The Economics and Politics of Administrative Law and Procedures: An Introduction

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In this special issue of the *Journal of Law, Economics, & Organization,* we present five of the eight papers discussed (and their respective comments) at the University of Illinois Conference on the Economics and Politics of Administrative Law and Procedures at Allerton House, Monticello, Illinois, May 10–12, 1991.[1]

The authors have aimed at advancing our understanding of issues central to public law in the administrative state. In particular, they deal with, first, how interest groups' demands for public policy get translated into legislative and administrative agencies' actions (Farber); second, how administrative agencies' policy options are, in turn, influenced by the nature of the institutional structure of the administrative state, in particular, the behavior of, and the strategies available to the courts, and the composition and organization of the legislature (Eskridge and Ferejohn, and Spiller and Spitzer); and, finally, how the organization of the administrative agencies themselves, and the rules

1. The Conference was sponsored by the University of Illinois Institute of Government and Public Affairs, and co-sponsored by the Ameritech Foundation and the Harry and Lynde Bradley Foundation. Financial support to the conference was also received from the Institute of Government, University of California, Davis, and from the Economics Department and the Bureau of Economics and Business Research, University of Illinois, Urbana–Champaign. We are indebted to all those institutions for their financial support that made possible both the Allerton gathering and the publication of this issue. We are also indebted to the staff of the Institute of Government and Public Affairs for their administrative help during the preparation of the Conference. The complete list of the papers discussed at the Allerton gathering and the list of participants appears elsewhere in this volume (pp. 214–7).

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under which they are required to operate, influence their policies (Macey, and Spulber and Besanko).

While the approaches taken in each of these five articles discussed here are somewhat diverse, all the authors take a rational-choice approach to the study of political institutions: they all assume, first, that individuals are rational in the sense of choosing the best available course of action and that individuals take account of the foreseeable consequences of their actions; and, second, that institutions constrain the set of actions available to political agents. These assumptions imply that the choice or design of institutions is an important determinant of policy outcomes and is understood to be so by the political actors. Thus, the choice of institutional structure is itself a profoundly political act.

While observers of American political life, at least since Hamilton and Jefferson, have employed some forms of rational-choice analysis in considering issues of institutional design, the formal articulation of this methodology is quite recent. In particular, our capacity to understand the ways in which institutions affect strategic opportunities over time and in situations of incomplete information has vastly increased over the past decade because of new developments in game theory and in the economics of information. A reading of the articles in this special issue suggests that these technical advances can have as great a significance for the positive analysis of law and legal institutions as they have already had in the study of political institutions.

From the point of view of a positive theory of law and legal institutions, the authors of each of these articles contribute to understanding policy-making in a constitutional system. By developing models of policy formation that include actions by courts, legislatures, and administrative agencies, they permit us to assess the impact of changes in the relative powers of these institutions, as well as in the strategies available to them. Furthermore, their models also allow us to understand the structure of institutions within government. In this regard, these articles represent an advance in the evolution of the "new institutionalism."

The authors in this volume suggest, furthermore, that these new approaches can have an impact on normative legal analysis as well. While the growth of the field of law and economics has had a major impact on how lawyers and judges think about issues of private law—contracts, property, torts—the areas of public law (such as constitutional and administrative law), which are largely concerned with regulating the actions of public officials, have proven more resistant to analysis. One reason for the relative success of law and economics in providing a normative as well as a positive foundation for private law is the availability of the relatively uncontroversial efficiency norm that, in some cases, provides a powerful benchmark for the evaluation of legal rules. In areas of public law, however, the centrality of distributional issues seems harder to avoid and analysts are driven to employ somewhat more controversial normative assumptions. Not surprisingly, therefore, we see political disagreement among scholars in this area in a number of areas. As a result the normative application of these new methodologies does not necessarily support conclusions of any particular political coloration.

We believe that this situation will endure—there are fundamental and irreconcilable differences of value that need to be expressed in a democratic society—but we do not think that this should be regarded as an impediment to the development of more analytical approaches to law and legal institutions. No matter what normative significance one attaches to property rights relative to the authority of state institutions, it is desirable to develop a rigorous theoretical apparatus that permits these issues to be addressed, if not resolved, in a clearheaded manner. That, in any case, is the hope of these authors and the promise of their articles.

1. Interest Groups and the Design of Public Policy

That public policy is influenced by the workings of interest groups is not a novel idea. The path-breaking work of Olson and of Stigler led to a demand theory of regulation that has received substantial empirical support during the last 20 years or so. The main thrust of this demand theory of public policy is that small and well-organized interest groups are able to influence public policy toward their own benefit, at the expense of large and diffuse groups. This demand-side model of the design of public policy, however, has faced substantial difficulties in explaining several major regulatory trends in the United States and elsewhere: in particular, the movement away from narrow industry regulation (i.e., airlines, trucking, telecommunications, and so on) and toward economy-wide social regulation (i.e., health, safety, environmental). By the early 1980s it was clear that a new view of the way interest-group pressure translates into public policy was needed. While the demand-side model could be revitalized, the task of solving this paradox seems to have fallen to what can be called supply-side models of public policy. These models analyze the process by which public policy is undertaken and explore their implications for policy determination. In other words, interest-group demands are not assumed to translate frictionlessly into policy, but rather the opening up of the black box of politics and agency behavior has provided new insights into public policy determination. Daniel Farber's piece is an attempt to explore the supply side of environmental legislation.[2]

Environmental legislation is a puzzle for demand-side theories of regulation because benefits are quite diffused as, in principle, most residents of the country (one could even say of the world) benefit from increasing air quality. On the other hand, the costs of environmental regulation have first-order effects on selected industries and second-order effects on the economy as a whole. The question that Farber tries to answer, then, is how is it that environmental legislation was even passed at all. Farber's model is one of entrepreneurial politics: given strong, but diffused, public support for environmental legislation, a symbiotic relationship between legislators and environmental groups develops, whereby environmental groups provide credit-seeking legislators with information and control mechanisms, while at the same time, the growth of environmental groups is promoted through environmental

2. Farber does not represent the first attempt to provide such an explanation. For a decade-old attempt, which to some extent captures some of Farber's main insights, see Weingast.

legislation. Following the Gely and Spiller approach to judicial decision-making, Farber recognizes that this symbiotic relationship, which was facilitated by a relatively liberal Court, may now be jeopardized by current conservative composition of the Supreme Court.

Farber's framework reconciles, to some extent, the instinct of the demand-side models with the enactment of environmental legislation. Facing strong legislative support for environmental legislation, "large textile or chemical firms may support environmental standards that discriminate against their smaller competitors" (p. 64), as empirical work seems to suggest (e.g., Pashigian).

2. The Institutional Structure of the Administrative State

In two pieces in this volume, the policy implications of the institutional structure of the administrative state are explored, albeit from slightly different perspectives. Spiller and Spitzer, using a game-theoretic representation of the interaction among Congress, the courts, the president, the agency, and the state legislatures, examine the implications for policy determination of the courts' ability to choose among different legal doctrines in their decision-making process. Eskridge and Ferejohn, on the other hand, using a game-theoretic model of the interaction among the three branches of government, explore how the administrative state seems to have unsettled the original constitutional understanding. They use their model to understand two recent cases involving delegation of powers under a variety of institutional circumstances.

Spiller and Spitzer focus on the Supreme Court's ability to select the legal grounds under which to make a decision. In particular, they analyze the choice of constitutional versus non–constitutionally based decisions. Since most cases coming to the Supreme Court seem to provide the Court with an opportunity to make a constitutional determination, Spiller and Spitzer try to provide an answer to the seeming reluctance of the Court to base decisions on constitutional grounds. An important contribution is their showing that an understanding of two basic differences between constitutional and nonconstitutional decisions—namely, their relative durability and their differing impact on the ensuing political game—may solve this puzzle. While decisions based on constitutional grounds are more difficult to overturn than those based on nonconstitutional grounds (at least in the U.S.), they are, in general, not as specific as statutorily based decisions. Instead, they argue that constitutionally restricting decisions provide broad policy guidelines, such that many outcomes could represent constitutionally acceptable policies.

They model constitutionally restricting decisions as reducing the dimensionality of the policy space in which the ensuing policy game among agencies, legislators, the president, and the Court can take place. Nonconstitutional decisions, on the other hand, are modeled as providing specific policy instructions. They find that once the differences in the game-theoretic implications of the different legal doctrines are taken into account, the fact that the courts are reluctant to use the constitutional instrument is not so surprising.

First, the threat of a constitutional interpretation restrains agency decisions. Second, a main condition for constitutionally restrictive decisions to constitute equilibrium outcomes is that the Court be far away from the political "mainstream" as represented by the composition of Congress and the policy preferences of the president. This result seems to be consistent with traditional political science analyses of the importance of "realigning elections" as explaining Supreme Court–Congress constitutional conflicts (e.g., see Adamany). Finally, Spiller and Spitzer use their model to analyze a variety of decisions of the "discrimination law" type.[3] By applying their model to cases involving the equal protection clause of the 14th Amendment, the viewpoint discrimination component of the First Amendment, freedom of religion, and just compensation, Spiller and Spitzer show that their methodology can be extended to analyze strategic Court behavior in several other areas of constitutional law.

Eskridge and Ferejohn, on the other hand, have aimed at understanding the ways in which the rise of the bureaucratic state, with its extensive delegation of legislative authority to administrative agencies, has affected the balance of power between Congress and the president. They introduce a new methodology for analyzing separation of powers issues and argue that some important recent Supreme Court rulings are either overbroad (*Chadha*) or misguided (*Chevron*). Eskridge and Ferejohn follow the idea that the Article I, Section 7 requirements (bicamerality and presentment) for lawmaking induce a specific structure of strategic interaction among the branches (Ferejohn and Shipan, 1990). They then use game-theoretic techniques to determine which policy outcomes could be supported in equilibrium and employ this analysis to analyze the effects of the delegation of authority to agencies. Specifically, they suggest that the delegation of legislative authority to administrative agencies has vastly shifted policy outcomes in favor of presidential desires and away from congressional ones.

These techniques are then employed to analyze the effects of various ways of deciding the *Chadha* and *Chevron* cases. They suggest that, while the court was right to strike down the legislative veto in the case of agency adjudications, it need not and should not have done so in cases of agency rulemakings. Moreover, they argue that the *Alaska Airlines* case, in which legislative veto provisions were thought to be severable from the statutes in which they are found, makes no sense as there is no reason to believe that statutes would have been enacted in their present form without the veto provisions. In the *Chevron* case, Eskridge and Ferejohn argue that aggressive judicial oversight of statutory interpretation by agencies does not suffer from a "countermajoritarian difficulty" and that judicial review can actually enhance the powers of congressional majorities to get the policies they want. In this sense, the effect of the *Chevron* decision is to exacerbate the effects of the rise of the administrative state. The Eskridge–Ferejohn methodology would support a

3. Discrimination law–type decisions are those that require equal treatment for different groups of individuals.

much different decision: one that would enhance congressional influence over policy-making.

3. The Organization of Administrative Agencies and the Design of Public Policy

The work of McCubbins, Noll, and Weingast (1987, 1989) has had a profound effect on our understanding of the role of administrative procedures in the determination of public policy. The main thrust of their work is that administrative procedures are designed to constrain the evolution of future policies so as to maintain the interests of the enacting coalition. The works of Macey and Spulber and Besanko go well beyond the McCubbins et al. approach and hence represent a genuine contribution to our understanding of the design of administrative agencies' procedures and organization.

Macey's main thesis is at the core of the organization of the administrative state. Since legislators delegate legislative power to administrative agencies that they themselves create,[4] they can reduce the chances of possible administrative-agency deviation from the original intent by manipulating the structure and design of those agencies. For example, should an agency be a single-industry regulator or should it regulate multiple industries? Macey's conjecture is that when a single interest group dominates the original legislative process, then "the resulting administrative agency will be a single interest-group agency" (p. 100). Similarly, how much discretion or independence from political influence an agency should have would depend, according to Macey's thesis, on the relative power of the interest groups at the time that the agency was enacted. For example, central banks created in periods where creditors represented a strong interest group in the society would usually have substantial independence, as that would assure relatively low inflation rates.

Spulber and Besanko take this logic a step further by looking at the implications for agency control of three basic control instruments: appointments, statutes, and oversight. An important difference among these instruments is in their timing and, as a consequence, in the level of information available to the decision-makers at the time of their respective actions. They show that whether the agency can commit to a particular regulatory policy has important implications for who the legislators and the president want to appoint to head the agency, as well as to the nature of the statute creating the agency (that is, to the extent of delegation). In particular, if the agency cannot commit, then the statute can be used to limit the discretion of the agency, and the "best" agency head will usually differ in her preferences from, for example, those of the president, as it will be in the president's interest to appoint someone whose preferences are more "extreme" than his own.

The nature and role of oversight activities differ drastically from those of the two previous instruments. While appointments and statutes are structured before administrative policy outcomes are observed, oversight can occur con-

4. This, however, is not always true, as the EPA was, for example, created not by Congress but by an executive decree.

comitantly to or following agency decision-making. Oversight facilitates the delegation problem, particularly when the agency cannot commit to a particular regulatory policy. In this case, the potential for oversight activities reduces the need to limit delegation. Thus, more active oversight may be seen, in equilibrium, in agencies with wider statutory mandate.

4. Final Comments

To summarize, in this issue of the *Journal of Law, Economics, & Organization,* we present a new approach to public law and legal institutions, an approach based on rationality and on the new institutionalism. This approach is obviously indebted to path-breaking earlier contributions by Landes and Posner (1975), and to the extensive development of the fields of law and economics and of rational choice. As editors of this issue, we have made no attempt to conceal or diminish the extent of controversy among these authors or others who attended the conference (as is evident by the commentaries that follow each of the articles). Issues of public law have substantive political effects that cannot be ignored. We regard the principal contribution of this volume as raising the level of discussion and argument, and not as offering definitive ways to settle contentious political questions.

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