*ESSAY*

# ENVIRONMENTAL LAW AND THE REGULATORY STATE: POSTMODERNISM REARS ITS "UGLY" HEAD?

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## I. INTRODUCTION: BASIC THEMES

The basic theme of this Essay is that the best explanation of the environmental law embedded in the regulatory state is postmodernism. I have defined postmodernism as a movement that resists definition, and which may be described as an attitude or an aesthetic. In opposition to the Enlightenment tradition of grand theory and foundationalism which purports to establish incontestable starting premises, postmodernism cautions against the use of reason as an arbiter of value choices.[1] Using deductive logic, legalists may claim to produce "answers" that resolve

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[1] *See* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISDPRUDENCE AT CENTURY'S END, 224 (1995) (expressing a fundamental skepticism about the possibility of a theoretical elucidation of jurisprudence); KEN VINSON, THE CASE AGAINST THE LAW: LEGAL JARGON, LEGAL LEARNING, AND LEGAL LEGERDEMAIN (2004). Vinson, though not a postmodernist, states that the inherited idea that there is a single correct answer to legal disputes is a hoax. *Id.* at 3, 128 (arguing that law does not contain true answers). Professor Ronald Dworkin, a preeminent jurisprudential thinker, holds that there is often one right answer to legal disputes. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 279–90 (1977); *see also* John W. Van Doren, *Theories of Professors H.L.A. Hart and Ronald Dworkin—A Critique*, 29 CLEV. ST. L. REV. 279, 306–07 (1980) (criticizing Dworkin's one-right-answer position).

disputes or explain phenomenon once and for all.[2] In short, postmodernism celebrates, or at least identifies as very significant, the fluid, the mercurial, and the flow while rejecting methodological or substantive truth claims as dispositive.[3] While postmodernism shares certain critiques of classical Enlightenment-based legalism with legal realist jurisprudence, there may be important differences. Both legal realism and postmodernism appear to share the idea that legalism is obfuscation for decisions made on grounds not often revealed.[4] Postmodernism differs from legal realism insofar as legal realists claim that answers lie in a pragmatic common sense or rationalism applied to social, economic, or political policies.[5] In its celebration of the ironic and the paradoxical, postmodernism rejects the claim of legal realists and others who hold that they can extract "right answers" by applying reason to policy considerations.[6] Accordingly, postmodernism may be upsetting to traditional mindsets in legal discourse that emphasize the stable and predictable element in law.

The inherited legal tradition includes the legacy that legalism

[2] *See* MINDA, *supra* note 1, at 2, 224. Postmodernism is suspicious of classical ideas about reason, objective truth, grand narratives, and so on; it sees the world as ungrounded, unstable, and indeterminate. TERRY EAGLETON, THE ILLUSIONS OF POSTMODERNISM, at vii (1996). Postmodernism believes we should celebrate differences and plurality. *Id.* at 32. Eagleton gives a helpful description of postmodernism, accepts some of its insights, and is critical of others.

[3] EAGLETON, *supra* note 2, at vii.

[4] *See* VINSON, *supra* note 1, at 55–58, 128 (arguing that legalist pretensions are obfuscation of decisions that are and should be made on social, political, and moral grounds).

[5] *See id.* Ken Vinson is a card-carrying legal realist and acolyte of former Yale law professor Fred Rodell. Vinson properly trashes the obscurantism of inherited legalism, but advocates "rational" policy planning including political science, economics, ethics, common sense, and so on to fill the gap once the amorphous rules of law are removed. *Id.* at 128; *see also* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1114–16 (1997) (arguing that changes in political ideas, e.g., Public Choice, may affect the entire administrative process more than the occasional Supreme Court decision on standing).

[6] *See* VINSON, *supra* note 1, at 3; *see also* MINDA, *supra* note 1, at 5 (noting that ironists find paradoxes of postmodern life and embrace them). Postmodernism would be reluctant to accept that there are propositions which are true at all times and which are not vacuous and trivial. *See* EAGLETON, *supra* note 3, at 112. In this Essay, I join Vinson in his critique of the obfuscation caused by legal rules that are indeterminate and amorphous. However, I argue that political science and economics, not to mention ethics and "common sense", have as much, and perhaps more, indeterminacy than what they might replace.

produces a *corpus juris*[7] that yields both neutral and predictable answers to potential legal disputes. I try to illustrate the instability of the thesis of legalism by referring to my own lack of predictive ability, as I was unable to anticipate the extension of an effective regulatory state to the environmental arena. Thus, my emphasis on common law remedies[8] in a former writing was in retrospect misplaced, since the regulatory state eclipsed common law remedies. I place this in the context of the times and thus suggest that sometimes, and perhaps often, we should expect the unexpected.[9]

In this Essay, I argue that the fluidity and instability of the environmental law embedded in the regulatory state is representative of fundamental and insoluble conflicts inherent in both the project of environmental law itself and the regulatory state more generally. To illustrate this thesis, I discuss briefly and anecdotally the competing norms that inform the conflicts between pro-development and pro-environment mindsets. I glance at possible impacts of religion and psychological explanations of the conflict between development and conservation of the environment, such as the aggressive acquisitive instinct and socializing instinct.[10] I find these explanations inconclusive and suggestive of irresolvable conflicts. Thus, I suggest that the environmental law administered by the regulatory state is beset with antinomies and conflicts, and has no essence to which it could be true, if that desire were even present.

To illustrate these themes more broadly, I move to the ebb and flow of the regulatory state, borrowing from Professor Thomas Merrill his tripartite division.[11] In Period I, during the New Deal, continuing to circa 1967, we see a shift in paradigm to an active

[7] *See* VINSON, *supra* note 1, at 49, 130 (arguing that legal formalism falsely boasts neutrality and predictable answers); MINDA, *supra* note 1, at 37–40 (summarizing argument of Harvard Legal Process School as stressing neutral principles).

[8] *See* John W. Van Doren, *Air Pollution—Expanding Citizens Remedies*, 32 OHIO ST. L.J. 16, 24–25 (1971), *reprinted in* CORP. COUNS. ANN. 943 (1972) (touting common law remedies and modified judicial attitude); *infra* Part III.A. For an account of the eclipse of common law remedies by the regulatory state, see *infra* notes 65–71 and accompanying text.

[9] *See infra* notes 58–61 and accompanying text.

[10] *See infra* Part II.

[11] *See* Merrill, *supra* note 5, at 1045–74. I will refer to this division in the following manner: Period I, public interest; Period II, capture theory; Period III, cacophony.

government dealing through an expanded set of administrative agencies.[12] These New Deal adherents developed doctrine to insulate agencies from conservative backpedaling, relying on doctrine such as limited judicial review and limited standing for would-be participants,[13] and stressing agency autonomy based on expertise.[14] In Period II, circa 1967–83, the paradigm shifted as regulated industries achieved some degree of "capture," which critics defined as undue influence over some of the regulatory agencies.[15]

Accordingly, judicial deference to agencies was replaced around 1970 by the courts' "hard look" review.[16] Courts required reasoned elaboration of administrative agency rulemaking decisions to facilitate their review.[17] The expertise model was jettisoned, and the emphasis was on counteracting "capture" with a more open process.[18] Citizen groups and other non-regulated parties were given standing to participate during and after agency rulemaking.[19] Congress promoted citizen participation by attaching citizen standing provisions to virtually all environmental statutes.[20] In summary, in Period I, a dominant justification for the regulatory state was expertise. In Period II, the emphasis shifted away from expertise to court supervision and reasoned elaboration of principles.

In Period III, circa 1983 to the present, there is a cacophony as many voices compete to attempt to direct policy.[21] Some

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[12] *See infra* Part III.B.2.a.

[13] *Id*.

[14] *Id*.

[15] *See infra* Part III.B.2.b.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *Id.*

[20] Congress, indicating concern about "capture," created and continued to reauthorize citizen actions in virtually all major environmental administrative statutes. *See* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 83–84, 84 n.5 (2002). Some courts favored environmental citizen actions not only because of fear of capture, but because they feared administrative lack of enthusiasm and laxity, and wanted to compensate for what was perceived as weak political influence of beneficiaries. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 n.11, 183–84 (1992).

[21] *See infra* Part III.B.2.c.

commentators have declared the administrative process has become unable to function properly due to ossification. These commentators reason, inter alia, that too many state requirements are imposed on agencies and there is too much "standing" for "outsider" participation.[22] Some commentators seeking to bolster the regulatory state have revived the movement of Civic Republicanism and stressed "neutral" values such as deliberation.[23] Thus, Civic Republicans may justify court review on the basis of a need to encourage deliberation and suggest a remand to the agency where appropriate deliberation could not be shown.[24] But Civic Republicans split on the question of "outsider" participation, with some adherents claiming it unduly hampers deliberation.[25] Thus, a model setting out to justify the regulatory state by neutral principles finds itself immersed in the competing "neutral principles" of deliberation and participation. Put another way: how much deliberation should be allowed, and who should get to participate?

Civic Republicanism's reliance on "neutral principles" involves an attempt to keep policy and politics out of the process of arbitration between values. This attempt to keep policy and politics out of the process, perhaps desirable as a legal ideal, seems to have failed in practice.[26] With its emphasis on reasoned deliberation, moreover, some Civic Republicans reveal the investment they make in the modernism of the Enlightenment.[27] Postmodernism discredits such moves, finding that reason is a

[22] *See infra* notes 137, 139, 153–65 and accompanying text.

[23] *See infra* notes 120–65 and accompanying text.

[24] *See infra* notes 157–61 and accompanying text. The emphasis on deliberation is questionable. *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 198–207 (3rd ed. 1996). The natural scientist Thomas Kuhn addresses himself to changes in science from one paradigm to another, e.g., from the Ptolemaic geocentric paradigm to the heliocentric Copernican scheme. Kuhn advises that changes in natural scientific paradigms are like changes in social science paradigms. Changes in political paradigms pit one model of community life against another incompatible scheme. The change cannot be made on logical grounds alone by an observer who refuses to step inside and adopt the premises of the rival paradigm. The standard of acceptance is and must be the acceptance of the relevant community. The adversaries still have something to say to each other but query how much. Kuhn expresses skepticism that incommensurable viewpoints can be settled by verbal argument. Hence, at some level in social science also, deliberation is useless.

[25] *See infra* notes 157–65 and accompanying text.

[26] *See infra* notes 137–46 and accompanying text.

[27] *See supra* note 2; *infra* note 72 and accompanying text.

flawed tool to arbitrate between conflicting values, policies, and politics.

In Period II and continuing in Period III, another voice, referred to as Public Choice, came forward to critique the regulatory state.[28] Public Choice adherents "capture" the concept of "capture" and report a system-wide perversion of government institutions and practices.[29] That alleged malfunction is based on grand theory borrowed from economics.[30] The underlying message seems the same as that of the early New Deal conservative Court: Beware of the regulatory state, restore competition, and let the laissez faire market prevail.[31] So, the major current debate, though sometimes not explicitly joined, is between Civic Republicans, along with other defenders of the regulatory state, and the Public Choice advocates.[32] The Civic Republicans and other regulatory state adherents tinkering with this or that standard of judicial review of agency actions may be descendants of the Harvard Legal Process School and, ironically, the McDougal-Lasswell Policy Science approach.[33] Civic Republicanism (or Policy Science) claims to have found dispositive neutral principles in high-level abstraction of law or policy are doomed to failure. For example, while these defenders of the regulatory state are busy modeling it with "neutral principles," which purportedly exclude politics, they disagree on such important matters as the trade-off between participation of citizens groups and agency-controlled "deliberation."[34]

Other commentators, largely rejecting "neutral principles," focus on political results, for example those that may flow from "hard look" judicial review. These commentators, shedding the opaqueness of "neutral principles," bring forth an occasional ray of light. The occasional critic noticing possible political

[28] *See infra* notes 107–19 and accompanying text.

[29] *See infra* notes 108–13 and accompanying text.

[30] *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 890–901 (1987) (borrowing economists' theory of self-interested behavior for Public Choice analysis).

[31] *See infra* notes 111–13 and accompanying text.

[32] *See infra* notes 167–69 and accompanying text.

[33] *See infra* note 130 and accompanying text. I say ironically because the Legal Process calls for reasoned elaboration produced generally conservative results and, as invoked by Civic Republican adherents, may produce more liberal results.

[34] *See infra* notes 120–65 and accompanying text.

ramifications, points out that during the Warren Court era, the court decisions were pro-environment, and, after the appointees of President Nixon and other Republican presidents took hold, the results became pro-development.[35] Another critic not as mesmerized by "neutral principles" notes that at present the federal judiciary is largely Republican-appointed and designed in some instances to stifle the environmental movement.[36] Accordingly, continues the critic, decreeing "hard look" judicial review, at least when he wrote, may play into the hands of the current anti-environment effort.[37]

However, even those who openly concern themselves with political consequences seem mesmerized by the semantic legal tests, such as the review standard.[38] Some commentators assume the current standard, namely the *Chevron* standard, of court review of agency determinations could somehow be made to be apolitical. But in practice, that standard is in fact manipulated and applied at random.[39] So if it is true that many results are political or policy driven, then there is an air of unreality about this medieval scholasticism, which is continually debating the stylistic intricacies of this or that review standard or other legal test.

This Essay, then, attempts to suggest that environmental law, embedded as it is in the regulatory state, fits the model of postmodernism. The administrative state's environmental arena displays many perspectives and no generally accepted "grand theory." Public Choice, for example, aspires to grand theory domain. The logic of the theory would lead to abolition of the regulatory state and return to the laissez faire condition prior to the New Deal. Public Choice fails to capture the complexities of decision making by government actors, and it has yet to show that an unregulated market solution is superior to the regulatory state. What results is fluid, contradictory, ironic, random, and illusive: in short, subject to policy forces usually considered outside traditional legalism. The relevant forces of sometimes helter-skelter policy-making often determine environmental decisions.

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[35] *See infra* notes 131–36 and accompanying text.

[36] See reference to Professor McGarity, *infra* note 137 and accompanying text.

[37] *Id.*

[38] *Id.* Professor McGarity, for all his realism, cannot seem to resist tinkering with the review standard.

[39] See *infra* notes 142–50 and accompanying text.

These forces may operate in the teeth of the portrait traditional legalism presents of a legal order of predictable results flowing from fundamental principles or rules contained within traditional legal materials. This Essay elaborates on the themes briefly suggested in this introduction.

## II. ENVIRONMENTAL LEGAL STANDARDS AS A REFLECTION OF ETHICAL NORMS

### A. *Relevance and Discussion*

In what follows, I want to suggest, in very anecdotal fashion, some of the broad conflicts in society and individuals about environmental matters.[40] It is not controversial that legal standards may reflect a society's ethical and moral values.[41] Environmental law, for example, broadly reflects a pro-development ethic based upon an anthropocentric conception of nature pitted against a pro-conservation ethic that relies on a more holistic conception of humankind's place in nature. These policy conflicts can be traced to value conflicts in the body politic and the individual, and indeed are mirrored in the variety of doctrine that exists within environmental law. For example, some commentators have attributed the side of humans that seeks to exploit natural phenomena to the Judeo-Christian ethic.[42] Dissatisfied with some

[40] For a further discussion of these conflicts, see generally AN ENVIRONMENTAL LAW ANTHOLOGY (Robert L. Fischman et al. eds., 1996); J.B. Ruhl, *The Case of the Speluncean Polluters: Six Themes of Environmental Law, Policy, and Ethics*, 27 ENVTL. L. 343 (1997) (setting out six hypothetical court opinions from the year 4310 A.D. based on contrasting theories such as "property rights" and "sustainable development"). Professor Ruhl's article offers a succinct examination of the different approaches to legal environmental policy and a helpful list of suggested readings. It is cited here as an introductory essay to readers unfamiliar with the basic approaches examined in this essay. Professor Ruhl's work takes as its model an essay by Professor Lon Fuller. *See* Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

[41] Lynn White, Jr., *The Historical Roots of Our Ecologic Crisis*, 155 SCIENCE 1203, 1203 (1967).

[42] *See id.* at 1205 (stating that historically unprecedented anthropomorphic conception of God includes idea that humans appropriately dominate nature for their own satisfaction). We are reminded that Genesis advises us to be fruitful and multiply, and that the external world is there to be dominated. *See* White, Jr., *supra* note 41, at 1206–07 (discussing Christian dogma that nature has no reason to exist except to serve man). *But see* Diane L. Coutu, *I Was Greedy, Too*, HARV. BUS. REV. Feb. 2003, at 38, 41 (stating that Christ warned followers against wealth acquisition and that St. Paul wrote that love of money is the root of all evil). Aspects of Christian teaching may be suggestive, but it is not clear to

of these teachings of the Judeo-Christian ethic, other writers have evolved a substitute ethic that can be referred to as the Leopold Land Ethic.[43] The Land Ethic involves a shift from regarding the earth and what sustains it solely as economic resources subject to self-interested exploitation. The tilt of the Land Ethic is to land use decisions that display an ethic of respect for the integrity, stability, and beauty of physical nature as an aesthetic end in itself.[44]

### B. *Policy Conflict Reflected in Environmental Norms*

The purpose of this Section is to continue to explore the dichotomy in norms in the environmental area, which illustrates the lack of foundational structure. The policy conflicts found in the *polis*, as related above, are reflected in the broad norms used to guide the selection of law in the environmental area. One approach refers to the Land Ethic,[45] stressing the environment as the central value relative to competing interests.[46] Other approaches rely on cost-benefit analysis.[47] Still other courts and commentators rely on or promote broad categories of values including sustainable development, property rights, and free market approaches applied to the administrative state. Still others argue that a free market approach to the regulatory state may have

me that Christianity alone has inculcated a fundamental ethic that places persons in a preferred position over the ecological cosmos. Both Max Weber and R.H. Tawney made a convincing case for the influence of religious ideas on economic behavior, but they allowed that there were other causes, and there remains agnosticism as to whether religion affected capitalism, or the reverse. *See* R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 218–23 (Penguin Books ed. 1975) (1926) (noting that some Protestants, particularly within Puritan sects, find Christianity as consistent with and encouraging of capitalist achievement); MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 160–61 (Talcott Parsons trans., Roxbury 2d ed. 1998). However, like Weber, Tawney sees capitalism as also affecting Puritanism. *Id.* at xiii., He sees this interaction as only one factor in the rise of capitalism. *Id.* at 275.

[43] *See* ALDO LEOPOLD, *The Land Ethic*, *in* A SAND COUNTY ALMANAC 237, 238–39 (Ballantine Books ed. 1970) (1949); *see also* Sierra Club v. Morton, 405 U.S. 727, 752 (1972) (Douglas, J., dissenting) (citing *Land Ethic* to support his dissenting opinion that Sierra Club should have been granted standing in their attempt to foreclose ski resort in semi-wilderness area).

[44] *See* Ruhl, *supra* note 40, at 357–61; LEOPOLD, *supra* note 43, at 238–39.

[45] *See* Ruhl, *supra* note 40,at 357–58; LEOPOLD, *supra* note 43, at 238–39.

[46] S*ee* Ruhl, *supra* note 40,at 364–66.

[47] *See id*. at 344–53 (discussing cost-benefit analysis).

a discriminatory effect on the poor.[48]

The various normative approaches to environmental regulation result in a wide diversity of policy prescriptions. For instance, a difference between the free market and property rights proponents is that the free market advocates may want government to address market imperfections.[49] Advocates of sustainable development propose a balancing of pro-development and pro-environment concerns. This balance falls short of the Leopold Land Ethic, but also does not fulfill the expectations of the free market or property rights approach. The operative word here is "sustainable," and the vagueness that makes the standard useful has the disadvantage of comparing incommensurate or even immeasurable values, which also makes that cost-benefit analysis problematic. For example, it is hard to evaluate the benefit of the peace one feels in a pristine environment or measure the value of clean air or the song of the endangered bird.[50] Moreover, advocates of "sustainable development" may tacitly and mistakenly assume that current consumption levels are a given which should be accepted.[51]

The property rights proponents are likely to be hostile to government regulation and law that interferes with the market or private property.[52] Property rights advocates would confine remedies to common law remedies such as nuisance or those which address public health problems, e.g., those caused by toxic waste.[53] Proponents of the free market mindset stress maximization of human wealth and pleasure and promote a private market free of government regulation.[54] The 1978 deregulation of

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[48] *See id.* at 351–52; *see also* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 105–06 (1994) (arguing that market approach to administrative process discounts lower socioeconomic groups).

[49] *See* Ruhl, *supra* note 40, at 356.

[50] *See id*. at 352 (arguing that market value of endangered song bird is hard to determine).

[51] *See id.* at 365 (arguing that there is need to alter consumption patterns).

[52] *See id.* at 352 (arguing that property rights emphasis puts government in role of bystander).

[53] *See id.* at 362–63 (arguing that administrative state should pay for excesses of regulation); Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435, 1461–62 (critically discussing Professor Epstein's property rights approach).

[54] *See* Ruhl, *supra* note 40, at 361–64 (arguing that hypothetical "property rights"-oriented justice complains of limiting extraction of important substance

the airline industry may be an illustration of this free market mode.[55] From a different position on the spectrum, critics in the environmental law area argue that the free market may be an impediment to social justice because it is part of racial and economic oppression producing allocations of resources disadvantageous to the poor.[56] These critics argue that resources allocated to environmental protection and enhancement facilitate middle- and upper-class values, which promote non-urban wilderness at the expense of low-income living conditions, sanitation, and health problems.[57]

In summary, results in environmental law cases may differ depending on the emphasis given to conflicting normative approaches. These concepts shape the legal doctrines chosen to decide disputes, reflecting, as they do, a diverse set of values. Moreover, if decision makers remain the same, there may be some stability in short or medium time frames. But where decision makers change, marked fluctuations may occur, for example, between the polar concepts of the Land Ethic on one hand and property rights on the other hand. These shifts lead to unpredictability because the legal system is not based on the sort of fundamental principles necessary to produce determinant results arrived at through discursive or deductive reasoning.

## III. THE REGULATORY STATE EXTENDED TO THE ENVIRONMENT

### A. *Law Professors and Prediction: The Environmental Movement Produces Unpredictable Surprises*

This unpredictability and fluidity in the environmental area is illustrated well by my personal experience. In the early 1970s, as a

as wrong because limitation curtails rights of private property); *see also id*. at 365 (assuming role of hypothetical "Justice" to criticize property rights, cost-benefit analysis, free market, and limited government as merely maximizing human wealth and pleasure).

[55] *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1324–25 (1998).

[56] Ruhl, *supra* note 40, at 352.

[57] *See id*. at 366–68; Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 815, 857 (1993) (noting that air and water pollution improvement expenditures and expenditures on visibility in national parks may prevent money from being better spent to reduce lead poisoning in minority communities; arguing that civil rights and the effect of environmental rights on the poor should be considered together).

teacher of environmental law, I wrote about the expansion of common law doctrines such as nuisance and the public trust doctrine and did not foresee the extension of an effective regulatory state into the environment arena.[58] It may be that law professors are not the best persons to ask about the potential direction of law.[59] One problem is that often legal scholarship may contain a carefully disguised normative element of subjective reaction to law in the field addressed.[60] Later events will prove or disprove the ascendancy of these political preferences. Thus, postmodernists can question whether law professors are not just stating their own preferences under the guise of legal or economic science. Power wielders, not professors, put content in the crystal ball. In any event, law professors are often not good prognosticators because they are more accustomed to dealing with the legal arguments with which incremental changes or existing practices might be expressed.[61]

As mentioned in the Introduction, the legal system we inherit carries the presumption of a scientific component in which legal developments are presented as rational and predictable. For

[58] *See* Van Doren, *supra* note 8; *see also* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 680, 715–16 (1986) (noting that public trust doctrine was rendered largely obsolete by advent and extension of administrative state into environmental law prior to and during the 1970s); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 459–61 (1972) (stating that common law remedies such as riparian rights are defective because they are subject to a balancing test in which courts weigh the importance of a "great public industry" such as a coal company over "mere personal inconvenience," such as that of persons protesting pollution of a river by polluted mine water). Even when courts found damages resulting from common law violations, compensation went to the protesting private owner and not to refurbish the polluted resource. *Id*. at 461–63. However, such common law remedies remain viable. *See* Phillip Weinberger, *Common-Law Controls*, 3 ENVTL. L. PRAC. GUIDE § 16.01 (2004) (noting that common law actions are "vital," providing damages to injured parties where environmental statutes do not).

[59] Merrill, *supra* note 5, at 1115–16 (asserting that law professors make their living dissecting past events and that they are not trained to look ahead).

[60] *See* LON L. FULLER, THE LAW IN QUEST OF ITSELF 138–40 (1940). Professor Fuller was not a postmodernist, but his critique of positivist constraints on legal scholarship can be adopted by postmodernists. Postmodernists stress the varying perspective of the writers as a destabilizing key to understanding pluralism and chaos.

[61] *See* Merrill, *supra* note 5, at 1115–16 (arguing that law professors do not note changes until they appear in court opinions, but that professors can provide doctrinal tools for change).

example, by analogy, as Thomas Kuhn has pointed out, scientific truth becomes accepted because the offered paradigm may display certain features, e.g., economy, simplicity, or predictability of future phenomenon.[62] Legal paradigms such as legal formalism, which we may define as any system that purports to produce right answers, have this feature. For instance, Ronald Dworkin maintains that right answers emerge out of a sea of principles.[63] Postmodernism challenges the formalist "right answer" theorists by stressing the random, unpredictable, and ironic—in short, the non-rational element in legal change. Thus, the unexpected aggressive expansion of the regulatory state in the 1970s and the failure of academics including myself to predict it can be understood as part of the postmodernist frame.

Before the transformation of environmental law in the 1970s, if you wanted reform that might reduce the power of polluting corporate power holders, often wedded to the conservative right wing, environmentally oriented persons did not look to the Executive or Congress. President Richard Nixon was one of the last persons one would have predicted as a leader of the governmental response to the environmental movement in the 1970s. Congress did not seem much better as it seemed incapable of independent action, timidly appearing to forfeit the War Power to the President in allocating money for the Vietnam War.[64] The remaining vestiges of the Warren Court and extant common law remedies, albeit fashioned and controlled by state courts generally not known as bastions of environmental protection, seemed the only hope. Commentators sympathetic to the environment stressed expansion of the public trust doctrine and common law remedies such as nuisance. The idea of an effective regulatory state that would protect the environment in the teeth of the corporate elite seemed extremely remote.

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[62] *See* KUHN, *supra* note 24, at 185, 199 (stating that simplicity is a criterion for acceptance of a paradigm). The ability of a paradigm to solve future unknown problems is the main criterion for acceptance of a paradigm, a criterion that can only be taken on faith and not reason. *Id.* at 157–58.

[63] *See* Van Doren, *supra* note 1, at 304–07.

[64] *See* Kelly A. MacGrady & John W. Van Doren, *AALS Constitutional Law Panel on* Brown, *Another Council of Nicaea?*, 35 AKRON L. REV. 371, 430–32 (2002) (summarizing argument that Congress, misled by the Executive in 1964, passed the Gulf of Tonkin Resolution, but should have investigated). *But see* DEAN RUSK, AS I SAW IT, 445–46 (Daniel S. Papp ed., 1990) (defending the Gulf of Tonkin resolution as a reasonable reaction which was not unconstitutional).

But, unpredictably, Congress entered the picture as a full-fledged player in the environmental movement. Not only was a large amount of environmental legislation passed, but citizen actions were appended to virtually all the new environmental legislation.[65] That the Executive, Congress, and the federal courts would have the occasion to expand the regulatory state into an environmentally oriented regulatory scheme was as curious then as it is now undeniable.

Are there any models of grand theory that could have predicted this result? Civic Republican "deliberation" certainly played no part, since the parties could not meet. Public Choice explanations fell short because the power exercised by personally motivated actors produced a result desired by neither participant. Commentators have recently addressed this environmental law revolution by looking at the process behind the enactment of the Clean Air Act of 1970.[66] Their theory accounts for the avalanche of environmental law by reference to the "prisoners' dilemma,"[67] or the "politicians' dilemma."

The "dilemma" account goes as follows: President Nixon and Senator Muskie found themselves rival politicians in the "prisoners' dilemma." In the "prisoners' dilemma," two persons in jail awaiting trail for murder are each told that if he confesses and agrees to testify against the other, the convicted suspect will get life, but the testifying person will go free. If both confess, they will both get a relatively short sentence. If both remain quiet, they will both get only a one-year sentence for illegal possession of a firearm. It turns out that both suspects implicate each other and each prisoner gets the life sentence. If they could meet and negotiate, both could agree not to implicate the other. But because each person fears that the other will seek to place him in a worse position, they both opt for the worst position for both of them.[68]

In the drafting of the Clean Air Act of 1970, both Nixon and Muskie ended up like the "prisoners," worse off in terms of

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[65] *See* Zinn, *supra* note 20, at 83–84, 84 n.5 (listing environmental statutes with citizen suit provisions).

[66] *See* E. Donald Elliott et al., *Toward a Theory of Statutory Evolution*: *The Federalization of Environmental Law*, 1 J. L. ECON. & ORG. 313 (1985) (arguing that conventional wisdom that pressure groups produced environmental legislation was not borne out).

[67] *Id*. at 321.

[68] *See id.* at 324–25.

competing for political capital, and giving more to environmental concerns than either would have liked.[69] Senator Muskie (stung by a Ralph Nader report accusing him of being "Mr. Dirty") and President Nixon each tried to outdo the other with more stringent laws protecting the environment.[70] To complete the irony of the situation, the powerful auto industry reversed course and went along with the Clean Air Act to obtain a single federal standard, fearing the possibility of multiple state standards would necessitate several vehicle models.[71]

### B. *Regulatory State in Which Environmental Law Exists*

#### 1. *Changing Paradigms of the Administrative State*

The development of the changing attitudes toward, and models or paradigms of, the administrative state and the resulting administrative law reflects the postmodern characteristics of instability, contingency, and volatility.[72] The theoretical model, attitude, or paradigm of the regulatory state to which one subscribes is important in that it is likely to determine one's attitudes toward whether there should be an administrative state of any significance and the relative roles of the players. If one's attitude calls for an administrative state, one must determine the appropriate interplay of powerful forces involved in the administrative process, such as judicial review, oversight by the Presidency and its executive agents (e.g., the OMB applying "cost benefit" analysis), and the role of Congress.[73]

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[69] *Id*. at 326–28.

[70] *See id*.

[71] The auto industry had traditionally preferred no regulation but feared that other states might emulate the State of California and enact stringent air quality standards. And the big pill for the auto people was that potentially fifty models of new cars would be necessary to comply with the environmental successes obtained in California. *See* Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 310 n.150 (2003).

[72] *See* EAGLETON, *supra* note 3, at vii (stating that postmodernists view world as unstable and indeterminate). Postmodernism posits a deep suspicion of the law and is brimful of universal moral prescriptions. Hybridity is preferred to purity, plurality to singularity, difference to self-identity. Postmodernism denounces such universals as oppressive hangovers from the Enlightenment. *Id.* at 27–28.

[73] *See* Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L. REV. 1059, 1061 (2001) (arguing that theoretical model chosen by the observer is important in evaluating policy choices). The executive oversight provided by the Office of Management and

The law of the regulatory state is a specialty that environmental lawyers may want to avoid, but it has impacts on environmental law whether environmentalists like it or not.[74] The resultant brew supports a postmodern paradigm because the environmental area bristles with indeterminate standards that vary substantially over time and are today, as they were in the past, subject to manipulation to achieve policy objectives. The absence of fundamental grounding and the presence of competing subjective norms in the administrative law structure likewise make for variation, flux, and indeterminacy. What results is a situation in which, for every statement made, someone can and does make a contrary statement.[75] Since postmodernists do not expect to find a rock-solid foundation, they would not be particularly surprised at this chaos, because as the composition of the Executive, Congress, and the Courts has changed, so has the law concerning the administrative state.[76]

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Budget (OMB) is well documented. *See* Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 41, 49–50 (l994) [hereinafter Seidenfeld, *Big Picture*] (favoring macromanagement instead of micromanagement). For example, ideology may determine the weight given to cost-benefit analysis. *See id.* at 44 n.226 (stating that cost-benefit directive was so imprecise that OMB can object to any rule it finds politically objectionable). Cost-benefit analysis is required by the Executive in the rule-making process. *See* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 534 n.4 (2000). While this requirement began with the Nixon administration, and continues to the present, the strictness of the requirement has varied with whether the administration at the time favored regulation. *Id.* Republican administrations have tended to have more opposition to regulation than Democratic, but this is only a trend and there are probably exceptions. *Id*. This phenomenon has been described as a competition between Congress and the Executive for control of the administrative agencies. *See id.* at 534 n.5. That a legal paradigm such as Civic Republicanism would attempt to contain such a volatile flow of conflicting power is as heroic as it is idealistic.

[74] *See* J.B. Ruhl, *The Coevolution of Administrative Law with Everything Else*, 28 FLA. ST. U. L. REV. 1, 1–2 (2000) (noting that environmental lawyers have plenty to do in substantive law area, but whether they like it or not, administrative law intersects).

[75] *See* Ruhl, *supra* note 40, at 369 (noting that the most appropriate solution is in the eye of the beholder). Postmodernists stress a lack of objective norms and, thus, a system groundless and anchorless. *See* EAGLETON, *supra* note 2, at vii.

[76] *See, e.g.*, DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA, at xxv (1996) (stating that even Justice Scalia's views are not predictable; that they may vary with party control of the Executive and Congress, as well as the state of the economy).

The postmodern direction is further indicated by both a lack of predictability and stability[77] in law at least beyond the short term or not even within the short term if decision makers change. The way the legal elite usually address this instability is to ignore it. Thus, the changes in law—for example, the changes in constitutional law as it affects environmental law—emerge from a rudderless process.[78] This inconsistency in law, supposedly emanating from a basically unchanged document, is there staring us in the face. But at least when I was in law school, I did not see it and the professors did not comment on this phenomenon.[79] By viewing the regulatory state over time, for example, dividing the emergence of the regulatory state into three periods, the observer can test the postmodern perspective. The developments in the regulatory state do not reveal or proceed from a solid-rock, fundamental structure of law explicable by a grand theory. In what I will call Period I, agencies were deemed to use their expertise to take the delegated power from Congress to carry out the public interest. In theory, this expertise produced non-political judgments on which reasonable experts would agree. The legitimating theory held that even if Congress delegated power broadly, delegation to experts was legitimate since the influence of politics was eliminated by expertise consensus.[80] The role of courts was, accordingly, to aid only at the penumbra by interpreting statutes only where necessary.

The transition between what I have labeled Period I and Period II can most profitably be seen through the lens of citizen participation in the regulatory process. In Period I, citizen participation was not necessary because the government operating

[77] *See* EAGLETON, *supra* note 2, at vii (noting characteristics of postmodernism).

[78] *See* VINSON, *supra* note 1, at 102–16. Vinson is a neo-Rodellian. *See generally* Charles Fried, *Courting Confusion*, N.Y. TIMES, Oct. 21, 2004, at A29 (arguing that Supreme Court is indefinite and incoherent (e.g., in affirmative action and free speech as applied to campaign contributions, the court is policy-oriented and unprincipled, ad hoc, and deceptive in making changes while claiming not to)). There are counter-examples where law is followed despite the views of the judge, but the generalization stands.

[79] Professor Fred Rodell gave a public lecture my first year in law school in which he basically argued that Constitutional Law was politics, changing as the composition of the Court changes. As a student, I filed this away in a part of my mind that never intruded on the business of the day (three years of days), which was positivist legal rules, principles, and system.

[80] *See infra* note 88 and accompanying text.

in the public interest does not need citizen actions second-guessing it all the time.[81] Experts declare the public interest as they are carefully trained to do. But in Period II, referred to as the capture period, courts and commentators focused on a new situation. Administrative agencies came to be viewed in a different light as leading jurists, for example, Justice Douglas and Judge Skelley Wright, both former New Dealers, were impressed by the concept of "capture." These judges found that the public interest was being distorted by regulated parties who exercised undue influence in a myriad of ways, contaminating the purity of the administrative process.[82]

Let us pause a moment and see what is and what is not happening in Period II. For example, what about standing of citizen groups? All of a sudden, there is a turnabout, and the theory of agency expertise self-destructs. Judges, perceiving that agency experts rubber stamp industry demands, change the law of standing and judicial review.[83] Standing is expanded to allow many citizen groups, including environmental citizen groups, to bring lawsuits. Courts are drawn into the fray, and now frequently address disputes over the proper reading of congressional acts. Courts now "hard look" the agencies as the presumptively corrosive effect of undue influence by the regulated parties rises to the surface.[84] But the regulatory state is not to be junked. In fact, the expansions of citizen standing and judicial review are meant to inject reasoned elaboration into the agency agenda to bolster the administrative state project, not to dismantle it. A few repairs here and there and the car is back on the road.

What is not happening is that change of law is being produced from a preexisting foundational legal structure. The Constitution moves in and out with "unlawful delegation" arguments[85] and elastic or inelastic readings of Article III standing requirements.[86] So the Constitution is not providing that fundamental legal edifice of predictability that the foundationalist claims of legal science led

[81] *See infra* notes 88–91 and accompanying text.

[82] *See infra* notes 97–103 and accompanying text.

[83] *See id.*

[84] *See infra* note 101 and accompanying text.

[85] *See generally* Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000).

[86] *See infra* notes 104–06 and accompanying text.

us to expect. The law of standing is without anchor.

Then, in Period III, the idea that law predictably arises from fundamental structures of norms takes a further beating. A cacophony of voices seeks to legitimate or delegitimate the regulatory state. Standing and the results from the standard of review have no anchor in anything internal to "legal science" and are tossed about in the churning sea of legalism. In this Period III cacophony period, forces outside what is traditionally perceived as the inherited legal structure move to the forefront. Public Choice weighs in to question much more than the standard of review or citizen standing. *Sub silentio*, Public Choice advocates mount a formidable attack that could, if followed, return the regulatory state to its pre-Roosevelt status. Laissez faire looms silently on the Public Choice horizon. From the wings, sometimes tentatively, emerge the defenders of the regulatory state. Civic Republicans, for one, come forward with an apology for the administrative state. They offer us another grand theory to oppose the self-interest model of Public Choice. The Civic Republican grand theory invokes deliberation and participation as quasi-universal touchstones to guide the selection of the degree of court review, participation of citizen groups, and other legal issues related to the regulatory state.[87]

2. *Three Periods of the Regulatory State*

a. *Period I, from Inception to Circa 1967*

(i) *Agencies Aligned with the Public Interest*

Now I turn to the elaboration of the postmodernist theme by reviewing aspects of the evolution of the regulatory state. Beginning in the early 1930s, the regulatory state assumed momentum. Government became actively involved in attempting to further the welfare of its citizens. In Period I, commentators legitimated the administrative state from the New Deal, up to circa 1967, with the assumption that agencies served a non-political "public interest," through the exercise of their expertise.[88] These

[87] *See infra* notes 120–65 and accompanying text.

[88] *See, e.g.*, Merrill, *supra* note 5, at 1049 (discussing public interest and expertise model); Seidenfeld, *supra* note 48, at 91 (noting that according to that view agencies are assumed to make value-neutral decisions based on expertise but that expertise theory conflicts with the transmission belt theory of agencies as agents of Congress—and noting that both theories exclude agencies as political

assumptions were reflected in Supreme Court limitations on "standing."[89] In the New Deal period, access to the process through what would now be referred to as "standing" was restricted to allow what were considered the appropriate results of democratic processes.[90] The goal was to insulate progressive New Deal legislation from conservative judicial attacks. This goal was facilitated by restricting "standing."[91] Judicial review was thought best when unobtrusive.

(ii) *Storm Clouds Appear over Period I—"Capture"*

As early as the 1950s, clouds appear on the horizon, questioning the role of agency expertise in facilitating the public interest, but these challenges were ineffective and occasional.[92] Harvard professor (as he later became) Samuel Huntington pointed out that regulated industries, railroads in particular, exercised more influence over the regulating agencies than might have been hoped.[93] But the solution Huntington proposed was to separately regulate the three transportation groups—rail, water, and highway—under the umbrella of the Department of Commerce to avoid an agency dominated by railroad interests.[94] Around 1955, another commentator saw the functioning of the administrative agency area as seriously flawed. The idea of "capture," the acquisition by the regulated of undue influence over the regulatory agency, continued to rear its ugly head.[95] But this notion of

actors).

[89] *See* Sunstein, *supra* note 20, at 179–81 (noting that "standing" issues were not referred to as such).

[90] *See id*.

[91] *See* Merrill, *supra* note 5, at 1048–49 (finding that view that courts should let agencies make decisions unhampered is carryover from New Deal attitudes). This theory of handling problems through reason or rationalism was behind public interest theory. *See id*.

[92] *See* John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723 (1986) (stating that "isolated attacks on regulation that appeared occasionally in the 1950s did not become widespread and profound until the 1960s" (citations omitted)).

[93] *See* Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 508–09 (l952) (stating that ICC's objectivity and impartiality were lost because agency was dependent on and responsive to railroads alone).

[94] *Id*. at 508–09.

[95] *See* MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 296 (1955) (arguing that agencies tend to define public interest as coincident with interests of regulated parties); *see, e.g.*, Wiley Jr., *supra* note 92,

regulated parties obtaining undue influence over the persons authorized to regulate did not gather substantial momentum until the 1960s.[96]

b. *Period II, Circa 1967–1983—Capture*

Around 1967,[97] elites began to crystallize their fear that agencies were being "captured" by the industries they regulated.[98] For example, Judge Skelly Wright, a judge on the very influential District of Columbia Circuit Court of Appeals, openly referred to "capture" in his writing and opinions,[99] as did then Supreme Court Justice Douglas.[100]

Recognition of "capture" led courts to intervene more in the process because if agencies were "captured" the public interest result could not be assumed. Therefore, instead of a passive role, courts would take a "hard look" at agency decisions and require agencies to produce evidence of reasoned decision making.[101]

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at 723.

[96] *See* Wiley Jr., *supra* note 92, at 723 (citing Bernstein, *see, e.g.*, *supra* note 95, as an early commentator).

[97] Professor Merrill identifies *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), as the start of this period of suspicious judicial review of agency action. *See* Merrill, *supra* note 5, at 1039.

[98] *See, e.g.*, Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 360 (1989) (stating that court activism has been justified by reference to capture and its distortion of agency decisions). For a recent article analyzing agency actions on a traditional "capture" basis, see Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, "Agency Capture," and Airline Security*, 10 AM. U. J. GENDER SOC. POL'Y & L. 381, 391 & n.32 (2002) (citing authors whose work supports the idea that, in the mid- to late 1960s, "capture" was conventional wisdom). Professor Niles notes, however, that the "capture" theory is controversial and difficult to apply. *Id.* at 388–89 (raising the question of how much influence is undue influence).

[99] Merrill, *supra* note 5, at 1065–67 (stating that Wright's writing featured "capture" and that Wright's law clerks often went to clerk at the Supreme Court).

[100] *See* Sierra Club v. Morton, 405 US 727, 745–50 (l972) (Douglas, J., dissenting) (linking need for expanded standing to presence of "capture").

[101] *See* Seidenfeld, *supra* note 48, at 128 n.239, 129 (tracing "hard look" to court decision in 1970); Seidenfeld, *supra* note 73 (discussing requirements agencies must comply with when promulgating rules and noting that the origin of these requirements may be traced to "hard look" review); *see also* Levy & Glicksman, *supra* note 98, at 355. The "hard look" was an aggressive substantive review, often applied when it would favor an environmental right over a development right. *Id.* at 358–59; *see also* Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 774 n.39 (1994) (tracing first use of "hard look" review to 1970 case of *Greater Boston Television Corp.*

Thus, since little expertise is necessary to rubber stamp an industry demand, "capture" presumptions replaced the idea that agencies should be insulated from review because of their expertise. But only the locus of power shifted, not the inherited precept that reasoned elaboration and neutral process-oriented compartmentalization could fix the problem. In short, the "capture" presumption was perceived as a minor adjustment, not a postmodern paradigm shift abandoning the reason-based, process-oriented paradigm.

To compensate for "capture," courts expanded standing in favor of groups, including public interest groups, whose interests might offer a policy and legal counterweight to the regulated industries.[102] In sum, the assumption in Period II was that the administrative juggernaut could be steered back on course. In any event, the opening up of administrative agencies to citizen interest groups led to standing and citizen actions that produced pro-environment results.[103]

(i) *Detour on "Standing"*

The changing status of citizens' actions signals changing assumptions and the eventual demise or curtailment of "reason" and "process" as legitimating foundational norms in the regulatory state. First, "standing" for citizen intervention was discouraged in Period I because agencies presumed to act in the public interest would not need such monitoring. In Period I, broad scope for standing was regarded as antithetical to the Enlightenment-based, reasoned consensus project of expertise-driven administration. In Period II, the presumption of agency capture was influential as a reason for expansion of standing under Article III's "cases and controversies" provisions. Thus, in Period II, standing was looked upon as a needed supplement, an ally, to the role of process-oriented reason in the administrative state. Period III displays and heralds a change. First, in Period III, there are many voices, and a concurrent decline of the dominance of traditional capture narratives in descriptions of the administrative process. Second, Period III has seen conservative appointees to the Supreme Court play a role in curtailing the liberal standing doctrine developed in

*v. FCC*, 444 F.2d 841 (D.C. Cir. 1970)).

[102] *See* Levy & Glicksman, *supra* note 98, at 355–60 (discussing fact that courts expanded pro-environment groups' access to courts and agencies).

[103] *Id.*

Period II in ways that are themselves ironic and unpredictable, based as they are on ideas beyond the purview of "legal science."[104]

Central to the process occurring is the manipulation of the Constitution's Article III "case and controversy" provision to allow or prevent citizen actions. Elite decision makers "interpret" the Constitution one way or another to allow or disallow citizen actions in response to their differing perspectives. Accordingly, traditional theories of legalism cannot contain the ebb and flow of unpredictability on such issues as citizen actions. Traditional legalism is equally at a loss to give a coherent and convincing account of the proper place and function of reason or process in the regulatory state. Thus, postmodernists find indeterminacy in rules and standards found in the Constitution, case law, congressional statutes, and other sources of traditional law. Likewise, postmodernists can note impermanency and confusion in policy choices, whether based on competing norms such as property rights and the Land Ethic, or Public Choice rational self-interest models as opposed to a regulated market. That is the postmodern condition.

As an illustration, Article III of the Constitution limits the Supreme Court's jurisdiction to matters involving a "case or controversy." The evolution of the law of standing is illustrative of the incapacity of such a foundational document as the Constitution to channel change in a determinate and predictable manner. The language of "case and controversy" for example, admittedly offers some constraint. Language is or can be

[104] *See id.* at 357, 419, 422–23 (noting that recent conservative Court has been inconsistent in observing institutional restraint and in ignoring predominant Congressional policy, e.g., hostility to attorney's fee provisions for environmental groups). Incidentally, deciding cases so as to defeat the predominant policies of Congress does not seem consistent with the Public Choice idea that courts act to ensure congressional appropriations. Congressional policy also falls victim to the postmodern standardless legal world. Justice Scalia led the court in virtually nullifying the standing provisions in most environmental acts. *See* Sunstein, *supra* note 20, at 165. *Lujan I* and *II* apparently invalidate scores of federal statute citizen standing provisions. Justice Scalia defends this move in his *Laidlaw* dissent, stating that restoring citizen actions is novel and that it decimates precedent. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc, 528 U.S. 167, 198, 202 (2000); *see infra* note 153 and accompanying text; *see also* Kearney & Merrill , *supra* note 55, at 1409 (crediting economic, political, and intellectual forces for changes in the regulatory state); Merrill, *supra* note 5, at 1114 (stressing that "political ideas" influence administrative law).

constraining and offer some predictability.[105] But as suggested by the above discussion, when we view the evolution of the Article III provision, we find it much closer to what a postmodernist would expect, namely uncertainty and unpredictable penumbra, than predictability based on adherence to any core of settled meaning.

Moreover, we find that the law of standing changes not only as the aims, goals, and desired policies of courts and commentators change, but as the composition of the Court changes. Thus, we already noted that the New Deal court did not encourage standing in Period I when agencies were assumed to be asking, "Is the public interest served?" In Period II, when elites perceived capture as occurring, standing was allowed to expand. Finally, in Period III, with a conservative court in power led by Justice Scalia, standing was again highly restricted. The constitutional provision related to standing did not change during this period—only the interpreters and their interpretations. Postmodernists can point to the lack of foundational legal material (in this instance, constitutional provisions) to explain the inability of standing doctrine to control or delimit change in a predictable manner.[106]

(ii) *Public Choice Voices Begin Critique During Period II*

Public Choice offers a leading critique of the use of the Enlightenment-based ideals of rational legal process or reasoned elaboration of fundamental principles in the regulatory state. Public Choice theorists spare no governmental group, whether legislative, executive, judicial, or administrative their critique that they are engaged in maximization of self-interest.[107] Thus, Public

[105] But even heavily rule-oriented legal positivists find that law is composed of a predictable core of settled meaning and a penumbra of uncertainty where it is necessary to consider aims and goals of the legal directive. *See, e.g.*, Van Doren, *supra* note 1, at 284–85 (citing Hart's argument that rules have a determinant center and open texture at the penumbra).

[106] For a more severe condemnation of Court manipulation, see VINSON, *supra* note 2, at 102–16 (stating that Supreme Court constantly manipulates the Constitution to achieve its policy objectives). *See generally* Levy & Glicksman, *supra* note 98, at 424 (detailing how Supreme Court's jurisprudence fluctuated between restraint and activism with regard to environmental questions).

[107] Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 344–47 (1988). Tollison argues that an independent judiciary may act in its self-interest and avoid interference with legislative acts to secure salaries and judicial budget. *Id.* at 345–46; Merrill, *supra* note 5, at 1069 (stating that Public Choice regards legislatures, the president, and increasingly courts as maximizing self-interest).

Choice theorists replace the ideal of objective reasoning based on discourse involving verifiable principles with the concept of fulfillment of subjective self-interest as the touchstone of statecraft and administrative regulation. At the same time, would Public Choice adherents not claim that such self-interested behavior is objectively verifiable?

Be that as it may, ironically, Public Choice advocates "captured" "capture" by expanding the traditional "capture" theory system-wide. Controlling elites had used "capture" as a reason for expanding judicial access and taking a "hard look" at administrative decisions,[108] but Public Choice advocates neutralized "capture" or turned it against them.[109] Pouncing on "capture theory," Public Choice advocates redefined capture to make it applicable not just to regulated industry, but to all groups seeking special benefits from government,[110] such as labor unions, groups seeking rent control, and environmental public interest groups, to name a few.

This extension of the notion of "capture" itself has postmodern dimensions. The irony is that the concept of capture advanced in Period II to bolster the regulatory state has become a justification for the dismantling of the regulatory state. Groups formerly thought to act in the public interest in Period II as a step in the reasoned-process ladder are lumped together with regulated industries in the basket of predatory "capturers." The very citizens that were invited into the regulatory process in order to bolster the Enlightenment project of reasoned solutions are now regarded as emblematic of a systemic failing of that very project. While Public Choice implications for administrative law reform are uncertain, it might be inferred that courts following the theory would shift to judicial lawmaking or, more dramatically, perhaps move to private ordering instead of traditional regulation.[111] Thus, the logic of the

[108] Merrill, *supra* note 5, at 1069; *see also supra* notes 101–02 and accompanying text.

[109] *See, e.g.*, Tollison, *supra* note 107, at 339–41 (explaining how original Public Choice scholars laid foundation that set intellectual agenda that encompassed broad swathes of legislative action).

[110] *Id*. at 342–43 (explaining basic ideas behind economics of lobbying group formation).

[111] Merrill, *supra* note 5, at 1054 (stating that Public Choice could lead away from regulation to private ordering). *But see* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?* 101 YALE L.J. 31, 109 (1991) (arguing that Public Choice theorists have not shown that expanding

critique might lead a sympathetic decision maker to conclude that eradication of the regulatory state is desirable.[112] Hence, we could read Public Choice theorists to imply that it is necessary to come back to the market[113] and laissez faire theory, thus bringing the repudiation of the New Deal full circle. What does seem clear from the advent of Public Choice theory is that policy focus on "capture" can produce results as flexible and malleable as the "case and controversy" requirement of Article III.

c. *Period III—Cacophony*

Public Choice theorists seem optimistic about their success in modifying the regulatory state.[114] Commentators looking at the current period have predicted that there will be a bipartisan trend toward deregulation, a trend which has already begun.[115] This deregulation trend may not eliminate agencies, but it will transform agencies to serve other functions, such as encouraging competition.[116] But in any event, defenders of the regulatory state seem to feel a burden to prove that whichever government institution they tout as preferred—i.e., agencies, courts, or Congress—is free of what public choice theorists regard as a cancer that threatens public institutions of the body politic.[117]

At present, there is a standoff between those who want to

judicial lawmaking and (perhaps) private ordering would produce better results than processes they would replace).

[112] *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1689 (1975). However, deregulation may result in transfer of discretion to highly organized private interest groups that reflect the concentration of social and economic power. *Id.* at 1693; *see also* Merrill, *supra* note 5, at 1053–54 (stating that separation of powers may be used to stifle regulation altogether and to encourage market ordering).

[113] *See* Merrill, *supra* note 5, at 1054 (stating that "market" is waiting for power transfer).

[114] *See* Kearney & Merrill , *supra* note 55, at 1405 (noting that continuation of trend depends on elite perceptions of Public Choice); Wiley Jr., *supra* note 92, at 726 (noting that broadly based Public Choice capture ideology has contributed to deregulation under both Republican and Democratic administrations, but that deregulation also occurred in areas in which industries had not actually "captured" their regulators).

[115] *See* Wiley Jr., *supra* note 92, at 726.

[116] *See* Kearney & Merrill , *supra* note 55, at 1406–07.

[117] S*ee* Cynthia R. Farina, *Faith, Hope, and Rationality: Or, Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 117 (2000) (arguing that since James Buchanan won the Nobel Prize in 1986, Public Choice theory has assumed a preeminent position to which all administrative law commentators must at least pay lip service).

keep the car on the road and those who want to junk it, which has produced a rearranging of pieces on the board. Defenders of the regulatory state argue that life is not so simple as Public Choice indicates. These defenders concede the explanatory power of the self-interest explanations,[118] but they point out that people act from many different motivations and that the ideology unrelated to self-interest that is used to direct policy may contain a public interest component.[119]

If defenders could show that all government actors made policy decisions from an ideological basis in opposition to their own self-interest, not much would remain of Public Choice self-interest theory. However, defenders are unable to do so. Nonetheless, this critique of Public Choice also smacks of postmodernism, in that the concept of self-interest is a subject of deconstructive focus. Defenders of the regulatory state destabilize the self-interest claims of Public Choice by suggesting that the public interest may result from actions of public actors transcending their self-interest. As mentioned before, Public Choice theorists abducted the concept of "capture" to justify dismantling the regulatory state. Now, with equal irony, defenders of the regulatory state exploit the ambiguity of the behavior of public actors, pointing out that Public Choice may overemphasize the relation of self-interest to the behavior of officials and overlook public officials' ability to act in the public interest.

(i) *Civic Republican Defense of the Regulatory State*

One group that styles itself Civic Republicanism has come to the fore to defend the regulatory state against opponents such as Public Choice critics. Civic Republicans rely on deliberation, participation, and responsiveness to marginalized groups as normative elements of a competing grand theory.[120] Civic Republican commentators set the stage for contradiction when they state that traditional capture may still be a problem but that one

[118] *See id*.

[119] *See* Farber & Frickey, *supra* note 30, at 899–901 (1987) (arguing that government actors may employ ideology as an important factor in decision making).

[120] *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1514, 1515, 1574–76 (1992) (characterizing Civic Republican argument that participation by citizens and deliberation by agencies present best hope for implementation of values of citizens including values that are out of mainstream).

reason for the reduced impact of capture is public interest groups filing of "citizen's actions."[121]

Postmodernists could intervene on several grounds. The tacit assumption that such criteria as deliberation and participation can operate to determine the outcome of decision making in a neutral manner without the introduction of more politics is highly suspect. As we have seen, deliberation and participation have proven throughout the history of the regulatory state to be themselves highly unstable concepts ripe for ideological manipulation. Similarly, the Civic Republican use of "reasoned elaboration" as a safety valve to prevent the introduction of bias and preconception into administrative decision making is ineffective. The history of the regulatory state discloses that there is no stable consensus on what reliance or "reason" would mean in the context of agency administration. Reasoned elaboration has not and does not prevent bias in court or administrative decisions. The regulatory state has had varying degrees of participation and similarly greater or lesser latitude has been given for "deliberation." So, whether Civic Republicanism is considered a kind of grand theory or as borrowing reasoned elaboration from another grand theory, the Harvard Legal Process theory,[122] it is subject to the postmodern criticism.

Civic Republican theory may advocate a move to promote deliberation with a "hard look" judicial review to remand cases back to the agency where appropriate deliberation has not occurred.[123] As a practical matter, the actual review standards seem to permit substantial latitude for policy results in which deliberation may in practice be ineffective. Tinkering with the *Chevron* standard to produce a judicial hard look may be ineffective because it is so highly manipulated to accommodate policy-oriented decisions, as discussed in the next sections.

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[121] *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 462–64 (1999) (discussing capture and domination by regulated parties and indicating that problem has lessened due in part to citizen actions); Sunstein, *supra* note 20, at 184 (discussing capture but stating that the emphasis was overstressed); *see also* Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1, 19 (2000) (referring to capture as one of several prime candidates for agency abuse, but indicating the problem may largely have been solved).

[122] *See infra* notes 129–30 and accompanying text.

[123] *See* Seidenfeld, *supra* note 48, at 128–30.

Furthermore, as a normative matter, deliberation is a questionable goal emanating from Enlightenment values. Where the Enlightenment conception of reason emphasizes objectivity and the stability of principles, deliberation, at least on its face, may be at odds with those goals, seemingly valorizing diversity, heterogeneity, and polyphony. Participation is also part of the Civic Republican program. As pointed out in future sections, application of participation and deliberation plunge Civic Republicans into contradiction. The inability of Civic Republicans to agree on the policy results flowing from application of their principles raises serious questions as to their feasibility in producing a determinant set of policies.

The picture revealed is one in which prevailing legal standards of court review vary over time in an ad hoc and makeshift fashion.[124] Civic Republicans promote hard look, although there are modifications suggested.[125] To add to the mix, some non-Civic Republican commentators sound the reality note that political hard look may at times stifle the environmental movement because of the political composition of the court.[126] Irony abounds here as well in that the institution of hard look review, originally intended to protect the public interest in environmental protection from captured agencies is now possibly a tool to suppress this same public interest, at least where remand is used politically to achieve a prodevelopment result.

What results is a postmodernist delight: multiple inconsistent voices, within and outside Civic Republicanism, producing, consciously or not, selective structures attempting to obscure the reality of a policy-driven legal arena. Indeed, the opening of the legal arena to many voices suggests a postmodern direction. Policy desirability aside, the opening up of citizen actions may display the postmodernist emphasis on plurality, which can conflict with a model of objective, reasoned decision making. But how much the legal system can or should accommodate this pluralism is unsolved by the grand theory of Civic Republicans. Their stress on deliberation and participation merely restates the problem, a problem which embodies the crisis that embroils Enlightenment conception of the primacy of reason as a guide and

[124] *See supra* notes 97–102.

[125] *See infra* notes 137–38.

[126] See Professor Thomas McGarity, *infra* notes 139–40.

progenitor of neutral process. And this potential antinome is just the tip of the iceberg. Disagreement redounds from some quarters about virtually everything: the importance of expertise of agencies and the appropriate role of courts, agencies and Congress inter alia. As if that is not enough, also contested is the extent to which courts can in fact be influenced by such precepts of review as hard look or soft look, which may turn on whether the treatment of environmental values is primarily policy and politically driven.

(ii) *Critique of the Deliberation Criterion*

Civic Republicans have defended the institution of the regulatory state. They may argue that if the institution is ailing, defects may be remedied if courts open up the regulatory process to encourage deliberation and the process is modeled to help ensure that such public values actually emerge.[127] Application of Civic Republican principles leads to conflicting or indeterminate policy recommendations, raising serious doubt about the efficacy of the principles.[128]

There are several problems connected with deliberation as a controlling principle in this area. First, the question arises whether persons who disagree on basic values, e.g., pro-environment and pro-development, can "deliberate" meaningfully. As detailed above, the interplay of these fundamentally divergent world views may lead more to chaos, doctrinal and otherwise, than meaningful engagement. Second, deliberation is a value that may conflict with another important value simultaneously advocated or condoned by some Civic Republican theorists, for example participation of citizen groups. Third, tinkering with standards of review may be ineffective if the decisions are based on policy that is affected little by the standards selected. Finally, the attempt to isolate particular high-level-abstraction criteria, such as deliberation, smacks of "neutral principles" or "neutral processes" associated with the somewhat discredited Harvard Legal Process School and Lasswell-McDougal Policy Science.

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[127] *See, e.g.*, Seidenfeld, *supra* note 48 at 138; *see also supra* note 120.

[128] Civic Republicans may agree on broad principles, but there are significant disagreements on the scope of the application of those principles; these disagreements may be perceived as difficulties in the principles themselves. *See* Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 806 (1993).

(iii) *Civic Republicanism: A Policy Science Revival?*

Civic Republican civic virtues such as deliberation suffer from the same problem as Lasswell-McDougal Policy Science because deliberation involves the suggestion that high-level abstractions resolve conflicts. Policy Science advocates accepted the legal realist analysis that rule-oriented positivism often obscures the real basis of the decision, but they sought to provide a set of values or principles to fill in the blanks where rules and principles were conflicting or otherwise indeterminate.[129] However, the high-level abstractions offered by both Policy Science and Civic Republicanism to resolve controversies are themselves indeterminate and the solutions proposed by adherents in some instances conflict with other policies they promote.[130]

(iv) *Where Policy and Politics Conflict, Neutral Values Do Not Help*

The emphasis of Civic Republicans on presumably value-neutral criteria such as deliberation does not appear to be of substantial aid in restraining or controlling the operative elements of legal decision making, at least in the environmental context. For example, commentators have traced the change of the Court as members of the Warren Court were replaced by the appointees of Republican presidents. The results show that Democratic appointees tend to decide cases on a pro-environment basis while

[129] *See* MINDA, *supra* note 1, at 33–34 (stating that "central jurisprudential project" of scholars who followed Lasswell and McDougal was "to tame the radical skepticism of legal realism by explaining how the intellectual criticism of the realists could be answered by a more 'prudential' rather than 'empirical' understanding of the process of law and adjudication").

[130] *See generally* Jack Van Doren, *Is Jurisprudence Politics by Other Means? The Case of Learned Hand*, 33 NEW ENG. L. REV. 1, 17, 18 & n.96 (1998) (arguing that lack of reasoned elaboration has been a political tool used by followers of the Harvard Legal Process School to criticize results such as the Warren Court's decisions not approved by the person invoking the doctrine). *See generally* John W. Van Doren, *Understanding Unger*, 16 WM. MITCHELL L. REV. 57, 70–72 (1990) (noting that Policy Science observers thought these "outcomes" provided a basis for determining results in cases, but that in fact they are indeterminate). *See infra* notes 153–65 and accompanying text, discussing competing values of deliberation and agenda setting vs. participation which causes a split in Civic Republicans approval of environmental citizen actions. *See generally* W. Michael Reisman & Aaron M. Schreiber, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 590 (1987) (raising questions as to whether Policy Science goals conflict and whether it offers guidance in choosing one value over another).

Republican appointees tend to decide on a pro-development basis.[131] Thus, during 1960–1975, the Court made pro-environment decisions, and in 1976–1988, the Court began to consistently reach pro-development results.[132] The driving force was not judicial activism or restraint but *policy* activism, namely, whatever it took to achieve the policy result desired, whether pro-environment or pro-development. Pro-development courts often finessed and defeated congressional policy.[133] These Court holdings may be a disingenuous manipulation of the principle of institutional restraint or, if the coloration producing the result was unconscious, courts may be deciding in consonance with their policy preferences in good faith.[134] In the post-Warren Court era, for example, the more conservative Court achieved pro-development decisions by affirming the results of agency decisions it agreed with and by claiming it was exercising institutional restraint.[135] But the conservative Court in this same period did not hesitate to use institutional activism to reach pro-development results when it suited them.[136]

(v) *Is Tinkering with the Chevron Standard of Court Review an Idle Act?*

Civic Republican Mark Seidenfeld favors the policy of deliberation and supports a modified judicial "hard look" to encourage agencies to deliberate more effectively.[137] A modification suggested by Seidenfeld is that reviewing courts should hesitate to remand for more factual data.[138] In his discussion of ossification of the administrative process, non-Civic Republican Professor McGarity fears aspects of "hard look"

[131] *See* Levy & Glicksman, *supra* note 98, at 357 n.57, 358–61.

[132] *Id*. at 424–31 (listing cases according to pro-environment or pro-development results).

[133] *Id*. at 419, 421–23 (arguing that recent conservative Court ignores congressional policy).

[134] *Id*. at 422 n.420 (taking view that Court is exercising its policy preferences in good faith, but ultimately leaving this question to the reader).

[135] *Id*. at 421 (concluding that Court's use of "institutional restraint" rejected apparent congressional policy).

[136] *Id*. at 421–24 (arguing that Court ran roughshod over congressionally enacted attorneys' fees provisions and supplemental state remedies).

[137] *See* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 490, 524 (1997).

[138] *See id.* at 524.

because of the conservative composition of federal reviewing courts.[139] McGarity thinks, however, that conservative judges will be less likely to remand if "hard look" is rejected in favor of "softer look," and that neutral judges may not be so quick to remand in areas of scientific uncertainty.[140] But does it matter whether it is "hard look" or "soft look" if judges are deciding on a policy basis? Where, as here, judicial manipulation occurs frequently, does the wording of the *Chevron* standard merit the volumes of debate revealed in the literature?[141]

It seems uncontested that courts manipulate the Period III standard of review in *Chevron*.[142] The *Chevron* standard for review provides for affirming an agency decision if the statute is ambiguous or silent on the subject addressed.[143] This standard, because manipulated, is somewhat random depending on the attitude of the reviewing court.[144] Even the "textualist," Justice Scalia, has exercised the ability to nullify agency action, by finding specific congressional intent in the murky congressional acts.[145]

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[139] Professor McGarity espouses a "softer look." McGarity points out that many agency rules are reviewed by federal judges, most of whom were appointed by conservative Republican presidents who are ideologically committed to private markets and skeptical of regulation. *See* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 530, 539 n.56 (1997).

[140] McGarity argues that neutral judges might be affected by a shift away from "hard look," and that conservative judges may have one less legal reason to defeat legislation they find objectionable *Id*. at 558.

[141] Verbal formulas, whether those of McGarity or Seidenfeld, may influence results very little. *See* New York Times v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., dissenting) (finding that legal formulas based on "malice," "good motives," or "justifiable ends," or any other legalisms that in theory would protect the press have no such effect on the lower court's decision to set aside or reduce jury verdict).

[142] *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[143] *See*, *e.g.*, Merrill, *supra* note 5, at 1084–85 (stating that courts defer if interpretation of agency is "reasonable" and reverse if statutory construction reveals clearly that agency erred); *id.* at 1090–92 (stating that *Chevron* is random like a game of roulette or "gotcha," where text and dictionary are supposedly used to provide a non-political determinant or fortuity of drafter provided language on point); Seidenfeld, *supra* note 48, at 103; Levy & Glicksman, *supra* note 98, at 373–74 (arguing that first prong of *Chevron*, whether statute is ambiguous or not, is easily manipulated, but that tendency has been to defer to agency even when this undermines legislative intent).

[144] Levy & Glicksman, *supra* note 98, at 373–74.

[145] *See* Bressman, *supra* note 85, at 1412–13 (arguing that textualism advocated by Justice Scalia and other interpretive devices result in manipulation

Recognizing that courts manipulate to achieve policy results that trump the policy of other government institutions, some commentators suggest that a more direct articulation of policy by court decision makers could produce a desirable transparency.[146]

It does not come as any news that *Chevron* is manipulable[147] or that courts are tempted to find congressional intent where such a finding produces a result consistent with their own values and politics.[148] While political or policy judicial decisions are recognized as occurring, some "rule of law"-oriented Civic Republicans do not approve.[149] Thus, lurking is the ideal that there should be rules and standards that limit discretion and make the judicial process different from politics. Otherwise, opines Seidenfeld, a likely outcome is judicially mandated bad public policy.[150]

Maybe in a world we could imagine there would be effective constraint from legislative intent and neutral principles and processes that control decisions, but to what extent do these constraints and neutral principles actually hold sway?[151] Are some Civic Republican commentators mesmerized by the conceptual world so brilliantly satirized by Von Jehring, who imagined a heaven of judicial concepts that were so purely self-contained that they gave answers to legal questions without reference to any

to find congressional intent when judges dislike agency action).

[146] *See* Levy & Glicksman, *supra* note 98, at 423–24 (suggesting that courts should be more candid in disclosure of policy considerations).

[147] *See* Seidenfeld, *supra* note 48, at 95 n.69, 103–04, 112–13 (characterizing reaction to agency decisions as deferential or active); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1112 (2001) (stating that looking for congressional intent in judicial review in some contexts of agency action is futile due to hopeless ambiguity).

[148] Seidenfeld, *supra* note 48, at 114–15 (stating that statutes are ambiguous, unfortunately sometimes allowing judges' personal values and politics to determine the outcome).

[149] *Id.* at 117 (noting that personal predilections are not good reasons for judicial decisions).

[150] *Id.* at 119.

[151] Where Professor Rossi sees "architecture," others may see postmodern "architecture" ripe for deconstruction. *See generally* Rossi, *supra* note 147. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (discussing Von Jhering's satirical dream of a "heaven" in which such infinitely derivable meanings of pure legal concepts really determine results without reference to the affect on human affairs).

worldly events or concerns?[152]

(vi) *Civic Republicans and Laidlaw: To Approve or Not to Approve*

The postmodernist position that grand theory is passé is bolstered by consideration of Civic Republican theory applied to citizen actions and the recent *Laidlaw* case.[153] Civic Republican grand theory seems inadequate to determine such issues as the appropriateness of citizen actions. The courts have fared no better in resolving citizen standing, tacitly purporting to apply their formalism or grand theory of constitutional interpretation. In a leading case, *Data Processing*, authored by Justice Douglas, the court invented the "injury in fact" test to expand standing.[154] Pressing fast forward, standing of environmental groups remained viable until the 1990s, when Justice Scalia led the Court in putting the brakes on standing.[155] Then seemingly out of nowhere comes *Laidlaw*. The Supreme Court in *Laidlaw* found standing for environmental groups under the Clean Water Act, disingenuously distinguishing *Lujan I* and *II*.[156] The implications of this case are unknown.

Looking for help from the Civil Republican paradigm for guidance in the *Laidlaw* situation leads to disappointment. The Civic Republican model could not produce predictability since its adherents cannot agree on a consistent result from the application of their deliberation and participation criteria. Application by Civic Republicans of their criteria of deliberation can produce conflicts with a goal of participation. Professor Seidenfeld sees traditional capture or even domination of the regulator by the regulated industries as a possible current problem but equivocates on the importance of citizen actions.[157] Civic Republican

[152] *See* Cohen, *supra* note 151.

[153] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc. 528 U.S. 167 (2000).

[154] *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970); *see also* Sunstein, *supra* note 20, at 166, 185–86 (criticizing *Data Processing* opinion as "sloppy" and a huge conceptual break from the past that the Court basically made up).

[155] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); *see also* Sunstein, *supra* note 20, at 163, 164–67 (citing article by Judge Scalia published in 1983 calling for curtailment of citizen standing).

[156] *Laidlaw*, 528 U.S. at 183–84.

[157] *See* Seidenfeld, *supra* note 121, at 463–64 (characterizing public interest groups as important part of antidote to capture). Seidenfeld cites David R.

Professor Jim Rossi, however, opposes citizen environmental actions.[158] Professor Seidenfeld seems equivocal, pointing out that the administrative process has adequate safeguards to curtail capture, including citizen actions, but expresses concern that citizen groups can be harmful to the process.[159] So does Seidenfeld favor the Rossi position concerning citizen environmental groups or not? Since Seidenfeld still sees capture problems and since he concludes that deliberation requires maximum participation even of groups of regulatory beneficiaries not historically represented, would it not be ironic if he were to join Rossi and recommend the demise of citizen actions?

Professor Sunstein also seems to equivocate, arguing that Congress may grant standing for citizen suits, if it grants a specific remedy to the private litigant.[160] Yet, he quotes observers with reservations about the policy desirability of citizen actions and finds citizen actions dispensable.[161] Query then, whether Professor

Hodas, *Enforcement of Environmental Law in a Triangular Federal System*, 54 MD. L. REV. 1552, 1618, an article that extols citizen actions. *See id.* at 1618–19, 1621). *But see* Seidenfeld, *supra* note 120, at 1565–67 (discussing capture as a problem, but indicating that capture by beneficiaries is also a problem because, for example, environmental groups may be able to capture an agency that cuts across industries); *id.* at 1565 n.263 (attributing this idea to Public Choice theory, but agreeing that this is a problem); *see also* Seidenfeld, *supra* note 48, at 125–27, (extolling broad participation and deliberation while criticizing special interests); Mark Seidenfeld, *An Apology for Administrative Law in the Contracting State*, 28 FLA. ST. U. L. REV. 215, 235–36 (2000) (arguing that while citizen suits have sometimes provided meaningful enforcement, citizen suits may be regarded negatively for several enumerated reasons); Seidenfeld, *Big Picture*, *supra* note 73, at 8 n.42 (arguing that action-forcing citizen actions may cause agencies to lose important discretion in prioritizing their regulatory agenda).

[158] *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174–80, 218–19, 223, 248 (1997) (finding that participation, including citizen suits, may restrict agency agenda setting and produce other negative effects). Professor Rossi also decries (appropriately) the lack of participation by women and minorities. *See* Rossi, *supra*, at 248 n.394. Rossi also heralds "hard look" for, inter alia, oversight of agencies to encourage them to allow all participants to have their views considered, e.g., small customers in the context of the electrical utility industry. *See* Rossi, *supra* note 101, at 819. Perhaps he would draw a distinction between larger well-established participants such as certain environmental groups, and small relatively powerless groups. However, in an interesting footnote, Rossi approves a case that states the public interest may include participation for vindication of aesthetic, conservational, and recreation needs! *Id.* at 819 n.238.

[159] *See supra* note 157.

[160] Sunstein, *supra* note 20, at 183, 232–36.

[161] *See id*. at 196–97 (stating reservations based on cost-benefit analysis and

Sunstein would approve of *Laidlaw*, where a citizen action under the Clean Water Act satisfied the standing requirement of the "case or controversy" provision of Article III of the Constitution. The Court in *Laidlaw* was able to find congressional intent, but in reality it is unclear what Congress intended.[162] Possibly Sunstein would be rankled by the use of the injury-in-fact test, but to Sunstein, at least, even where there may be constitutional objections, congressional intent should override them.[163]

Moreover, Civic Republican commentators who disagree with *Laidlaw* are in conflict with other observers who find that citizen suits have been important, numerous, and effective.[164] Citizen suits are an important part of the environmental protection arsenal and constitute almost five times the number of federal government environmental suits as well as almost all the state environmental actions combined on a yearly basis.[165] Without resolving the

worry about over-enforcement). Sunstein does note with apparent approval the success of citizens suits under the Clean Water Act. *Id.* at 221–22. Additionally, he stressed the tendency of regulated parties to be able to exercise undue influence over the regulators, at the expense of a more amorphous but concerned public. Sunstein equivocates on whether citizen actions have been helpful to the environment but concludes in any event that they are dispensable. *See* Sunstein, *supra* note 20, at 221–22. Citizen suits are a band-aid which can do some good on a complex, somewhat ineffective regulatory system of command and control with often inadequate resources allotted to agencies to perform. *Id.* at 222. What Sunstein thinks is needed is a major overhaul of the administrative system to produce more flexible voluntary controls. *Id.* at 222. Yet Sunstein throws a life preserver to citizen actions, suggesting that Congress could cure constitutional "redressability" concerns. *Id. But see* Rossi, *supra* note 158, at 209–10, 218–19 where Professor Rossi describes "participation" and "deliberation" as notable goals of Civic Republicans, but deemphasizes participation and states that his own position against environmental citizen actions is opposed by Civic Republican Professor Sunstein.

[162] *See generally* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000). The Supreme Court reversed the Federal Court of Appeals in *Laidlaw*, so how can it be argued that congressional intent was clear?

[163] *See* Sunstein, *supra* note 20, at 185–86.

[164] *See* Zinn, *supra* note 20, at 133 & n.206, 160–61 (discussing success of citizen actions and applauding *Laidlaw* a "model application of the 'diligent prosecution' test"); *see also* Hodas, *supra* note 157, at 1609 (noting that citizen suits have not diminished since early 1980s, and arguing that the EPA's practice of settling suits in order to manage its case load weakens the incentive for compliance on the part of violators); David Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship*, 24 HARV. ENVTL. L. REV. 1, 113–14 n.418 (2000) (arguing that citizen actions are necessary because states may not be diligent and may even be collusive to prevent federal enforcement).

[165] *See* Hodas, *supra* note 157, at 1609.

policy conflict, suffice it to say that Civic Republicans seem consistently unable to resolve it with their "civic virtue" standards of deliberation and participation.

## IV. CONCLUSION

Postmodernism would be banned or regarded as antithetical in a closed society where texts and authority are the ruling models. Many persons in even relatively open societies would find it unpalatable now. Theorists who rely on an edifice of established "revealed" premises or who view law as a science with stability and predictability could not embrace postmodernism. Both Public Choice and Civic Republicanism, for example, have aspirations to grand theory with projections of wide-ranging explanatory power. Postmodernism stands in opposition to such projects and indeed to any grand theory. Nothing within these paradigms, Civic Republicanism or Public Choice, makes them postmodern. Quite the reverse—and advocates of these paradigms should shudder in abhorrence of postmodernism. But conflict and contradiction are grist for the postmodernist's mill. The more conflicting edifices are offered as dispositive of real-world disputes, the better for the postmodern frame.

Thus, for example, the geocentric frame of Ptolemy was replaced by the heliocentric frame of Copernicus, illustrating a postmodern delight—natural science caught in disarray. This example illustrates that what is accepted as scientific truth changes over time. Scientific elites determine what will be accepted as such truth. One criterion for such acceptance is the ability of the conceptual frame to predict future phenomena. Since such future phenomena cannot be knowable in advance, acceptance of a particular frame involves faith.[166] No wonder law as a mere social science cannot produce unalterable edifices that contain restive phenomena. This limitation is particularly the case when Civic Republican and other paradigms purport to enshrine science, scientific method, rationalism, predictability, and so on. In fact however, proponents of these paradigms are either unaware of or engaged in a cover-up of the political nature of the judicial process. In truth, these paradigms themselves are partial

[166] The selection of a new paradigm in natural science is often based on its future promise. *See* KUHN, *supra* note 24, at 157–58. For a discussion of scientific elites establishing a new paradigm, see *id*. at 144–59.

explanations. Worse yet, the data used, such as court decisions and legislative and policy explanations, are often designed to obscure rather than illuminate the real basis of the decision. Moreover, there can be a masking of normative implications, as, for instance, with Public Choice advocates who seem reluctant to say directly that they desire a return to a laissez faire economy without the imposition of the regulatory state.

For example, court decisions in environmental law seem to mirror indeterminacy over time, as the regulatory state produces chaos, cycling, and unpredictability. Possibly worse, these movements are concealed by decision makers whose data might otherwise aid scientific system builders if any there could be. Thus, courts seem to have made decisions not according to determinate principles, but according to their policy preferences. They seem to manipulate standards to achieve those preferences, which may be linked to highly contestable preferences in economic and political theory brought to the decision table.

The desire to avoid the predicament of indeterminacy and the search for a value neutrality of legalism, rule of law, "civic virtue," or whatever your favorite characterization might be, is valiant, but it is highly suspect if offered as determinant in this arena. But that does not mean the regulatory state should be abolished in favor of a laissez-faire market. The regulatory state in some form is the best we have and the best we are going to get. The only thing worse than the regulatory state is a government without the regulatory state.

In any event, postmodernism has "reared its ugly head." No generally accepted grand theory or fundamental paradigm appears, though Public Choice and Civic Republicanism are contenders with such aspirations.[167] The confrontation of Public Choice advocates with adherents of the regulatory state does occur, but should be more frequent.[168] Postmodernists, unlike their formalist adversaries, carry the day because they are comfortable with the irony, contradiction, fluidity, and lack of generally accepted foundational ruling paradigms in court decisions, agency determinations, and congressional intervention or abstinence.

[167] *See* Farina, *supra* note 118, at 109–11 (discussing Public Choice as broad or grand theory).

[168] *See, e.g.*, Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96 MICH. L. REV. 1746, 1749–54 (1998) (an excellent article pitting the claims of public choice against its critics).

Reason and formalist structure as arbitrators of values are being routed by unfolding events. Adherents of both Public Choice and Civic Republican theories cling to reason and formalism as adherents of the Ptolemaic theory stuck to geocentrism.[169] They fail to see the Enlightenment values of reason and formalism coming up short because such processes or structures are of very limited help in the choice of beginning precepts. The reason god of the Enlightenment is in serious trouble, except as an instrument to provide comforting rationalizations for decisions made on other grounds.

Decision makers involved in the legal process have gone back and forth and continue to regard as important or dismiss such issues as: expertise of agencies as a justification, standing for citizen participation, traditional and system-wide capture, courts as important or marginal players, the role of the Constitution ("unlawful delegation," "case or controversy," standing or not), standards of review, the public interest, and the proper role of Congress and the Executive. Environmental law has waxed and waned, since it gets tossed about in this swirling sea. All of this is not so surprising when we remind ourselves that our view of the importance of environmental protection is based on perhaps irresolvable conflicts within the society and the individual. Perhaps it would be better if theory could contain the recurrence of contradiction and antinome. But the fact is that grand theory cannot do so. Postmodern is the label I affix to this phenomenon, which I find is not "ugly" but descriptive.[170] Perhaps you have a better label.

[169] Kuhn describes a process in which the new paradigm is received in natural science. Gradually, the scientific community shifts from the old paradigm. Those who remain wedded to the old paradigm may be judged not to be doing science. *See* KUHN, *supra* note 24, at 159. The case in law is at once not so dramatic and more difficult. Perhaps the closest analogy is natural law as an absolute trump to positive law. While there are not many natural lawyers around, they do exist, and would not be read out of the elite membership by saying they are "not doing law." *See also* EAGLETON, *supra* note 2, at 133–34 (stating that those who bear the burden of running the system cannot dispense with high-sounding rationales (I assume he means empty convention wisdom, such as "manifest destiny") because citizens may cling to them ever more tenaciously as the ground shifts under their feet).

[170] Diagnosis of a condition may not constitute approval of it.