The Possibility of Experimentalist Administrative Agencies

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Abstract

The separation of powers became the ambivalent, largely rhetorical tradition it is today because of a plasticity in its core concepts, power, authority, and liberty. Throughout the Progressive and New Deal eras its basic meaning was complicated by an "experimentalist" attitude toward lawmaking and legal change. This experimentalism generated a rich new array of institutional forms and theories of legitimate lawmaking. Contrary to conventional wisdom, though, this experimentalism built from the doctrine's past more than it departed from it. Moreover, the experimentalist attitude was perhaps most important for the reaction it engendered: a "legalist" attitude that rejected the very premises of experimentalism. The competition between these two played a formative role in modern administrative law. The creation of at least one core structure separating powers/authorities and protecting liberty in the administrative state—the APA's model of rulemaking—was a direct result of the political and intellectual competition between experimentalists and legalists. In the first third of this study, I try to trace that influence in one of the major innovations of governance in the twentieth century, notice and comment rulemaking.

The second third of this study shifts to one field of contemporary regulation in particular: the protection of biodiversity. It makes the argument that federal agencies charged with the protection and restoration of wildlife populations are to a fault too rational, too deliberate, too sequential in operation, and too fixated on putting various tracts of land on highly protective pedestals. I argue that these agencies have become locked in regulatory processes weighed down and incapacitated by their own importance, their own dignity. Thus, the overall claim is that our administrative system's commitments to rationality and public participation per se render it incompatible with the societal objective of biodiversity and, derivatively, habitat protection. In this connection, the federal law of habitat exemplifies a larger condition of the administrative system. The modern science of conservation biology has shown how important continuous adaptation is to success and how provisional all judgments must be throughout implementation. Federal lands managers, the Fish and Wildlife Service, and the Council on Environmental Quality all have known as much for years. Yet these institutions have done little to adapt their administrative architectures accordingly. Indeed, as the agencies have actually implemented their conservation mandates, they have been neither adaptive nor pragmatic – largely, I argue, as a result of the legal structure of this field. In this paper, I highlight the lack of fit between that structure and this public policy objective and question whether any changes at the federal level could make it much better.

In the final third of this study, I try to conceive of alternatives to top-down federal management in the field of biodiversity conservation. There is wide agreement among conservation activists and scientists alike that loss and alteration of habitat are the leading threats to biodiversity in America. Municipalities, though, are only beginning to acknowledge that they are the problem in the struggle to stem the tide of "sprawl" and other economic processes producing ecosystem-wide habitat degradation today. Much recent attention to local governments is reconsidering them as viable solutions to environmental problems like habitat degradation. But most of this dialogue is being based upon a mistaken conception of local governance. Much of the legal scholarship on local environmentalism has ignored the reality of our localism and its role in the creation of the ever-expanding built landscape in America. This part of the study argues that a lack of realism in the debate about local environmental initiative renders it blind to the vices and weaknesses of local governments and some of their sham conservation efforts. But this misunderstanding also obscures localism's counterintuitive virtues and possibilities for real conservation progress. Local government's deep connection to private property entrepreneurialism is what has made it so practically powerful in resisting so many state and federal habitat programs. But it may well be this dimension of our localism that renders it uniquely fit to the tasks of real habitat protection and restoration in the twenty-first century.

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INTRODUCTION AND ANALYTICAL SUMMARY OF THE PROJECT

I began this project out of a longstanding interest in federalism and the separation of powers and a firm conviction that most of our environmental troubles are basically failures of governance. What I learned from almost three years (2000-03) of historical and doctrinal research into the separation of powers and our Constitution's particular brand of federalism is how tightly connected the different periods of American history are in their conceptualization of dividing government in order to check its abuses. In my view, neither the New Deal nor much else in the twentieth century was all that novel or distinct from the nation's founding (or, for that matter, its other equally formative moments of constitutional-structural evolution) with respect to that principle Indeed, the deeper I searched for the origins of the modern separation of powers within the British Constitution of Harrington, Walpole, Bolingbroke and other framers of the seventeenth and early eighteenth centuries, the clearer this continuity seemed. The imagining of new forms of governmental organization so often associated with the New Deal had been done for centuries and it had been challenged as threatening to "liberty" for just as long. In this introduction and analysis of the project, I describe how I came to that conclusion and what inferences I have argued should be drawn for twenty-first century conservation.

I eventually decided to trace the conceptual evolution of power, governmental functionality, and liberty as a means of identifying the threads connecting early modernity to the twentieth century and beyond.[1] Doing so for both the separation of powers and federalism was too much. Thus, the model I chose from that research was a dual-axis account of the separation of powers: two ideal types of liberty and two ideal principles of governmental organization. My two ideal types of liberty, ancient and modern, are relatively familiar. To reveal my historical bias, I suggested that these two are different from each other in their chronological appearance and highpoints of influence. Though I am hopeful that a new era of civic engagement—a new *vita activa*—is possible for the democracy our children will inherit, it seemed more descriptively accurate to put such concepts of liberty behind those that Hobbes, Locke, and Mill synthesized. Modern liberty is, in my view, much more individualistic, materialistic, and patterned to capitalism as such.

When it came to describing two ideal principles of governmental organization, chronological ordering was more complicated. Though the balance of power is probably the older of my two principles, a rationalization of functions (often identified with the Enlightenment's modern, multi-agency state) has very deep roots itself. Since my overall concern was with the making of law, I focused on the history of the distinct law-making functions our Constitution explicitly establishes: legislation, execution, and adjudication. That sharpened a much narrower period of constitutional development for attention, principally the emergence of the distinction between legislating and governing and the rise of an independent judiciary. This focus allowed me to highlight what it is about

[1] **The research for the historical part of the project, when it was not the analysis of appellate opinions, consisted mostly in secondary materials and most of that in monographs by trained historians of the periods in question.**

these three that makes them unique and supposedly uniquely suited to a particular domain in the convoluted social and institutional process of "jurisgenesis." (Some of what I highlighted was how intensely interested and partisan the theorists who idealized the separation of our three branches were in that process of constitutional differentiation.) In my view, to whatever extent these three functions/branches are unique and uniquely suited to their own fraction of lawmaking, it is where they are situated temporally in the processes of making and changing of law. *The Federalist Papers* and other partisans at the founding (and since) identified the "rule of law" with a sharp division and sequencing of legislating, executing, and adjudicating. Given high variability in the degree of separation and in the sequencing of the three, though (even before the New Deal), it is particularly difficult to find that the rule of law demands any certain distribution of functions. Maintaining a "balance of power" among the branches (or those possessed of one type of power) has never been synonymous with the rule of law, either. Indeed, if anything, the temporal sequence has been routinely confused by execution: it is as unclear where the act/function of executing the law begins or ends as it is what it must necessarily be in relation to the others. All the same, the distinctions are idealistic and, therefore, could be normatively valid even if they have only been observed in the breach. This is what led me to conclude that the separation of powers as such is mostly *rhetoric*. It is highly developed, nuanced, and normatively powerful, at least in some settings. But the concepts it employs are plastic and, in some sense, designedly so.

Focusing on lawmaking alone also crystallized the differences between "power" as a threat to liberty and "authority" as such a threat. In trying to understand Founding and Federal period political thought, I was forced to consider the differences between power and authority not just in history but in contemporary practice as well. Indeed, within this part of the project the concept of power became almost intractable. 'Checks and balances' is a slogan with which every student of the Constitution is familiar. But some reflection reveals that it is an essentially meaningless abstraction on which people begin to disagree sharply the instant its real content is explored. Who is to be balanced against whom? The one, the few, and the many (as Aristotle may have argued) or particular agencies of government—of which there are an infinity? Simply positing that power ought to be checked by power is just a high-sounding ideal that, in the context of popular sovereignty, has some extremely undesirable applications. While both power and authority can conceivably be measured quantitatively, power is better fit to empirical, social scientific study. The capacity to get what one wants is, after all, a question of results and is, at least presumptively, an empirical question. Whether the chosen ends are just, legitimate, or duly authorized is another, more clearly philosophical matter. Nonetheless, it is possible to view both power and authority as threats to liberty, however defined.

Proving all of this with case analysis seemed redundant: much of that historical-doctrinal work has been done by others. As I summarize in the first piece (pp. 42-49), *The Federalist*'s political philosophy of natural aristocracy has been superseded by a very different philosophical paradigm today. Virtually no respectable political philosopher of today makes the case for innate or natural superiority of talents for public life. Yet most contemporary political science (and public choice in particular) seems to share that much

in common with Federalist political thought, *i.e.*, as to the regularity and/or predictability of elite control.[2] Of course, whether leading elites can claim legitimate authority to rule is zoned out of that empirical work. Perhaps with good reason: weighing in on such claims necessitates resort to what may be the most complex normative ideals in political philosophy. Simplifying such ideals out of prescriptions for governmental organization can be a path to a clearer, more rigorous intellectual exercise. But what is left has been criticized (rightly in my view) as being rather thin and beside the point.

The differences between these two kinds of threats to freedom were understood and deliberately incorporated into conceptions of the separation of powers only *after* late eighteenth- and early nineteenth-century British and European philosophy revolutionized the concept of rationality itself—setting it apart as the benchmark of all human thought and action (pp. 57-69). Rationalizing governance in this sense became a process of identifying ends and matching them to effective means. Most of the attention, thus, gravitated toward the identification of the public's ends. The aggregation of preferences in a legislative chamber naturally withered under the intense scrutiny almost immediately (Condorcet) and in the intervening centuries (Arrow et al.). A rationalization of governance driven by the modern view of rationality is one driven largely by the empirical study of legislative bargaining and the agency costs of law and policy that must be applied by others (whether by courts or bureaus). Of course, it could just as easily focus attention on the evolving nature of means and ends, as modern experimentalists explain. Indeed, as I argue in the first piece, the rise of bureaucratic administration was at least hastened by legislators' realization of their own incapacity to make concrete and particularized laws that serve as effective means to the public's ends (pp. 75-83). Importantly, though, the fuller study of that reality—one that would become a truly political-scientific approach to the separation of powers—had little traction in America until, at the earliest, the end of Progressivism.

I argue, nonetheless, that a pragmatic attitude toward lawmaking for the public's benefit led legislators and administrators in roughly similar directions, even before academia caught up. Precisely the sort of iterative process that produces administrative agencies and animates them to this day generated the first administrative agencies and invested them with lawmaking authority (pp. 75-91). In fact, precisely the dynamics of lawmaking by bureaucracy that provoked an early backlash from legal traditionalists in the late nineteenth century are the dynamics the Administrative Procedure Act's rules about rulemaking sought to govern (pp. 109-116) and that today divide the federal judiciary.

In short, I take my point about the deep ambivalence of the separation of powers into the structural foment of the New Deal and, specifically, into the legislating of the APA. Contrary to some of the suppositions made by my committee members (or at least my own imperfect understanding of their work), I believe that at least some of the architects of our administrative state understood fully and sought to institutionalize the

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[2] This may reflect its poverty more than anything else. See Ian Shapiro, The Flight From Reality in the Human Sciences (2005); Donald Green and Ian Shapiro, Pathologies of Rational Choice Theory: A Critique of Applications in Political Science (1994).

kind of experimentalism contemporary progressives now advocate. Moreover, the experimentalist attitude of those partisans was perhaps most important for the reaction it provoked: a “legalist” attitude that rejected the very premises of experimentalist administrative agencies, doing so by touting the rule of law and the separation of powers in public. The competition between these two played a formative role in modern administrative law by shaping the APA’s core structural innovation: notice and comment rulemaking. I contend that the APA’s model of rulemaking evidences the political and intellectual competition between experimentalists and legal traditionalists in the administrative state.

The second third of this study analyzes one field of contemporary environmental regulation in particular: the protection of biodiversity. It makes the argument that the federal agencies charged with the protection of biodiversity are, paradoxically, paralyzed by their own power, authority, and ambiguous enabling legislation. I argue that these agencies have become gridlocked in legislative politics and regulatory processes because they are weighed down and incapacitated by their own importance—what I call their own dignity. I refine this argument to administrative law’s commitments to rationality and public participation per se and attempt to show that it has become a substantial barrier to exactly the kind of regulatory adaptation that must be sustained for real conservation progress (pp. 152-228). In this breach, I argue that the possibility of institutionalizing the experimentalism so many have sought is defined in large measure by the presence or absence of modern administrative law. In short, I use the analysis of the first part of the study to argue that administrative agencies and lawmaking in the administrative state are, in a substantial sense, incompatible with a societal objective like biodiversity and habitat protection.

I spend a good portion of the second piece explaining the modern science of conservation biology and how it has clarified our need for continuous adaptation. Conservation biology has shown that virtually all high stakes judgments (whether about means or ends) must be kept provisional throughout implementation of a conservation plan (pp. 135-152). Federal lands managers, the Fish and Wildlife Service, and the Council on Environmental Quality all learned this the hard way (years ago). Yet institutional redesign has remained a marginal concern at most. These institutions have done little to adapt their administrative architectures to make the process of changing legal norms into a creative or constructive process. Indeed, as the agencies have actually implemented their ambiguous conservation mandates, they have been neither adaptive nor pragmatic. I argue that this is so at least partly because of the legal structure of the field and the way administrative law conceives of legal change by agencies and seeks to control it. In the end, I highlight the lack of fit between that structure and a complex public policy objective like biodiversity protection and question whether any feasible (or imaginable) changes at the federal level could overcome this fundamental reality.

In the final third of the study, I try to conceive of alternatives to federal regulation for the protection of biodiversity. Private ordering is one alternative, to be sure. In subsequent work (outside this project), I have begun to consider what legal mechanisms might best support nonprofit and academic sector efforts for maximum effect. But what I

sketch in the third part of this study is a bottom-up approach to regulating the most potent threats to biodiversity in America: the problems of sprawl. The authority to control land uses has overwhelmingly come to rest in local governments across the fifty states. This is at least partly a function of our federalism and partly a function of "our localism," as it has been called. But while scholars have linked our failures in protecting biodiversity to the "forgotten agenda" of land use reform, few have gone any further and offered real solutions—other than more centralization.

I start by acknowledging the challenges that local government's scale and lack of technical capacity pose for effective biodiversity conservation and restoration from the ground up (pp. 241-253). And I argue that the reason our localism has been such a potent force against regulatory initiatives to protect biodiversity is because of how tightly coupled local government has always been to private property in land. Indeed, this is the same foundational reality that renders so much recent (romantic) attention to local environmentalism misguided in my view (pp. 253-266). But to begin the massive project of synthesizing a ground-up model of regulation for biodiversity, I suggest that suburban and exurban development as market-driven phenomena are not as incompatible with real conservation progress as our recent history would suggest. In fact, when the scale of exurban and suburban local governance is compared to the federated, distributed organizational designs conservation biology promotes, and municipalities' capacity to borrow human and physical capital on an as-needed basis is considered, locality-by-locality networks of conservation land protection hold significant promise. Ideally, what any individual local government lacks in scale (small territories being the norm) or technical capacity (even expert federal agencies cannot have all the kinds of experts conservation planning requires) *could* become a driver of inter-local cooperation (pp. 288-300). The real challenge is finding leverage to this end that is both ubiquitous and powerful. In reality, then, the problem to be solved is promoting and appropriately rewarding inter-local cooperation, whether for identifying the ends to be pursued or in finding the most effective means for their pursuit.

Getting competitors to cooperate is a notoriously difficult task—yet real markets do so constantly. My approach rests on the premise that suburban and exurban municipalities are competitors with one another and that they compete at least to a degree on their environmental amenities and, increasingly, their environmental branding. Predictable political and market failures, of course, result from widespread ignorance of how landscape fragmentation damages ecosystems, sometimes significantly. And these harms are as yet unremedied in the law. But in my view the political and market failures that result from this ignorance will never be addressed effectively by federal regulation. The blowback generated from any given increment of legal change by administrative agencies or Congress is simply too significant, too unpredictable, and too widespread for that form to be a good fit to this collective problem. In contrast, a model of distributed design and production—distributed design and production of the applicable *norms*—may open significant opportunity by generating less opposition, lower information costs, and smaller incentives to litigate disputes. Moreover, in the event of litigation, the lawmaking that occurs is of much smaller magnitudes and greater diversity, perhaps

opening creative avenues of dispute resolution that, in a federal context, are often foreclosed.

Thus, in the end I argue that suburban, exurban, and rural local governments must be made to compete more openly on how they are responding to the habitat-degrading effects of uneconomic, uncoordinated development. Conservation biology has established that, in the context of developing landscapes, the central objective is the maintenance of adequate connectivity between habitat patches. The modest improvements I suggest for the law of local government empowerment are aimed at gently incentivizing inter-local collaboration for the (provisional) purpose of achieving or maintaining better landscape permeability (pp. 279-288, 300-304). What this will mean in operation is still uncertain. But minimizing roads and other infrastructure, dampening the scattering of homes and the related landscape disturbances they bring, and fully and adaptively mitigating the effects of these land uses where they are permitted, are all critical. Furthermore and more broadly, viewing conservation landscapes as the very same landscapes that people inhabit is a necessary step toward a pragmatic approach to modern conservation. Local land use authorities can be of supreme importance to that end. And if federal agencies have a role to play in any of this project, it is chiefly in their capacity to pool talents, capital, and information—but not with their lawmaking powers. In this respect, the normative structure of lawmaking in the administrative state is a central variable in the design of institutions for conservation in the twenty first century.