

## CORRALLING CAPTURE

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Regulatory capture is an idea at the center of virtually any discussion of the appropriate balance between Congress and administrative agencies. It has echoed throughout the proceedings of this conference. But it is also much-abused. So I want to use this Essay to make a plea for more rigor in how we think and talk about the idea of regulatory capture. Toward that end, consider three fairly simple framing points.

First, when we think and talk about capture, definitions matter. There is a standard 20,000-foot definition of “capture”: a process by which policy is directed away from the public interest and toward the interests of a regulated industry.<sup>1</sup> Fair enough. But note the obvious problem here: The standard definition requires a conception of what the public interest is in the first place. Put another way, arguments about capture necessarily turn on a difficult counterfactual inquiry about what public-interested regulation would look like in capture’s absence.<sup>2</sup> This is no mean feat, as virtually any policy can be framed in public interest terms.

Conceptual slipperiness has led to some recent efforts among legal scholars and political scientists to specify more clearly the problem of capture and define key terms. Some have now taken to talking about two different kinds of capture: materialist and non-materialist.<sup>3</sup> The materialist version of capture is the

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1. See Michael E. Levine, *Regulatory Capture*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 267, 267 (Peter Newman ed., 1998).

2. See *id.* at 268.

3. See, e.g., James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., forthcoming 2013), (manuscript at 9, 11, 31), available at <http://www.tobinproject.org/sites/tobinproject.org/files/assets/Kwak%20%20Cultural%20Capture%20and%20the%20Financial%20Crisis%20%2810.24.11%29.pdf>.

classic account.<sup>4</sup> Concentrated and diffuse costs and benefits create asymmetric stakes among interest groups.<sup>5</sup> Collective action problems make it harder for some groups to organize than others.<sup>6</sup> Here, capture is a structural problem that allows some interests to systematically win out over others.

Compare this classic conception to the newer, non-materialist theories of capture—sometimes referred to in the scholarly literature as “cognitive” or “cultural” capture.<sup>7</sup> This idea emphasizes interest-group capture of the administrative process through the creeping colonization of ideas. Thus, an industry can somehow convince regulators to think like it.<sup>8</sup> Consider financial deregulation, which some observers think has contributed substantially to our recent economic woes by lowering capital requirements, allowing banks to get into the securities business, and the like.<sup>9</sup> These changes, the argument goes, came about at least in part because the financial industry convinced regulators that what was good for Wall Street was good for America.<sup>10</sup>

4. See STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 14–25 (2007) (summarizing traditional “capture” view); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (offering seminal treatment of capture theory); see also Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. OF ECON. 371 (1983) (extending and critiquing the Stigler model); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976) (same); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 343–50 (1974) (same).

5. See Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 14 (2000).

6. See *id.* at 13–14; RUSSEL HARDIN, COLLECTIVE ACTION (1982) (extending the Olson model); MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (offering seminal account of challenges group organization poses).

7. See Kwak, *supra* note 3, at 9–12; Stanley I. Langbein, *Cognitive Capture, Parliamentary Parentheses, and the Rise of Fractional Apportionment*, 39 TAX MGMT INT’L J. 567, 580–81 (2010); Willem H. Buiter, Central banks and financial crises 104, 106 (Sept. 14, 2008) (unpublished manuscript), available at <http://www.willembuiter.com/hole.pdf> (setting forth theory of “cognitive regulatory capture”).

8. See Kwak, *supra* note 3, at 9–12; Langbein, *supra* note 7, at 580–81; Buiter, *supra* note 7, at 104, 106; see also Steven M. Davidoff, *The Government’s Elite and Regulatory Capture*, N.Y. TIMES (June 11, 2010, 2:00 PM), <http://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture>.

9. See, e.g., Brooksley Born, *Foreword: Deregulation: A Major Cause of the Financial Crisis*, 5 HARV. L. & POL’Y REV. 231, 231–32 (2011).

10. See, e.g., Kwak, *supra* note 3, at 9; Buiter, *supra* note 7, at 104, 106. For a version of the argument in the popular press, see Simon Johnson, *The Quiet Coup*, THE ATLANTIC, May 2009, <http://www.theatlantic.com/magazine/archive/2009/05/the-quiet-coup/7364/> (arguing that the financial industry gradually shaped both the technocratic and normative views of regulators).

The problem with the classic, materialist version of capture is surprisingly simple. If you look really hard at the political science and related literatures, it is difficult to find any good, solid empirical evidence that materialist capture exists at all.<sup>11</sup> Diffuse interests often do quite well.<sup>12</sup> Concentrated interests often lose, sometimes spectacularly.<sup>13</sup>

For its part, the non-materialist account of capture does not fare much better. Indeed, non-materialist capture begins to resemble, upon further examination, the marketplace of ideas. Some ideas win out; some do not. This helps underscore the more general problem, noted previously, that virtually any policy position can be framed as furthering the public interest.<sup>14</sup> It also suggests that, when deploying the concept of capture, it is quite easy to lose focus to the point where we are not talking about much at all.

Other efforts to define terms are more helpful. Legal scholars and political scientists now also talk about “strong” versus “weak” forms of capture.<sup>15</sup> Strong capture is the idea that interest-group rent-seeking is so pervasive and so socially costly that we might be better off without any regulation at all.<sup>16</sup> Weak theories of capture, by contrast, maintain that the regulation that gets kicked out the back end of the administrative process is less publically interested than it should be but is still on balance social-welfare-enhancing.<sup>17</sup>

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11. See, e.g., Croley, *supra* note 5, at 7–8 (reviewing studies and finding little consistent evidence in support of capture theories); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 204–05, 236–68 (1988) (offering an earlier canvass of existing studies and arriving at the same conclusion). For a thoughtful recent effort to set forth an agenda for how scholars might subject capture theories to better empirical testing, see Daniel Carpenter, *Detecting and Measuring Capture*, in PREVENTING CAPTURE, *supra* note 3.

12. See Croley, *supra* note 5, at 7–8 (noting repeated successes of diffuse interests in environmental, consumer protection, and tax contexts).

13. See *id.* (providing examples); see also David A. Moss & Mary Oey, *The Paranoid Style in the Study of American Politics*, in GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 256, 257 (Edward J. Balleisen & David A. Moss eds., 2010) (describing three policy episodes—voting rights, Medicare, and Superfund—in which “special interests appear to have given way to the general interest in the policymaking process”).

14. See *supra* note 2 and accompanying text.

15. See, e.g., Daniel Carpenter & David Moss, *Introduction*, in PREVENTING CAPTURE *supra* note 3, at 26–27.

16. *Id.* at 26.

17. *Id.* at 26–27.

The distinction is an important one, for it helps us to understand what remedies might be indicated upon a “capture” diagnosis. If a strong form of capture is the problem, then we might want to revive a robust form of the non-delegation doctrine within administrative law.<sup>18</sup> We might even want to get rid of entire departments or agencies—if, unlike Texas Governor (and then-presidential candidate) Rick Perry,<sup>19</sup> we can remember what they are. But if weak capture is the issue, then the conversation looks very different. Under these circumstances, we are more likely to be talking about how to tweak institutional structures—for instance, by designing better agencies<sup>20</sup>—or quibbling about doctrinal structures governing judicial review. My own view is that we should be very skeptical about reform proposals that flow from claims invoking the strong form of capture.

The broader point of all of this discussion is that defining terms is very important. Some recent scholarly efforts have

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18. For classic arguments for and against reviving the non-delegation doctrine, compare JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 125–34 (1980) (arguing for revival of non-delegation doctrine as a way to discipline congressional lawmaking), JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 78–94 (1978) (same), and THEODORE LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 129–146, 297–99 (1969) (same), with Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1190 & n.37 (1973) (arguing against non-delegation’s revival), and Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1693–97 (1975) (same). The most prominent judicial argument in favor of reviving non-delegation is then-Justice Rehnquist’s concurrence in the so-called Benzene Case. See *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) (“If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it. It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge.”). As students of administrative law know, however, the Supreme Court decisively rejected the D.C. Circuit’s attempt to revive non-delegation in *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 476 (2001). Still, some have argued that non-delegation lives on in other forms. See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (arguing that non-delegation doctrine has been “relocated” to various canons of statutory interpretation).

19. Arlette Saenz & Emily Friedman, *Rick Perry’s Debate Lapse: ‘Oops’—Can’t Remember Department of Energy*, ABC NEWS, Nov. 9, 2011, <http://abcnews.go.com/blogs/politics/2011/11/rick-perrys-debate-lapse-oops-cant-remember-department-of-energy>.

20. See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 27–30 (2010).

done noble work along these lines. Our understanding of the mechanisms that allegedly underlie capture and the harms capture supposedly causes is richer and more precise thanks to these efforts. But we too often forget these points when we move outward and engage in broader debates about, say, the proper allocation of authority between Congress and agencies. That is my first point.

The second point is that the dynamics of capture—assuming we can agree on what capture means in the first place—will be highly contextual in ways that can frustrate and even defeat sound generalizations about the administrative process. First, policy context matters. Environmental regulation is very different from insurance regulation, both of which are very different from drug regulation. These and other policy areas vary in the structure of the interest group environment and in their complexity.<sup>21</sup> The complexity point is especially important, for capture, at least in its classic form, depends on a public that is “rationally ignorant” or otherwise incapable of tracing policy outcomes to agency decisions.<sup>22</sup>

The agency’s choice of administrative instrument matters as well. Much of the discussion here today has focused on agency rulemaking. Yet rulemaking is arguably far more insulated from capture than other types of administrative action. This insulation does not just derive from familiar mechanisms of control like congressional oversight. The Administrative Procedure Act (APA)<sup>23</sup> also injects all sorts of onerous procedural requirements into the rulemaking process, facilitating at least some measure of transparency and pluralistic participation in

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21. See, e.g., JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 79–83 (1989) (offering a typology of the ways in which the interest-group environment can vary across policy contexts); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285–87 (1988) (discussing varying interest-group dynamics across policy contexts).

22. See, e.g., DENNIS C. MUELLER, PUBLIC CHOICE III 303–08 (1989); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238–59 (1957). For policy “traceability” in the legislative context, but with obvious applications to the administrative process as well, see R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 119–20 (1990) (describing congressional use of legislative procedures to conceal actions from public view or make it difficult to trace policy outcomes to legislative (in)action).

23. See Administrative Procedure Act, 5 U.S.C. § 500 (2006).

the regulatory process.<sup>24</sup> Indeed, the APA works hand in hand with congressional oversight in this regard; many liken the APA to a vast network of “fire alarms” that interest groups can use to alert legislators to naked interest-group transfers.<sup>25</sup>

In my view, we should be far more worried about capture as we move to more micro-levels of agency decisionmaking. Consider capture in the context of adjudication, where disputes are often binary in character, and where the APA is less onerous in its requirements regarding notice to interest groups and an opportunity to participate.<sup>26</sup> Consider as well enforcement actions and also agency decisions *not* to enforce, where agencies have long enjoyed unreviewable discretion.<sup>27</sup> Indeed, some administrative law scholars have suggested that agencies are increasingly turning to decentralized enforcement actions, whether in-house adjudications or agency-filed civil actions in court, as a way to achieve regulatory outcomes that could previously be achieved only through ponderous—and far more transparent—rulemakings.<sup>28</sup>

An illuminating example of the relative opacity of micro-level agency action is found in United States Department of Justice (DOJ) oversight of *qui tam* litigation under the False Claims Act,<sup>29</sup> the subject of some of my recent scholarly work. The DOJ makes frequent and critically important micro-level decisions about whether to join particular *qui tam* cases that are largely hidden from public view.<sup>30</sup> Until I built the first large

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24. See Croley, *supra* note 5, at 35–36; see also Administrative Procedure Act §§ 552–553 (setting forth procedural requirements for informal rulemaking).

25. Matthew O. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166, 176 (1984).

26. See Administrative Procedure Act § 554.

27. See *Heckler v. Chaney*, 470 U.S. 821, 830–35 (1985) (holding agency decisions not to enforce to be unreviewable under the APA).

28. See, e.g., ANDREW P. MORRIS, BRUCE YANDLE & ANDREW DORCHAK, REGULATION BY LITIGATION 1 (2009) (noting that “regulation-by-litigation” entails “bringing suits and achieving ends that could be and traditionally had been achieved by regulatory agencies using rulemaking procedures”); see also *id.* at 49 (noting use of litigation “with sufficient coverage of the regulated industry to serve as a substitute for generally applicable rules”); *id.* at 172–74 (noting relative lack of transparency for privately driven “regulation by litigation”). For earlier analyses making similar arguments, see generally REGULATION THROUGH LITIGATION 50–52 (Kip Viscusi ed., 2002); William M. Sage, *Unfinished Business: How Litigation Relates to Health Care Regulation*, 28 J. HEALTH POL. POL’Y & L. 387 (2003).

29. See generally 31 U.S.C. § 3729–3733 (2006).

30. David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. (forthcoming 2013).

dataset of *qui tam* litigation, even congressional overseers had nothing like a synoptic view of the DOJ's role in the regime. Importantly, this lack of information had persisted despite the regime's stunning growth—*qui tam* suits now easily eclipse securities litigation in filings and recoveries<sup>31</sup>—and rising controversy about its workings.

The broader point is that policy context and administrative instrument really matter when we talk about capture. Both make it hard to generalize about the administrative process compared to the legislative process. It is also possible that we have simply been looking for evidence of capture in the wrong place.

My third point is that institutional context matters, but probably less than is commonly thought. When we talk about capture, we should—but too often do not—move immediately into a comparative institutional posture. If agencies are at risk of capture, then what is the alternative? A simple option is to cut agencies out of the process entirely by having Congress write more detailed laws. Congress is, after all, making a basic make-or-buy decision when it decides to delegate to an agency in the first place.<sup>32</sup> But are the congressional subcommittees that write the bills any less susceptible than administrative agencies to patterns of political influence? Are they any more likely to reflect the median voter or the public interest? They certainly do not seem immune to capture-like concerns. Query why Iowans tend to end up on agriculture committees.<sup>33</sup>

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31. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1246 (2012) (noting more than 600 *qui tam* suits and \$3 billion in recoveries in 2011 compared to 600 securities class actions and only \$1.4 billion in recoveries in that same year).

32. See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 7 (1999).

33. Iowa currently has four members of Congress on agricultural committees. Its two Senators sit on the Senate Committee on Agriculture, Nutrition and Forestry, and two of its five Representatives sit on the House Committee on Agriculture. See COMMITTEE MEMBERS, <http://agriculture.house.gov/about/membership> (last visited Nov. 4, 2012) (listing the members of the Committee on Agriculture); COMMITTEE MEMBERSHIP, <http://www.ag.senate.gov/about> (last visited Nov. 4, 2012) (listing the members of the Committee on Agriculture, Nutrition and Forestry). To be sure, this is a contested point among political scientists, and some have countered the notion that committee members are outliers relative to the median legislator. See, e.g., KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 191–200, 232–34* (1998) (offering evidence from the period 1993–1997 that most committee members have policy preferences close to that of the median floor member). Other classic studies, however, clearly link committee composition

We might also minimize the agency role by giving courts broad interpretive law-making authority. Consider laws such as the Sherman Act or Title VII, where Congress has effectively delegated to courts the responsibility for fleshing out open-ended legal mandates.<sup>34</sup> Yet judicial delegations bring their own problems. Evidence from a wide range of litigation contexts suggests that repeat players—the “haves”—tend to come out ahead.<sup>35</sup> Among other things, repeat players have superior resources<sup>36</sup> and an ability to “play for rules” by treating clusters of lawsuits strategically.<sup>37</sup> The broader point here is that when it comes to the structural conditions that supposedly facilitate regulatory capture—patterns of diffuse and concentrated costs and benefits and collective action problems—institutions like legislatures, agencies, and courts all tend to “move together.”<sup>38</sup>

Perhaps the best way to sum all of this up comes from a book entitled *Greed, Chaos, and Governance* by Yale Law School’s Jerry Mashaw.<sup>39</sup> The book opens by citing Pablo Picasso, of all people, who, in commenting on his very strange Cubist portrait of

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to agency enforcement decisions. See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 779, 788–92 (1983) (asserting that “firms located in districts represented on FTC oversight committees are favored in the commission’s antitrust decisions” and that “[t]he statistical evidence implies that the FTC is remarkably sensitive to changes in the composition of its oversight subcommittee.”). Two conclusions follow from studies of the latter type. First, capture of legislative committee members, if it happens, may exacerbate capture at the agency level via oversight activity. Second, committee actions cannot always be perfectly policed by legislative leaders even if committee members are not, on average and over time, ideological outliers relative to legislative medians.

34. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008) (exploring the practice of congressional delegation to the judiciary). For earlier efforts to theorize about judicial delegations, see Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 46–52 (1982); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006).

35. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 97–103 (1974) (discussing the many advantages that “repeat players” have over the “one-shotters” in litigation).

36. *Id.* at 97. *But see* CROLEY, *supra* note 5, at 140–42 (arguing that resource disparities matter less in administrative law litigation than in political competition for regulatory influence).

37. *Id.* at 99–103.

38. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 23 (1994).

39. JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997).



Gertrude Stein, said the following: “Everybody thinks she is not at all like her picture, but never mind, in the end she will manage to look just like it.”<sup>40</sup>

Here is a critical lesson that applies no less to the administrative process than to portraiture: Images and perceptions are powerful. The “is” and the “ought” are connected.<sup>41</sup> Ideas can become self-fulfilling prophecies. As this conference has shown, it is common to hear that the administrative state is bad or that too much policy gets made by a runaway or captured bureaucracy.<sup>42</sup> This rhetoric has a big effect. It degrades our faith in government. It undermines civic trust.

Of course, from the perspective of a conservative activist, such disillusionment might be a good thing. After all, a core tenet of the conservative political strategy is to “starve the beast” of resources.<sup>43</sup> Yet the image of regulation that has been created in recent decades, with a strong conception of capture as its centerpiece, is in my view deeply flawed. The resulting conversation has not been sufficiently rigorous about defining terms, including what is meant by “capture” or the “public interest” in the first place. Nor has the conversation been sufficiently attuned to differences across policy areas or the administrative instrument that is being used. And the conversation has tended to *overstate* differences in the susceptibility of different institutions to common problems of collective mobilization and influence. It is not clear that we need to corral agencies so much as we need to corral the capture concept itself.

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40. *Id.* at 1.

41. *Id.*

42. See, e.g., C. Boyden Gray, *Congressional Abdication: Delegation Without Detail and Without Waiver*, 36 HARV. J.L. & PUB. POL’Y 41 (2013).

43. “Starve the beast” commonly refers to the political strategy of cutting taxes before cutting spending, then using the ensuing budget deficit as an argument to reduce existing spending or reject new forms of spending. Though it has become a centerpiece of anti-tax advocates such as Grover Norquist, the term is often attributed to President Reagan’s budget director, David Stockman. See, e.g., Richard Lavoie, *Patriotism and Taxation: The Tax Compliance Implications of the Tea Party Movement*, 45 LOY. L.A. L. REV. 39, 73 & n.134, 74–76 (2011) (tracing term’s origins and reviewing existing studies about its efficacy as a political strategy).