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### ADMINISTRATIVE LAW AGONISTES

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In *Procedures as Politics in Administrative Law*,<sup>1</sup> Lisa Bressman pulls together two disparate traditions in contemporary administrative law scholarship: one that stems from the work of generations of leading legal scholars and the other that emerges, more recently, from leading work in positive political theory (PPT) in political science. Professor Bressman explains why and how theories of judicial control of regulatory administration must take account of both how agencies function and the political environment in which administrative decisionmaking occurs. After all, administrative law shapes administrative politics in profound ways. Congress configures administrative procedures in the shadow of legal doctrines; moreover, courts are themselves deep in the business of procedure-configuring, as modern American administrative law amply demonstrates.

The idea that the enacting Congress enjoys pride of place in regulatory administration and oversight is a normatively controversial one. Even assuming that courts and agencies ought to act as the honest agents of legislative principals, the structure and incentives of congressional preferences change over time. As a result, the enacting and current Congresses may be in conflict. While earlier PPT models presupposed that courts would enforce the legislative bargain struck by the enacting Congress, further reflection indicates that a serious normative dispute remains about whether and to what extent that enacting coalition should be preferred over the current coalition in

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1. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum. L. Rev. 1749 (2007). Professor Bressman has also written a short summation of her article. See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 108 Colum. L. Rev. Sidebar 1 (2008), [http://www.columbialawreview.org/Sidebar/volume/108/1\\_Bressman.pdf](http://www.columbialawreview.org/Sidebar/volume/108/1_Bressman.pdf).

Congress. In the end, it is one thing to say that Congress tries to stack the deck in favor of certain interests and policies; it is another thing to say that we ought to let Congress get away with it.

What does it mean to say that Congress gets away with it? Left to its own devices, Congress can forge an administrative law that ensures that both agencies and courts act as resolutely honest agents of the enacting coalition. In other words, legislative preferences are implemented through not only legislators' own police patrols and fire alarms, but also through the courts' implementation of legislative will via judicial rules of appropriate agency behavior and through judicial ruling on statutory interpretation. Alternatively, we can suppose that courts ought to sit outside the political process and determine as best they can whether and to what extent agency decisions reflect sound governance and suitable legality; in short, whether agencies are acting consistent with law rather than politics. Congressional choice, in this latter framework, is posed against administrative law; in the former framework, administrative law is a reflection of congressional choice. Professor Bressman seeks a reconciliation of these two competing frameworks. The journey is a valuable one, for it is only by figuring out the special and often baffling role of courts in regulatory administration that we can profitably measure the PPT account of regulatory administration.

A. *The Elements of Professor Bressman's Approach*

Professor Bressman offers two seemingly conflicting principal insights regarding the role of courts in implementing the agenda and objectives of Congress. First, she explains how courts supplement legislative efforts to control agency performance. The doctrines she focuses on—in particular, the relationship between “reasonableness” requirements and the reticence to impose hybrid procedures on agencies—illustrate well how contemporary legal doctrine can be reconciled with the PPT view of congressional control. She explains, within the basic structure of legal argument, how key judicial decisions facilitate legislative efforts to supervise regulatory decisionmaking. The insight is essentially right, and it rests squarely on the PPT depiction of the dynamics between Congress and the courts. Deploying several pertinent examples of administrative law from this perspective of congressional control, she provides a convincing explanation of how judicial decisions that might seem like courts intervening to make political control more difficult are actually consistent with legislative interests.

Second, Professor Bressman explains how courts use administrative law to safeguard sound administrative governance from the twin threats of intrusive presidential influence and agency misfeasance. Administrative law therefore can be viewed as a means of correcting excessive political influence and assuring a rough equilibrium between

Congress and the President. In this way, the PPT account, which focuses on legislative strategies of control, can be reconciled with the traditional legal model's account of courts intervening to rescue agencies from baleful political interventions.

At first blush, these two perspectives on judicial doctrine and strategy are in tension with one another. How can we view courts as comrades-in-arms with Congress while also viewing them as guardians of the balance of power between Congress and the President? Perhaps one can reconcile these two accounts by drawing a sharp distinction between positive theory and prescriptive analysis. We start with the notion that courts generally try to follow the purposive strategies of Congress. This alliance may be born of necessity (as would follow from an account of courts as subject to legislative control) or of willing obedience (as would follow from an account of courts as political actors). But, in any case, the courts develop and implement various administrative law doctrines in order to facilitate legislative control. Professor Bressman further argues that courts ought to protect administrative agencies from unacceptable political intrusion. In other words, she claims that courts should behave less like faithful agents and political actors and more like safekeepers of rule of law values and facilitators of sound regulatory governance.

#### B. *Integrating Professor Bressman's Theory and PPT*

The principal problem Professor Bressman faces is a version of the dilemma endemic in reconciling PPT and normative analysis more generally: One cannot keep separate a theory of administrative law and a positive theory of administrative politics. While Bressman's holistic analysis is insightful, a more complete account can and must be given of the relationship between these two perspectives on judicial decisionmaking.

We offer a short, rough sketch of what this account would look like. First, consider the policymaking dilemma from the vantage point of courts: Judges are interested in maximizing their own interests; for our purposes here, we can stipulate that these interests include a mix of objectives, such as furthering their own ideological preferences, protecting the rule of law or law's integrity, and making good policy. This maximizing strategy requires that their decisions be immune from direct legislative or executive interference. In addition, courts will want Congress and the President to face obstacles in overriding judicial decisions.

With these pieces of the analysis in mind, we turn to judicial strategy. Crucially, courts can impact the structure and parameters of legislative and executive influence through the development and application of judicial doctrine aimed at restricting the options available to members of Congress and the President. Professor Bressman suggests

that judges will do so in order to help “reconcile the administrative state with the constitutional structure [thereby] helping to promote the legitimacy of agency action.”<sup>2</sup> This proposed function, while capturing a key insight about the incentive structure of courts, supposes that courts are in fact preoccupied with fidelity to the Constitution and, likewise, to the legitimacy of the administrative state. Yet, courts have a substantial say in what the Constitution requires, and further, the administrative state’s legitimacy is not a separate question, but rather is bound up with judicial pronouncements of proper agency action.

Among the many examples from administrative law and its history that illustrate this point, consider the Supreme Court’s approach in *INS v. Chadha*,<sup>3</sup> the case striking down the “legislative veto” on constitutional grounds. The line drawn in *Chadha* between exercise of legislative power requiring compliance with Article I, Section 7 and the exercise of nonlegislative rulemaking power is notoriously shaky. While the Court was not against broad delegation of administrative power, they looked askance at the particular mechanisms of power reflected in the legislative veto. In the end, the Court sustained broad lawmaking-type powers, while invalidating the legislative veto. Professor Bressman could plausibly use *Chadha* to support her thesis: the Court intervened to protect the constitutional structure of government. However, at the same time notice that the Court could have decided *Chadha* differently by emphasizing that the legitimacy of agency lawmaking stems not from obeying the procedural requirements of Article I, Section 7, but instead from the nexus between statutory delegation, legislative oversight, and even judicial control. While legitimacy is an important element in the constitutional structure of regulatory administration, it is nevertheless one that is ubiquitously subject to judicial framing and creative articulation through doctrine, rules, and standards.

### C. *The Judicial-Legislative Partnership Revisited*

We come then to the apparent puzzle raised by the two principal arguments in Professor Bressman’s article: Why would courts use administrative law doctrine to maintain constitutional balance and ensure administrative legitimacy when courts are so concerned with implementing legislative strategies? The answer comes in discrete pieces developed by scholars working squarely in the PPT tradition. One piece flows directly from the general architecture of the PPT framework. First, as Brian Marks observed two decades ago, legislators face a series of intrainstitutional hurdles to overturning judicial decisions that are within the “gridlock region.”<sup>4</sup> Because of the gridlock region, courts (and, for

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2. Bressman, *supra* note 1, at 1805.

3. 462 U.S. 919 (1983).

4. Judicial policies can become a “structure based equilibrium” and be “invulnerable to change” where a Court’s policy falls irreconcilably between preferred policy choices of

that matter, agencies)<sup>5</sup> can implement their most preferred policy within the gridlock region without fearing congressional reversals.

Second, one of the especially formidable ways in which courts can act to protect their prerogatives in the face of legislative and executive influence is to use legal rules to prevent legislative overturning their rulings. They do so strategically; for example, by splitting the original legislative coalition that formed to pass the legislation.<sup>6</sup> This action lessens the risk of legislative reversal of judicial decisions that fall within policy region where the coalition has been split. Therefore, within this region courts can maximize their own interests and, where necessary, implement their own regulatory strategies.

In what situations might courts be interested in following these strategies? They are likely to do so in situations where the judiciary cares more about certain regulatory outcomes and aspects of administrative performance than does Congress. One area in which this is likely is with respect to agency decisions that implicate individual rights and fundamental fairness. There are two separate reasons to expect that courts will care more about these issues than will Congress. First, courts traditionally create and implement doctrines concerning individual justice and therefore are more often engaged with rights and specific justice in adjudication than is the legislature or executive branch. Second, and in a more political vein, courts can and do use rights analysis to negotiate the demands of outside interest groups. Of course, these groups may initially bring their principal policy demands directly to the legislature, with their arguments taking the form of “I want” or “I need.” However, they will also approach the courts as bearers of individual rights, making entitlement-form assertions such as “I deserve” or “I have been denied my rights.” While this is a crude cut at a deep jurisprudential matter, the salient point here is just that courts might cherish hegemony—or at least priority—in matters of individual rights

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the two legislative houses. See Brian A. Marks, A Model of Judicial Influence of Congressional Policymaking: *Grove City College v. Bell* 18–19 (Hoover Inst., Working Papers in Political Science No. P-88-7, 1988) (on file with the *Columbia Law Review*). Gridlock also occurs in areas where those policies preferred by Congress make the president worse off and will be vetoed, while policies preferred by the president make Congress worse off and will not be passed. Therefore, subject to qualifications related to the veto-override, any judicial decision within these regions is stable because it cannot be legislatively overturned.

5. Ferejohn and Shipan show how the gridlock argument grants agencies a degree of discretion. See John A. Ferejohn & Chales R. Shipan, Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy, *in* Congress Reconsidered 393 (Lawrence C. Dodd & Bruce I. Oppenheimer, eds., 4th ed. 1989).

6. Cases which may effectively split the legislative coalition are those whose results are appealing to an unusual combination of liberals and conservatives, a combination which draws these legislators away from their respective coalitions and thereby makes it harder for Congress to cobble together a majority to overturn or modify the judicial decision.

and fairness, rather than in matters of administrative performance.

If this presumption is correct, then the judiciary will maintain, for sensible reasons, influence and even authority in the realm of extrastatutory administrative law, for this will give them leverage in and over domains that most substantially implicate the institutional interests of courts. While some skeptics allege courts care about fairness only as a means to an end, we believe rights-creating and rights-implementing adjudication is in the wheelhouse of courts; that is, they indeed do care about the ways in which agency decisionmaking is more or less fair. Of course, this interest is symmetrical with congressional strategies, as legislators will also protect their important prerogatives to control the processes of regulation and regulatory decisionmaking, and will keep judicial interventions more directly focused on policy at greater arms length.

In the end, Professor Bressman has the point basically right: Courts and legislators are indeed in partnership with one another. PPT can enrich the understanding of the proper role of the courts in this partnership by focusing attention on the strategies courts use to implement rights interests—particularly concerns with individual fairness (what Bressman usefully frames as attention to regulatory “arbitrariness”)—while leaving to Congress and the President prerogatives over the content of social and economic policy. As the PPT framework reveals, this relationship is also born of a purposive desire of legislators to implement their preferred policies through, inter alia, the careful design of administrative procedures and regulatory instruments and a parallel desire of courts to assist legislators with these objectives. And yet it is borne, as well, of an interest in judicial concerns with their own institutional prerogatives and preferences.

In addition, viewing the courts as especially concerned with safeguarding individual rights and administrative fairness also helps illuminate the question of why and how courts sometimes look to the Constitution as a source of rules for superintending administrative agency performance, while, at other times, look to subconstitutional sources of law, such as the Administrative Procedure Act (APA)<sup>7</sup> or administrative common law. In a similar vein, courts determined to require heightened rationality and procedural protection from agencies in the wake of the due process revolution’s demise (consider *Matthews v. Eldridge*<sup>8</sup> and its progeny) sought to transform the rather incrementalist approaches of *Overton Park, Inc. v. Volpe*<sup>9</sup> and *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automotive Insurance, Co.*<sup>10</sup> into the sort of

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7. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

8. 424 U.S. 319 (1976).

9. 401 U.S. 402 (1971).

10. 463 U.S. 29 (1983).

synoptic rationality requirements that one would have thought untenable or at least thinly supported by existing legal doctrine. In short, judges are both shrewd and resourceful in developing strategies to ensure that constitutional values—or, more precisely, fairness values—are protected. Ultimately, more work is needed to illuminate the dynamics of judicial choice among the Constitution, the APA, organic regulatory statutes, or judge-made law. The fundamental positive question is how administrative law fits into the larger menu of legal rules and strategic possibilities.

Other puzzles in administrative law have exactly this quality. We ought to ask why the courts and Congress choose one strategy over another in particular circumstances and under particular conditions. Consider the fundamental question—traditionally the purview of legal philosophers rather than political scientists or administrative law scholars—of why courts produce general rules governing administrative performance in some cases but very specific, limited rulings in other cases. Notably, administrative law is itself made up of both wide-ranging, even somewhat transcendent rules, as well as carefully tailored, non-transcendent rules. Imagine a two-by-two matrix, with the rows consisting of rules and standards and the columns of general and specific instructions. The upper left quadrant best describes most of the APA: rules of general applicability that all agencies must follow. The upper right quadrant describes some scattered APA procedures (for example, the prohibition against *ex parte* communications), in that while generally applicable, the instruction is much more in the nature of a standard—requiring the agency, (and afterward, the reviewing court) to consider various factors to determine whether and to what extent impermissible contacts have occurred. The lower quadrants can be filled with real examples as well. The federal statute books are filled with agency-specific procedures, some that are classically rule-like in content (consider the plethora of agency deadlines in modern environmental and health and safety statutes), and others that are much more in the nature of standards (for example, the “best available technology” instructions in the Clean Air Act). Viewed through the lens of the PPT framework, the choice between agency specific and general rules and the choice between rules and standards emerges from strategic assessments by courts made in the shadow of congressional choices that also can be viewed within a similar framework of general versus specific and rules versus standards.

#### CONCLUDING REMARKS

The answers to the puzzles described in the previous section and others require continuing work by an eclectic collection of scholars, some, like Professor Bressman, with an informed and nuanced take on administrative law doctrine, some with a large analytic toolkit to help

shape and refine extant PPT models of administrative behavior and regulatory administration, and still others with a scrupulously empirical focus. The expanding literature in the PPT tradition suggests that progress will come steadily.

One of the central, emerging issues is how to integrate issues concerning the courts' longstanding preoccupation with individual rights and retail justice considerations—a preoccupation that is well understood by legal scholars but historically only dimly understood by rational choice political scientists—with legislators' strategic behavior, a focus of modern PPT scholarship. Scholars in these two traditions can no longer chalk up their colleagues' insights to misunderstanding, and real progress in this area will require a greater integration of PPT and the so-called legal model.

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