-regarding interests of powerful factions, and that congressional control over these initiatives has been tenuous at best.<sup>40</sup> As we revisit his examples, I will explore three additional conclusions. First, an outcome arguably serving the public interest may also be consistent with the objectives of a narrow special interest that has managed to prevail in a costly and vigorous competition. Some public interested regulation is a fortuitous result of the right interest group winning the competition, although the ability of the group to use convincing substantive arguments may well have contributed to its success.<sup>41</sup> Second, an agency's final rule does not necessarily represent the final policy equilibrium. Interest groups may decide to pursue their objectives in different institutions—typically, the courts or the legislatures—once it is clear that they will not prevail in front of an agency. Such a strategy, although costly and not always successful,<sup>42</sup> may be the best option when the regulation has provoked significant public attention and when the effort is spearheaded by a zealous policy entrepreneur at the helm of the agency. Finally, Croley's case studies most persua-

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39. See Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 269-71 (1996) (discussing such proposals in the 104th Congress); see also Croley, *supra* note 2, at 48-49 (discussing such initiatives in Republican congresses).

40. See Croley, *supra* note 2, at 106.

41. Croley makes this point early in his article with respect to the case study of banking regulation. See Croley, *supra* note 2, at 17-18.

42. See generally Linda Cohen & Matthew Spitzer, *The Government Litigation Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391 (2000) (arguing empirically that the government litigant has certain advantages in appeals before the Supreme Court, which reduce the likelihood that an interest group will prevail in that judicial institution).

sively reveal that the framework put in place both by the Administrative Procedure Act and the court decisions interpreting it insulates regulators from oversight by Congress and frees them to pursue their own agendas with relatively little interference during the agency rulemaking. This last observation will lead us finally to a discussion of the meaning of the key term in Croley's work: the public interest served by public interested regulation.

As Croley details, the OCC, along with Congress and the courts, has faced the demands of national banks to enter complementary financial services industries.<sup>43</sup> Of course, national banks were not the only financial service providers hoping to enter new markets with the permission of regulators. Other businesses in this sector worked to offer their customers traditional banking products such as checking accounts and consumer loans. The field of banking regulation has long been characterized by strained statutory interpretations and awkward organizational arrangements, such as intricate networks of related businesses in a bank holding company structure or strange-sounding creatures like nonbank banks.<sup>44</sup> Such unusual business configurations were necessary as banks, securities firms, and other financial services businesses evolved and competed in an environment shaped by an anachronistic set of laws passed in vastly different economic and political times.

Until recently, the laws regulating commercial banks were passed many decades ago when lawmakers were mainly concerned about bank soundness and the specter of widespread bank runs.<sup>45</sup> Legislators (as well as the public and most experts) believed that one way to ensure safety and soundness for depositors was to restrict the activities allowed to banks.<sup>46</sup> Furthermore, legislators, again along with the vast majority of the public, believed that banks should remain small and local and that large national banks not only posed a threat to economic stability but were also somehow un-American.<sup>47</sup> As the country moved further from the Great Depression, however, our no-

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43. See, e.g., Croley, *supra* note 2, at 76-77 (discussing the OCC's decision to allow national banks to sell fixed and variable rate annuities and to allow banks to sell crop insurance).

44. See HOWELL E. JACKSON & EDWARD L. SYMONS, JR., REGULATION OF FINANCIAL INSTITUTIONS 241-66 (1999).

45. See KERRY COOPER & DONALD R. FRASER, BANKING DEREGULATION AND THE NEW COMPETITION IN FINANCIAL SERVICES 145 (1984) (citing deposit insurance as a means of protecting small depositors and small investors).

46. See *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 155 (1970) (discussing the legislative history of provisions limiting activities open to banks).

47. See COOPER & FRASER, *supra* note 45, at 145; Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 507 (2000); Elizabeth Garrett, Note, *The Modified Payoff of Failed Banks: A Settlement Practice to Inject Market Discipline into the Commercial Banking System*, 73 VA. L. REV. 1349, 1353 (1987) (stating that the two objectives of creating the Federal Deposit Insurance Corporation (FDIC) were to protect small depositors and achieve monetary stability).

tions of acceptable banking activities changed. Now, most sophisticated observers believe that banks will be stronger and sounder if they have a diversified portfolio of activities.<sup>48</sup> Regulatory policy need not aim to prevent any bank failure, or even any failure of medium-sized or large banks, in order to protect the economy.<sup>49</sup> Furthermore, activities not traditionally engaged in by commercial banks are seen as less risky and less frightening as more Americans invest in the stock market and own a variety of financial products, many of which are not protected by explicit government guarantees like deposit insurance.

Although our notion of what regulatory policy best serves the public interest has changed over time—assuming that the conclusions of most economists, sophisticated financial commentators, and the public determine the public interest—the laws restricting the activities of commercial banks remained on the books.<sup>50</sup> Congress retained these outdated laws primarily because businesses that would have to compete with commercial banks favored restrictive legislation protecting their market share.<sup>51</sup> Insurance companies and securities firms did not want Congress to allow banks to offer products similar to theirs because they preferred a less competitive market artificially constrained by federal law and regulations.<sup>52</sup> Of course, they seldom made their anticompetitive arguments explicitly; rather, they argued that the public interest was better served by rules that kept banks out of risky businesses like insurance. More liberal rules, they contended, put the economy at risk and exposed the government to the prospect of paying billions of dollars in deposit insurance or other assistance when banks failed and the regulators stepped in to rescue customers. The savings and loan crisis in the 1980s gave these arguments some credibility by providing an example of the government's financial exposure when institutions failed because they had invested in unacceptably risky ventures or entered markets in which

48. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan, and the United States*, 48 STAN. L. REV. 73, 110 (1995) (citing studies which show that banks engaged in securities activities are less likely to fail than those which are not engaged in such activities).

49. See Jonathan R. Macey & Elizabeth H. Garrett, *Market Discipline by Depositors: A Summary of the Theoretical and Empirical Arguments*, 5 YALE J. ON REG. 215, 215 (1988) (arguing that federal banking regulations which encourage depositors to monitor banks' risk levels—and consequently exert their market influence by patronizing only banks that achieve acceptable levels of risk—are sufficient to ensure the safety of banks and protect the economy).

50. See, e.g., Banking (Glass-Steagall) Act of 1933, 12 U.S.C. § 377 (repealed 1999).

51. See Randall S. Kroszner & Thomas Stratmann, *Interest-Group Competition and the Organization of Congress: Theory and Evidence from Financial Services' Political Action Committees*, 88 AM. ECON. REV. 1163, 1170 (1998) (studying the effort to repeal the Glass-Steagall Act as a battleground between commercial banks and investment banks).

52. See *id.*

they lacked expertise.<sup>53</sup> Commercial banks also couched their arguments in public interest rhetoric. Representatives of the interest groups may well have sincerely believed their arguments, or they may have deployed the arguments strategically.<sup>54</sup> Nonetheless, they spurred and participated in a larger public debate about what regulatory policy best serves the aggregate interests of the public in our modern and more global economy.

Even if members of Congress became convinced that the commercial banks had the better argument, they may well have delayed passing more liberal laws because the interest group conflict produced substantial campaign contributions and other benefits to members of committees with jurisdiction over such legislation. Commercial banks provided financial resources to lawmakers in the hope legislation would be passed; insurance companies, the securities industry, and other competitors did the same to preserve the status quo. The latter dynamic is a powerful example of rent extraction. Fred McChesney argues that:

payments to politicians [campaign contributions, gifts, post-tenure employment] often are made, not for particular political favors, but to avoid particular political disfavor, that is, as part of a system of political extortion or “rent extraction.” . . . Because the state, quite legally, can (and does) take money and other forms of wealth from its citizens, politicians can extort from private parties payments *not* to expropriate private wealth. . . . In that sense, rent extraction—receiving payments not to take or destroy private wealth—is “money for nothing” in the words of the song.<sup>55</sup>

In order for rent extraction to work, legislators’ threats to harm interest groups must be credible. The banking context provided an environment conducive to credible threats by lawmakers because powerful interest groups with clout were actively pressuring Congress to pass legislation expanding the range of their permitted activities.<sup>56</sup> Congress did not act, in part, because it could not (lawmakers representing powerful interests could block legislation) and, in part, because it did not want to act (all lawmakers benefited from the competitive interest group environment). In some sense, the regula-

53. Of course, many have argued that the presence of government insurance and other federal regulatory structures actually encouraged savings and loan institutions to increase their exposure to risk in clearly imprudent ways. See, e.g., Macey & Garrett, *supra* note 49, at 215, 218-19.

54. See Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 103, 113 (Jon Elster & Aanund Hylland eds., 1986) (suggesting that, in public discourse, the requirement that at least lip service be paid to arguments about the public good may lead to sincere consideration of such reasons for action).

55. FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 2-3 (1997).

56. See Kroszner & Stratmann, *supra* note 51, at 1170.

tions and judicial decisions altering the landscape only helped lawmakers interested in prolonging the interest group activity because they provided a release when old regulations became too restrictive. Moreover, regulatory and judicial actions kept the area unsettled, providing for many possible legislative fixes over time and encouraging numerous interests to become actively involved in the political process.

In the end, as Croley reports, Congress did act, largely because the competition between the interest groups ceased as a compromise was forged in the wake of OCC rules and judicial decisions.<sup>57</sup> Congressional acquiescence in a transformed financial services sector, characterized by large national banks and financial service providers with diversified portfolios of products and services, has occurred not only in the insurance context, but also finally in the context of investment banking with the repeal of the Glass-Steagall Act.<sup>58</sup> I agree with Croley that the new regulatory structure better serves the public interest, as I understand it, but it also serves the interest of certain strong, organized private interests. The example demonstrates powerfully that the public interest is not necessarily always inconsistent with the interests of private actors. It is not enough to say that a particular interest group has prevailed in order to know whether the resulting policy is good or bad for the rest of us.<sup>59</sup> Furthermore, it is not the case that the old regulatory structure was the result of invidious interest group activity; rather it served an older, now discarded vision of the public interest as well as the private interests of those who opposed more robust competition.

While the OCC example is a case study of powerful and competing interest groups' fighting for years in numerous institutional arenas,<sup>60</sup> the other two examples that Croley offers may present a different

57. See Croley, *supra* note 2, at 83-84.

58. Financial Services Modernization Act, Pub. L. No. 106-102, § 101(a), 113 Stat. 1338, 1341 (1999).

59. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 34-35 (1991) (arguing that interest group activity does not necessarily lead to outcomes inconsistent with the public interest). Croley also notes that "at least part of the time even groups organized to promote a specific trade or industry appear to favor regulatory policies that plausibly do advance broad interests." Croley, *supra* note 2, at 17.

60. To use a typology familiar to students of legislation, the dynamics surrounding policy decisions affecting the regulation of financial institutions provide an example of robust *interest group politics*. The other two case studies appear, in contrast, to provide examples of *majoritarian politics*. See ESKRIDGE, JR. ET AL., *supra* note 3, at 91-94 (drawing on the work of Michael T. Hayes, Theodore J. Lowi, James Q. Wilson, and Mancur Olson to produce a typology of interest group activity in the legislative process); see also Theodore J. Lowi, *American Business, Public Policy, Case-Studies, and Political Theory*, 16 WORLD POL. 677, 688 (1964) (arguing that the political relationship among demanders of the legislative product is "determined by the type of policy at stake, so that for every type of policy there is likely to be a distinctive type of political relationship").

configuration of interests. Croley argues that in the tobacco and ozone/particulate rulemakings, there were on one side organized private interests and on the other broad-based, diffuse, and largely unorganized public interests.<sup>61</sup> In fact, the diffuse interests at stake in both regulations are represented by organized and relatively influential groups, including the health industry and medical establishment, environmental groups, and other public interest groups.<sup>62</sup> Public choice and other interest group theorists have for some time acknowledged that such large groups can form and exert political clout, and they have discussed why environmental groups seem particularly adept in the political realm.<sup>63</sup> Thus, again as in the OCC case study, we may have a situation of competing interest groups in a robustly pluralistic environment. One side won in each rulemaking, and that side supported policy that Croley views as compatible with the public interest. Indeed, we may not be very surprised that large membership groups with influence in every district would be particularly successful in the legislative or executive branches. Organization is only one ingredient for political success; larger, dispersed groups that can overcome collective action barriers to coordinate their members' efforts often have more influence than small groups, even if the latter are more cohesive and disciplined.

But even if we accept Croley's characterization of these two case studies as pitting organized economic interests against diffuse and relatively unorganized public interests, we should add two further conclusions to his case studies. First, it is not clear that Croley's "good guys" have won the policymaking wars, even if they did win the battles of the rulemakings.<sup>64</sup> In both cases, federal courts of appeals struck down Croley's public interested regulations.<sup>65</sup> And, in the tobacco case, the Supreme Court upheld the appellate court, find-

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61. See Croley, *supra* note 2, at 84-85.

62. See *id.* (listing public interest groups and other organized interests that supported the regulatory agenda of the FDA and EPA); see also *id.* at 91-92 (noting that environmental groups have political clout but claiming that they have relatively less influence than private economic interests).

63. See, e.g., JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* 57 (3d ed. 1997) (pointing out that environmental groups specialize in certain areas to attract members); RUSSELL HARDIN, *COLLECTIVE ACTION* 105, 117 (1982) (noting the Sierra Club's effectiveness at raising funds); Christopher J. Bosso, *Adaptation and Change in the Environmental Movement*, in *INTEREST GROUP POLITICS* 151, 154-65 (Allan J. Cigler & Burdett A. Loomis eds., 3d ed. 1991) (examining how environmental issues have remained at the forefront since the early 1970s).

64. [Editor's Note: *American Trucking Associations v. EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999) (per curiam), *modified in part*, 195 F.3d 4 (D.C. Cir. 1999), which held that the EPA rules reflected an interpretation of the Clean Air Act violative of the nondelegation doctrine, was reversed as to the delegation issue by the Supreme Court on February 27, 2001. *Whitman v. American Trucking Ass'ns*, 121 S. Ct. 903, 911-14 (2001).]

65. See *American Trucking Ass'ns*, 175 F.3d 1027; *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 176 (4th Cir. 1998) (striking EPA air quality regulations and FDA tobacco regulations respectively), *aff'd*, 120 S. Ct. 1291 (2000).

ing that the FDA does not have the authority to regulate tobacco.<sup>66</sup> The economic interests harmed by the regulations did not give up the fight; instead, when it became clear that they would not prevail in the informal rulemakings, they shifted their efforts to a new institution. Not surprisingly, the tobacco companies attacked the FDA's regulation in a sympathetic forum—the extremely conservative Fourth Circuit Court of Appeals located in the heart of the country's tobacco-growing region.<sup>67</sup> The opponents of the ozone/particulate regulations faced a less sympathetic group of judges, but the economic interests knew they stood a good chance of convincing an often libertarian court that the EPA's regulation was invalid. Indeed, they won (for the time being) more than they had hoped for, receiving in Judge Williams' opinion an aggressive articulation of the nondelegation doctrine that can be used to strike down other regulatory initiatives.<sup>68</sup>

Of course, going to court is not a certain route to victory, and the strategy means that the economic interests may face more battles before the Supreme Court and then perhaps again before the agencies on remand. But immediately after the rulemaking, it is premature to conclude that private interests have been vanquished by public-regarding regulators—the policy process has not concluded. One of the lessons of institutional analysis and positive political theory is that the process seldom ends definitively; losers can always seek to modify or reverse the decision of one institution by appealing to another. Even if the tobacco industry had lost on the issues of statutory interpretation that convinced a majority of the Supreme Court, it could have challenged the substance of the regulation as arbitrary and capricious or it could have gone to Congress for legislative change. At the least, it would have been able to delay implementation of the regulation until it reached a compromise solution with the political branches. Although every regulatory loser can adopt this strategy of seeking new review in different institutions, organized groups like the tobacco industry or trade organizations are often in a better position to pursue such options because they have the organization to remain politically active for some time and they have the financial resources to hire the best lawyers and advisers.

I am not arguing that the private interests would not have vastly preferred to avoid the rulemaking outcomes that Croley characterizes as public regarding. Certainly, an early victory would have been

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66. See *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1314 (2000).

67. See *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d at 158 (originally filing suit in the federal district court for the Middle District of North Carolina).

68. See *American Trucking Ass'ns*, 175 F.3d at 1030-40. [Editor's Note: *American Trucking* was reversed as to the delegation issue by the Supreme Court on February 27, 2001. *Whitman v. American Trucking Ass'ns*, 121 S. Ct. 903, 911-14 (2001).]

much cheaper and would have had fewer negative public relations ramifications. But given the salience of the issues involved—smoking at a time of strong public disapproval of the habit and the protection of air quality in an era of heightened environmental awareness—the passion of the particular regulators for these rules, and at least the acquiescence of Congress to the agencies' proposals,<sup>69</sup> the economic interests had little choice but to move the battlefronts to other institutions. Nor am I arguing that the final equilibria will necessarily favor the economic interests; the political process is complicated and subject to more than the influence of organized interests. In these cases, which are exceptional for several reasons, the tobacco industry and the businesses burdened by the EPA's ozone/particulate regulations may find their influence limited. My primary point is that organized interest groups have systematic advantages in a world where policy takes a long time to formulate and involves several differentiated institutions.

The third conclusion I would draw from Croley's case studies is consistent with his thesis that administrative procedure insulates agencies from close control by Congress,<sup>70</sup> although I am not sure that the procedure necessarily empowers the representatives of the public interest. In these three cases, and most particularly in the tobacco and ozone/particulate rulemakings, procedure has allowed zealous policy entrepreneurs with strong visions of appropriate regulatory outcomes to adopt regulations consistent with their visions. Croley's stories about Carol Browner and David Kessler reveal strong-willed and talented policy advocates who used their positions to place certain issues on the policy agenda (or in Kessler's case, to take advantage of developments in state courts and other policy forums to move a salient issue higher on the federal policy agenda) and then used the resources of their agencies to adopt solutions that they favored.<sup>71</sup> When Congress delegates substantial power to executive branch officials through broad and vague statutory language and has limited the ability to take the power back or otherwise discipline wayward agency heads, we will sometimes see committed and aggressive policy entrepreneurs using executive branch positions to pursue their own objectives. As long as they follow the APA's procedures and produce reasoned explanations sufficient to withstand ju-

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69. I echo Farina's series of questions to Croley about the position of Congress as an institution on these regulatory outcomes. See Farina, *supra* note 16, at 131-34. At least in the case of tobacco, the legislature was clearly ready to attack the tobacco companies and allow increased interference into their business affairs.

70. See, e.g., Croley, *supra* note 2, at 33 (noting that administrative procedures allow agencies to be autonomous and independent from congressional influence).

71. See Croley, *supra* note 2, at 87. Croley's story of the OCC regulatory decisionmaking also reveals the presence of a strong policy entrepreneur—Eugene Ludwig. See Croley, *supra* note 2, at 79-80.

dicial review under the arbitrary-and-capricious standard, they can shift policy away from the preferences of the enacting Congress toward their personal preferences.

Note that my characterization is not substantially different from Croley's conclusions in his case studies. In circumstances where agency leaders have strong personal commitments, they may be able to reach regulatory outcomes that organized economic interests oppose, and they can often resist a great deal of congressional pressure to reverse course. We do not know what other factors must be present to allow entrepreneurs to succeed; there are surely many examples of agencies led by aggressive and zealous policy entrepreneurs who were not able to implement their priorities. The major difference between my description and Croley's is one of emphasis: Croley believes that administrative procedure frees agencies to reach public interested outcomes; I am comfortable concluding only that in some cases agencies can be manipulated by zealous leaders to implement policies consistent with their preferences. The final question to which this characterization of administrative procedure leads us is the crucial inquiry for Croley in subsequent work in his project: Is the agenda of a policy entrepreneur who heads a regulatory agency and who is relatively immune from congressional influence necessarily—or even usually—consistent with the public interest?

## II

At several places in *Public Interested Regulation*, Croley reaches a conclusion that is compatible with but more expansive than my conclusion that administrative process sometimes allows regulators to implement policies they strongly support. He writes: "Given the nature of the administrative process, particularly in contrast to the legislative process, administrators *motivated by commitments to public interests* can do what similarly motivated legislators may find difficult to do themselves."<sup>72</sup> Of course, procedure does not insulate only public spirited regulators; it insulates all administrators. Thus, to conclude that administrative procedure systematically leads to public interested outcomes, Croley must show that executive branch officials systematically pursue such outcomes. And, as a necessary part of that inquiry, Croley must grapple with the question he identifies but does not analyze in depth.<sup>73</sup> What is a public interested outcome?

This article provides some hints about what Croley means by public interested results. In several places he contrasts the preferences of narrow special interests with the preferences of diffuse, broad-

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72. *Id.* at 27 (emphasis added); see also *id.* at 92 (noting that Browner, Kessler, and Ludwig "pursued their own visions of what public interests required").

73. See *id.* at 106-07.

based groups, suggesting that the latter are public interested.<sup>74</sup> But as he acknowledges in his conclusion, some of the preferences of diffuse, broad-based groups may be socially undesirable.<sup>75</sup> As the American Association of Retired Persons and the National Rifle Association vividly demonstrate in the modern political arena, large, diffuse, but somewhat organized groups can rent-seek as avidly—and often more successfully—than small economic interests. Furthermore, it is not clear to me that policy entrepreneurs appointed to head agencies will systematically represent the interests of the diffuse and unorganized. These entrepreneurs often come from the ranks of the regulated industries and plan to return to that environment, or lobby on their behalf, when they end their public service. I am not claiming that regulators with such backgrounds will act strategically and cynically to enhance their post-tenure employment opportunities—although some doubtlessly will—but only that they may be more sympathetic because of their experience, perspective, and training to the interests of economic groups rather than those of the diffuse public.

Agency heads are also political appointees, and many will try to act as faithful agents of the President, both because he is their boss and because they share his ideological commitments. Thus, Croley might support his conclusion that agency entrepreneurs will work to devise public interested regulations by arguing that the President, with his national constituency, party leadership position, and limited term of office, is better suited to vindicate broad-based interests than are federal legislators.<sup>76</sup> This argument is a familiar one in institutional literature, although it can be overstated.<sup>77</sup> Some states, and therefore the interests that are influential within them, are more important to the electoral success of the President, his successor, and his party than others. He and those who lead his agencies may pay more attention to the preferences of these important constituencies rather than to any notion of the diffuse public interest.<sup>78</sup> Furthermore, although the President can serve only two terms, he is vitally concerned with the electoral fate of his successor who will be responsible for ensuring the longevity of some of his policies. President

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74. See, e.g., *id.* at 84; see also *id.* at 106-07 (acknowledging that these questions are outside the principal focus of his article).

75. See *id.* at 106-08.

76. See, e.g., Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 3; Terry M. Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*, in THE PRESIDENCY AND THE POLITICAL SYSTEM 443, 446 (M. Nelson ed., 2000).

77. See Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 836 (1996).

78. See Benjamin Ginsberg, Walter R. Mebane, Jr., & Martin Shefter, *The President and "Interests": Why the White House Cannot Govern*, in THE PRESIDENCY AND THE POLITICAL SYSTEM, *supra* note 76, at 361, 365-70.

Clinton could not run for a third term, but many of his decisions and actions demonstrated his keen interest in Al Gore's candidacy, as well as his awareness of which states were most important to the outcome in November 2000. Nonetheless, considering institutional differences between the legislative and executive branches might lead to an explanation of why agencies would produce outcomes favoring diffuse, unorganized groups (which in some cases may be public interested outcomes) more often than the legislative branch.

Some policy entrepreneurs appointed to agency positions are drawn from the ranks of the academy. Perhaps these representatives of the intellectual elite are more in tune with the public interest than popularly elected representatives. Perhaps not, however, if the public interest corresponds somehow to preferences of a majority of the electorate. The elite, particularly those isolated in the academy, may not be the best reflection of majoritarian sentiments. Indeed, federal legislators who face frequent elections may well be more adept at aligning policy with the wishes of a majority of the electorate than any other political actors. Perhaps policy entrepreneurs from academic or similar backgrounds are well equipped, however, to construct a deliberative process that will ascertain and shape the objectives of diffuse and large masses of people. We need to know more about the abilities of these leaders before we can comfortably conclude that agency heads can design a system consistent with such civic republican goals. And, if this vision of policymaking is what Croley means by public interested regulation, such a view of public interest must be justified.

In short, the next installments of Croley's project analyzing public interested regulation promise to make significant contributions to the study of administrative law and procedures. First, he and other scholars will present additional case studies, allowing us to test the conclusions he offers here in different contexts. Croley mentions several possibilities for further detailed description, including agency decisions not to regulate.<sup>79</sup> Second, and most important, he will further develop his theory of public interested regulation to determine whether administrators, given the backgrounds they bring to their jobs, the institutions in which they work, and the interaction among regulators, the President, interest groups, and legislators, really do "aspire to vindicate public interests."<sup>80</sup> Vital to the success of his project studying public interested regulation, Croley must present a theory and description of the public interest—only then can we discover if the current administrative process operates to produce public interested regulation or not, and if particular procedural reforms are more or less compatible with the public interest.

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79. See Croley, *supra* note 2, at 106.

80. *Id.* at 107.