

# Well-Regulated

*The future of progressive governance depends on the unglamorous, little-noticed world of regulation.*

---

**REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT** • BY STEVEN P. CROLEY • PRINCETON UNIVERSITY PRESS • 2007 • 392 PAGES • \$65

# F

ederal regulatory action—and inaction—often generates top headlines: “Citizen Vigilance Leads to Toy Recalls”; “Report Faults FDA on Drug Safety”; “EPA Denies California’s Right to Mandate Emissions.” Federal agencies sit uneasily in our system of separated but overlapping branches of government, but they arguably do far more lawmaking than Congress and much more judging than the courts. *CQ Weekly* and the *Congressional Record*, for example, have reported that Congress passed nearly two dozen major statutes and more than 100 other public laws in 2001, respectively; by contrast, according to the Government Accountability Office (GAO), that year cabinet departments, the Executive Office of the President, and independent agencies promulgated 70 major rules and nearly 3,500 other regulations. Law professor Judith Resnik has calculated that the federal judicial branch conducted approximately 85,000 adversarial proceedings, including trials, in 2001; in the

---

ANNE JOSEPH O'CONNELL *is an assistant professor at the University of California, Berkeley, School of Law.*

same period, administrative agencies engaged in over 700,000 such proceedings, including immigration and Social Security disputes.

Especially in partisan times, politicians and the press often label all agency rulemaking and adjudication as either desirable or troubling. In simple terms, they imply that liberals like regulation, while conservatives abhor it. But the reality of regulation is much more complicated. Much depends on who controls regulatory authority, and how they exercise that power. Not surprisingly, debates over agency behavior occupy scholars in political science departments, public policy schools, and law schools. But the regulatory system as a whole, tied to considerable real-world consequences, rarely draws the attention of policymakers, including those who would like to see more stringent federal regulations. As we approach the presidential election—and a new administration and agency leadership—it’s time to consider the benefits and problems of different mechanisms of regulation. Progressives must devote real attention and political capital to ensuring that agencies employ methods that are as efficient, effective, and democratically legitimate as possible.

**T**o libertarians and free-market conservatives, the popular way of viewing the federal administrative state is through public choice theory, which looks at our vast bureaucratic apparatus and sees “iron triangles” everywhere. To them, agencies, Congress, and organized, narrow interest groups form powerful bonds, peddling regulatory initiatives that serve targeted interests at the expense of broader social well-being. Accountability and the generation of social welfare are nowhere to be seen.

In *Regulation and Public Interests: The Possibility of Good Regulatory Government*, Steven Croley, a political scientist and legal scholar at the University of Michigan, offers a more optimistic vision. He conceives of agencies as potentially autonomous institutions that can produce desirable regulatory outcomes, like the ozone and particulate matter rules issued in 1997 under the Clean Air Act. In doing so, he tears down the public choice account of the administrative state and builds an alternative theory of public interested regulation that depends on administrative process. The former effort is formidable, while the latter is admirable, if not completely successful.

In refreshingly readable prose—he is, after all, writing about regulatory theory—Croley carefully dissects the assumptions and empirical validity of the public choice worldview. In its most concentrated form, the theory is an easy target. Drawing on considerable academic work, Croley hones his attack on public choice’s premises concerning interest group formation, including that “interest groups seek regulatory decisions that advance the selfish interests of

their members.” As he demonstrates, while the public choice framework might explain the power of, say, the oil industry, it has never been especially good at explaining the creation, maintenance, and regulatory reach achieved by environmental and consumer groups like the Sierra Club and Public Citizen for broad social goals.

Croley also questions public choice theory’s predictive power by looking at several testable propositions: that organized, narrow interests manipulate agencies and Congress more successfully than other groups; that the negotiations among these narrow interests, agencies, and Congress will not be transparent; that agency decisions will generate minimal public criticism; and that few interests will participate in regulatory decisionmaking processes. Through a series of case studies, Croley undermines these propositions, though larger-scale empirical work might ultimately prove more compelling. His cases examine, among other topics, the Environmental Protection Agency’s (EPA) ozone and particulate matter regulations, the Food and Drug Administration’s (FDA) tobacco restrictions (later struck down by the Supreme Court), and the Forest Service’s roadless rule for national forests (subsequently pulled by President George W. Bush’s administration). In all of these, Croley shows that narrow interest groups did not, in fact, drive the regulatory outcomes, that negotiations were remarkably transparent, that the regulatory process generated considerable debate, and that many interests took part. Croley is at his best when detailing how a wide range of interests fights for specific policies in the administrative state. By the end, we see a very different picture from the one public choice theory paints. Far from involving a small subset of the polity behind closed doors, the administrative process is fairly transparent and open to a diverse set of groups and individuals.

Croley’s book is the latest in a long line of scholarly works critiquing the theoretical assumptions and methodological commitments of public choice. *Regulation and Public Interests* is more than just an attack, however. The book comprehensively develops an alternative theory of the administrative state, one in which agencies wield their authority through various administrative procedures that the public choice account largely ignores—such as the promulgation of rules after the public has notice of a regulatory action and an opportunity to comment (termed “notice and comment rulemaking”), public hearings, and detailed explanations of decisions—to achieve regulatory outcomes Croley considers desirable. Whereas public choice theorists see agencies as dominated by Congress and interest groups, Croley sees them as much more autonomous and able to push through “public interested regulation” (a term whose definition shifts somewhat in the book).

Croley's approach, alternately labeled "public interested regulation" and "administrative process," rests on the premise that agency regulators often act to accomplish "some conception of the public interest." But it also assumes that laws governing agencies leave Congress with little influence over the process, and that presidential oversight and judicial review of actions further diminish Congress's role. Administrative procedures also allow smaller groups to participate along with more powerful groups in the regulatory process. As a result, this procedural framework permits agencies to enact "socially desirable regulatory outcomes." In other words, agencies dominate, a view in direct opposition to the public choice account. Croley spends the rest of his book demonstrating how agencies can enact "good" regulatory outcomes in the face of a "bad" Congress. The government may not be perfect, but regulatory agencies are the ones wearing the white hats.

In a matchup between Croley's public interested regulation theory and public choice theory, Croley's story looks exceptionally promising. But in focusing exclusively on criticism of public choice theory, Croley ignores a critical question: Who actually controls the government? Another academic school—the political institutionalists—argues that agencies are constrained not just by Congress, but by the White House and possibly the courts. The policy preferences of the White House and Congress (sometimes unified, sometimes competing) shape regulatory outcomes, often dramatically. Croley's core claims for his alternative theory are compelling, until it becomes clear that he provides no substantial account for who actually controls the government. This peculiar silence seems at odds with recent events and Croley's own case studies.

Croley relegates the White House to a bit part, one in which the political leadership of the executive branch mostly weakens any interference by Congress in agency decision-making. Tellingly, all the major case studies of socially desirable regulation that Croley marshals involve executive agencies in President Bill Clinton's administration. His smaller examples involve both Democratic and Republican administrations, but many concern independent regulatory commissions, such as the Securities and Exchange Commission (SEC), which arguably have more independence from both Congress and the President than do executive agencies. No example is provided of desirable new regulatory activity by a classic executive agency (led by an appointee who serves entirely at the pleasure of the president and is not appointed to a fixed term) in a Republican administration.

That is not to say that executive agencies under a Republican president do not make efficient, fair, and democratically legitimate regulatory decisions (as

they sometimes do). It is merely to say that political control of the legislature and the White House is a necessary factor to consider, one that Croley underemphasizes. This is where political institutions theory, to which I largely subscribe, comes in handy, insisting that the key to understanding policy outcomes is found in the interaction among the branches, mainly between Congress and the White House.

In Croley's telling, Congress is often detrimental to public interested regulation, and agencies are often the good guys. But even for those who share his generally progressive view of what is in the public interest, things are not so clear. Since January 2007, Congress, and not federal agencies, arguably has been most concerned with protecting social interests in our administrative state, struggling against agencies bent on promoting narrower interests. In recent months, Congress has, for instance, tried to revamp and strengthen the Consumer Product Safety Commission (CPSC) in the face of opposition from the White House and the agency's own leadership. Even though the agency admittedly cannot meet growing demands for inspections (especially of products coming from abroad), the Commission's acting chair explicitly asked Congress not to give the agency more money. This is an example not of an agency promoting the public good, but of one driven by the political pressures of an anti-regulatory White House to damage it.

**W**hat does this all mean in the real world? Croley's provocative account justly focuses attention on two aspects of the administrative state that deserve wider consideration, especially as we approach the 2008 election: agency leaders and agency procedures. To Croley, many agency leaders care deeply about social welfare, and agency procedures provide important opportunities for transparency and public participation in the regulatory system. He is right that good agency leaders and agency procedures are necessary for efficient, fair, and legitimate regulatory outcomes. Croley misses, however, some of the complex realities of federal institutions, and thus overlooks the ways in which progressive policymakers can work to make them more accountable and effective.

For one, as the performance of the Federal Emergency Management Agency (FEMA) during Hurricane Katrina made clear, we need qualified and trained agency officials who stick around government long enough to push through desirable regulatory policies (a concern Croley essentially dismisses). We know surprisingly little about who serves in top executive agency positions across a range of recent administrations, including the current one, other than information such executives have voluntarily submitted to the Senate and academic

surveys. We need to know if individuals who serve in key positions in the administrative state are qualified and accountable, and if not, we need to develop ways to make sure they are.

Congress could enact additional statutory requirements for particular positions (for instance, experience requirements for a specific office). In the aftermath of Hurricane Katrina, for example, Congress mandated that the head of the FEMA have emergency management and executive leadership experience. The constitutionality of such requirements, particularly for core executive positions, is not entirely clear. But it's worth pushing for them in many circumstances. The next President can also improve the quality of agency leaders he or she selects by investing more time during the presidential transition to considering non-cabinet level positions. In the meantime, we can press presidential candidates to promise that they will appoint qualified leaders to agencies and to say now whom they might nominate so voters and the media can assess them.

Assuming we can get qualified individuals into important agency positions, they also need more comprehensive training, not only about their agencies, administrative law, congressional oversight, and White House regulatory review procedures, but also about media relations, management, and other executive skills. Many members of Congress attend intensive orientation sessions; so too should top-level bureaucrats.

Qualified, trained agency leaders then need to stay put to engage in meaningful regulatory activity. Their average tenure is far shorter than the tenure of members of Congress or the federal judiciary, despite their extensive lawmaking and adjudicatory responsibilities. Research by political scientists Roger Davidson and Walter Oleszek has found that, as of the start of the 108th Congress, the average member had spent almost 11 years in the House of Representatives and the average senator had provided almost 16 years of service. Federal judges enjoy life tenure. The average tenures of Supreme Court Justices who retired between 1970 and 2004 and lower court federal judges who retired between 1983 and 2003 were, legal studies show, 25.6 years and 20 to 25 years, respectively. On the other hand, agency leaders seem to stay for “a social season and a half and then leave,” as one Eisenhower staff member quipped. Looking at all Senate-confirmed agency appointees from October 1981 to September 1991, the GAO found that the median appointee tenure was 2.1 years. Researchers at the RAND Corporation determined that from 1949 to 1999 most top-level appointees

**Federal agencies arguably do far more law-making than Congress and much more judging than the courts.**

in the Defense Department served only 11 to 20 months. To encourage agency leaders to remain in government for more than two years, we should be open to a range of reforms, including increasing salaries and benefits, streamlining the nomination and confirmation process, and, in some instances, giving agency heads more policy authority.

Leadership is just one necessary component of a desirable bureaucracy; agency operating procedures are another. In Croley's view, agency procedures such as notice and comment rulemaking are paragons of democratic legitimacy, particularly when contrasted with the relatively opaque communications between Congress and interest groups (as he sees them). But just because such tools exist doesn't mean they get used. In fact, in recent administrations some agencies have increasingly enacted policies without providing prior notice and opportunity to comment at all. They instead turn to such items as guidance documents and interim and direct final rulemaking, which skip traditional notice and comment procedures at the front end, or to informal adjudications. The GAO estimates that approximately half of the final regulatory actions listed in the *Federal Register* in 1997 were completed without prior notice and comment. Public policy professor Stuart Shapiro has found that about 40 percent of rules promulgated in November and December 2003 were direct or interim final rules. Statutory deadlines for prompt agency action seem to encourage agencies to forgo notice and comment procedures. Sometimes, skipping notice and comment is justified (for emergency reasons or for routine announcements); sometimes it is not. But the result is the same: less public input, and an increasingly opaque agency rulemaking process.

Of course, some agency procedures that increase outside involvement may even be detrimental to good regulatory governance. The Data Quality Act, two sentences snuck into an appropriations bill in 2000, allows interest groups to challenge the reliability of agency information. In a 2004 series, the *Washington Post* demonstrated how industry groups have become skilled at using the Act to introduce "uncertainty" into scientific decisions by agencies to the detriment of larger social concerns. For instance, the makers of a popular herbicide called atrazine—which scientific research has linked to cancer and hormonal disruption in animals—escaped regulation because the Act allowed them to introduce doubt about the scientific community's findings. White House regulatory review, as recently strengthened by Executive Order 13,422, also provides opportunities for arguably beneficial regulatory initiatives to be halted. In May, the National Oceanic and Atmospheric Administration (NOAA) submitted its proposed rule to limit the fishing of krill, a marine species and important food source for whales and other animals in the Pacific Ocean. But the Office of Information

## WELL-REGULATED

and Regulatory Affairs (OIRA), which leads the White House regulatory review process, rejected the rule in November. The same executive order also requires the agency regulatory policy officers who coordinate with OIRA on regulatory review to be political appointees. This new provision undermines transparency and good regulatory governance, and it should be repealed. Instead, we need regulatory procedures that encourage public participation and foster transparency (while balancing their ability to delay regulatory outcomes), and we must shy away from policymaking mechanisms that bar prior public comment unless they are truly needed.

We cannot lose sight of the immense policy repercussions of agency regulatory activity and inactivity, and the ways in which intellectual developments can help guide policymaking. Nor can we wait until we find the perfect theory of regulation to act. Because no matter what happens in November 2008, the administrative state will shift, perhaps considerably, opening the possibility for real change in the way the government constructs, staffs, and monitors regulatory agencies. And it is then that we can—and must—push for reforms to improve regulatory governance, the often overlooked, but critical part of creating the rules that govern our country. **■**