Public Administration and Professional Virtue

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In this paper I examine a major issue public administration faces in the United States—the charge of impermissible delegation of lawmaking functions. I describe the deeply entrenched nature of this problem, which makes complete non-delegation highly unlikely. I then offer a significant partial solution to this issue. Specifically, in light of deeply rooted delegation to administrative agencies, scholars and practitioners of public administration must renew their attention to the virtues of public administrators. I develop in turn an outline of the virtues especially in need for public administrators today.

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THE DELEGATION OF LAWMAKING TO ADMINISTRATIVE AGENCIES

In the United States governmental system, the elected legislature is vested with lawmaking authority. Article I, Section I of the Constitution states, "all legislative powers herein granted shall be vested in a Congress of the United States." The federal legislature is elected and represents the variety of interests and concerns of the U.S. population. Due to the principle of popular sovereignty embedded in the Constitution and the norms of the U.S. government, legislation by any other source constitutes an impermissible delegation of legislative functions. Indeed, in the 1935 Supreme Court case of *Schecter Poultry Company v. United States*,[1] the Court explicitly ruled that the federal legislature cannot delegate to the presidency, or to administrative agencies under the executive branch, the power to make laws. To do so violates the Constitution by denying the people the ultimate authority, through popular elections, to control the lawmaking process.

Yet, despite this ruling—on the Supreme Court has never been formally overturned--delegation is in fact what we see in a wide array of instances at the federal level. Take, for example, the Clean Air Act of 1970. This federal law legislates that there be no unclean air; but what constitutes unclean air is left, for all intents and purposes, to an administrative agency of the executive branch—the Environmental Protection Agency—to decide. This effectively delegates lawmaking to that agency, and it is therefore technically unconstitutional under *Schechter* and the principles embedded in the ruling. The legal justification for the continuance of delegation following the *Schechter* ruling was left for many decades unprovided by the federal judiciary. In recent years, however, the Supreme Court has upheld the ruling in *Schechter* through the claim that delegation of lawmaking functions is indeed unconstitutional, but delegation occurs only when congress fails to inform the administrative agencies of an "intelligible principle" that must guide their application of the law.[2] Many legal scholars, nevertheless, argue that the "intelligible principle" requirement is so vague as to constitute a de facto dismissal into the realm of desuetude of the non-delegation principle—

since just about anything can constitute an "intelligible principle" guiding agencies—allowing a persistent violation of the core of the *Schechter* ruling.[3] This effective dismissal of *Schechter* in turn is deeply questionable in terms of political legitimacy. For not only under constitutional case law but also under reigning democratic political theory, for the much-vaunted principle of popular sovereignty to have teeth, it must be that the elected representatives--individuals accountable to the people—make the laws, not unelected bureaucrats.

In response to the continuing growth of administrative de facto lawmaking—or what agency champions usually call "agency rule-making," to mask the legislative reality--a rising number of organizations in the United States over the past decade have called for the vigorous upholding of the principles espoused in *Schechter*—a case, again, that has never formally been overruled. One such organization is the New Civil Liberties Alliance, led by prominent Columbia Law School professor Philip Hamburger.[4]

However, as a matter of political reality, it is simply highly unlikely that the Supreme Court will dismantle the delegation to administrative agencies of de facto lawmaking authority which has developed over the years in the United States government. The first reason is that the causes of the delegation are deeply rooted, and the second is that the costs of the dismantling delegation would likely prove too high.

First, the federal legislature is delegating to administrative agencies in large measure because the country faces serious problems—pollution, for example—that are not being addressed in legislation in part due to the entrenched partisan political divides confronting the nation. Due to the depths of these political divisions, all that can often be agreed upon in the legislature is a vague general law—like the Clean Air Act's declaration that air is clean--with the details of what clean air is left to administrative agencies to determine. In this way, the lawmaking that regulates what clean air means is transferred from the legislative branch to the executive branch. This practice allows partisan adversaries to hope that in upcoming elections they might gain the presidency and a favorable senate and with it the directorships of administrative agencies and all the effective lawmaking authority that will entail.

Second, the problems society faces are real, and, given the failure of the legislature to pass specific laws, someone has to give specificity to the laws to address the real and pressing issues; someone has to do it. And so, someone does the administrative agencies.

Given these twin dynamics in this country, it seems highly unlikely that the process of the delegation will be stopped by the federal judiciary soon, lest the courts become complicit in seriously hampering the needed operations of national governance.[5]

AN OUTLINE OF A PARTIAL SOLUTION

If a delegation of lawmaking to agencies is something we are mostly stuck with, at least in the short and medium term, the issue becomes: what can we do *to improve* administrative rule-making-cum-legislation? What can we do to make the process of agency-based lawmaking as effectively conducted as it is possible to make it?

What would improve administrative rulemaking qua de facto federal lawmaking look like? To answer this question we need to remember the underlying issues at the core of the critiques of the "administrative state": delegation of lawmaking to executive agencies was held by the Supreme Court in *Schechter* to be unconstitutional in large part because agencies are not elected, and elections are important in part because elections allow for representation in the lawmaking process of a wide array of citizen viewpoints, which, in turn, gives life and meaning to the underlying legal and political norm of popular sovereignty.[6]

Since lawmaking by agencies is not likely to go away in the near term, a partial but meaningful solution to our problem is to work to ensure that the directors and senior staff members of executive agencies simulate—to the greatest degree possible—the diversity of viewpoints found in society--that they approximate within themselves the diversity embodied in a legislature accountable to a diverse citizenry.

AN ARETAIC TURN: ENHANCING THE DEGREE TO WHICH THE PRINCIPALS OF ADMINISTRATIVE AGENCIES REPRESENT THE DIVERSITY IN CONTEMPORARY SOCIETY

One pressing goal must be to have the individuals who wield rule-setting power in administrative agencies strive to possess certain virtues: the virtues of imaginatively representing in their minds and their work the multiplicity of viewpoints held among the diverse citizens. Moreover, senior administrators must still administrate; they must still oversee the effective concrete application of rules to particular contexts (a longstanding administrative function). Senior administrators, therefore, must have both the virtues of imaginatively representing the multiplicity of views found in contemporary society to simulate the lawmaking of a legislative chamber, as well as the ability effectively to apply the rules so devised to an array of specific circumstances.

Is there any real and sustainable way to improve the performance of administrators along these two dimensions? I think there is. Specifically, we can learn in this effort from the thought of two important theorists of politics and the human condition: Hannah Arendt and Walt Whitman. In what follows, I shall give an outline of how these thinkers offer both a mode of acting that could enable administrators to act appropriately and one that can be realized to an appreciable degree through a concerted focus on improving the quality of continuing professional education of senior public administrators. I do so by articulating how Arendt and Whitman advance an understanding of virtue that can assist our task and how each thinker's understanding of virtue can be operationalized in the administrative context. Of course, this can here only be an outline. However, given the importance of the changes to the lawmaking process we have surveyed, it is very important to theorize about the nature of an aretaic response to the delegation of lawmaking to administrative agencies, if here only in a necessarily abbreviated form.

Hannah Arendt—a 20th Century political philosopher especially influential in the aftermath of World War Two in Western Europe and the United States—is I believe relevant to this enterprise. Arendt describes a mode of intellectual activity that she refers to as "enlarged understanding." An enlarged understanding is based on the idea of a "reflective judgment." A reflective judgment is formed by "representative thinking." Ideally, representative thinking is thinking "from the position of all others," and rendering these views mutually communicable.[7] The practitioner of enlarged understanding desires and works to achieve "universal communicability," or universal communicative exchange, where points of view, once understood, can be put into extensive dialogue with each other.[8] Enlarged understanding, therefore, involves imaginatively communicating with a diverse range of viewpoints.

Moreover, this virtue of aggregative communicability through enlarged understanding is capable, Arendt maintained, of being cultivated to a considerable degree. Here we should note that Arendt saw the capacity for enlarged understanding as related to a certain kind of political engagement. For Arendt, political activity—in some contexts at least--involves "the ability to see things from not only one's point of view" but from the perspective of "everyone else."[9] The practice of reflective judgment and participation in political activity of a certain kind share the quality that they both are "a being with others."[10] As such, Arendt notes that enlarged judgment can be more closely approximated employing participation in certain kinds of public life, specifically, activities "where people have the opportunity to exchange their opinions on particular matters and see whether they accord with the opinions of others."[11] Moreover, to stimulate enlarged understanding there must be, as Arendt scholar Professor Pierre D'Entreves notes, a genuine encounter with a variety of viewpoints, and public engagements must be done based on equality among the distinct participants.[12] Furthermore, the interaction must be a direct form of political participation and not a much more passive activity of electing representatives. Additionally, it must be a political activity, so understood, that addresses issues that are not matters of mere survival or material necessity.[13] In sum, cultivating an enlarged understanding requires, Arendt argues and her interpreters underscore, political engagement of a distinctive kind—one that is a direct form of decision-making among roughly equal individuals and which is free from dire necessities for those involved.[14]

In the administrative context, Arendt's thought could be applied to agency administrators in a particular way.[15] Certain aspects of political life that she finds important—especially the equality among participants,

its capacious communicative give and take, and its deliberations free from personal concern over material necessity—can be found in certain kinds of community activities. If administrators were to serve on a rotating basis as an advisor—but as no more than a first among equals—on a range of community organizations to which the administrator has no personal connection, including perhaps school boards or municipal or community associations, the beneficial aspects of political life that Arendt emphasizes could be brought to the fore.

Additionally, important research indicates that such forms of associational activity can indeed augment the ability to entertain a wide range of viewpoints. Based on extensive empirical research, Professor Dietlind Stolle argues that participation in diverse groups increases robust levels of generalized trust, that is, trust in others outside one's established group, and openness to a range of competing claims.[16] Stolle's research finds that individuals who are active, even for a relatively short time, in community groups are more open-minded than those who are not; generalized trust and open-mindedness can grow as a result of relatively short-term participation in a range of community activities. Moreover, Stolle finds that if the groups in which one participates are internally diverse, the beneficial results of participating in them in this way are even more pronounced. It should be emphasized that this is not the result of selection effects—levels of education and prior socialization are kept constant in Stolle's research. Her research, therefore, supports the conclusion that activity in a range of diverse community groups can have beneficial consequences.[17] Her work supports the idea that the virtues necessary for good reflective judgment in the Arendtian sense can be inculcated to a considerable degree through a process of requiring senior administrators periodically to engage—perhaps as advisors, attentive auditors, or non-voting consultants--with the decision-making activities of local community associations. Informed by these experiences, the rule-maker would be able to simulate, to an appreciable degree, the diverse voices among contemporary citizens. This would reduce (I do not say eliminate) the problems which critics see as besetting an unelected administrative state operating in a diverse democratic society.

The second thinker whose views I believe are especially relevant to our task is the great 19th-century American poet and political thinker, Walt Whitman. We can focus on Whitman's emphasis on what he calls "equitable judgment." As one part of their task, senior administrators must exercise oversight of highly context-specific judgments applying the rules, however, settled upon, to individual cases. For Whitman, being able to judge effectively in this way is vitally important. As he expresses in his work, "By Blue Ontario's Shore," a truly enlightened judge or administrator—"bestows on every object or quality its fit proportion to its circumstances."[18]

This capacity for judging appropriately how to apply rules to specific cases—namely, by "bestowing on every object or quality its fit proportion to the circumstances"—can also be inculcated to a considerable extent. Although Whitman himself may not give us a clear guide for doing so, here we can investigate the work on phronesis, or sound practical judgment, of the philosopher and psychologist Kyron Huigens. According to Huigens, it is possible to provide an account of how one can acquire a sound practical judgment or further fortify capacities one already possesses. To do so requires a commitment to a life of reason combined with the experience of conscientious decision-making and the formulation of practical judgments in a range of contexts.[19]

On this understanding, enhancing the qualities of judgment can be developed by emphasizing a sense of calling or vocation—specifically, the vocation to lead a life of reason, or what Huigens calls a life of "rationality in action."[20] Moreover, this can be cultivated by developing experience in a variety of circumstances that call for rational reflection on specific practical issues. Experience with a wide range of practical decisions decision-making can thus fortify one's ability to render perceptive judgments. Hence simply by expanding one's range of experiences and acting with a conscientious commitment to reason, administrators can become better at making judgments. For as Aristotle long ago noted, those who are serious and have experienced much are to be "paid attention to," for they have "an eye with which to see correctly."[21] Hence, a program that calls for broadening the situations in which administrators must make decisions and concomitantly widening their experiences outside of their office if coupled with the affirmation of the importance of reason to the life and role of the administrator, can help to establish a close simulation to complete phronesis, and so move the administrator closer to the ideal described by Whitman.

Hence, we have a further reason, once more, for holding professional education of a concrete kind can bear positive fruit.

In sum, the virtues we have sought after—reflective judgment and equitable judgment—can be nourished by the very same kind of engagement in the deliberative activities of community organizations.

NURTURING IN PRACTICE ENHANCED PROFESSIONAL VIRTUE: SUCCESSFUL JUDICIAL PROGRAMS

I have argued that the related traits described by Arendt and Whitman are relevant to public administrators and are inculcate to an appreciable extent. At this point, however, one might still hold that this project is simply both too ambitious and too vague. In light of such a possible objection, is there anything further that can be said to make this project of enhancing the virtues of administrators appear more plausible to those who might remain skeptical? I believe there is. We can see this by looking at recent developments in the field of judicial professional education.

At the state level in the United States, the Wisconsin bar, in conjunction with the State Supreme Court, has implemented a plan requiring greater out-of-court activities for trial judges. This program, known as the Wisconsin Initiative, encourages trial judges to become more active in their communities.[22] The Wisconsin Initiative maintains that by creating a greater attachment, through concrete community service, between trial judges and the diverse communities they serve, judges can enhance the performance of their responsibilities, in part by increasing their ability to understand the viewpoints of society's diverse populations. This successful program provides support for the claim that an enhancement of reflective and equitable judgment can occur through a certain kind of professional education.

But what about Huigens's claims about the importance of professionals embracing the personal calling to bring reason to bear in their life and work? As we saw, that is an important element in securing the full realization of equitable judgment. The federal judiciary's Seventh Circuit Court of Appeals adopted in the mid-1990s a professionalism creed for federal judges—the first such creed in the nation. The creed seeks to have judges develop a sense of self-defined by personal commitment to reason, civility, and open-mindedness.[23] Since the inauguration of this program in the 1990s, the Federal Bar Association has also developed programs that address the professional responsibilities and associated professional virtues of judges, all of which focus in part on the sense of vocation—the sense that the judge must embody the calling to bring reason to bear in conducting their work.[24]

These developments in judicial education and training, by combining a sense of vocation with concrete community experiences, are consistent with the vision I have set forth for public administrators. For there is no reason that the beneficial consequences of these activities would not translate from the legal profession to other areas of professional activity, including public administration. These examples, therefore, underscore the plausibility of a concerted effort to improve the exercise of judgment by senior public administrators as they wield the awesome power of de facto lawmaking in a large number of cases.

ENDNOTES

1. *A.L.A. Schechter Poultry Corp. v. United States*, **295 U.S. 495** (1935).
2. See *Mistretta v. United States* (488 U.S. 361, 1989) and *Gundy v. United States* (No. 17-6086, 588 U.S. ___, 2019). In *Gundy* the Court reaffirmed that unconstitutional delegation does not occur if Congress has set forth an "intelligible principle to guide the delegee's exercise of authority."
3. Loren Johnson summarizes this issue bluntly: "the Supreme Court has essentially created a fiction" through its refusal to overturn *Schechter* by distinguishing true delegation from faux delegation by reference to an "intelligible principle" guiding the administrative agency. Loren Johnson, "Bring on the Chickens and Hot Oil: Reviving the Nondelegation Doctrine for Congressional Delegations to the President," *St. John's Law Review* 95 (2021): 683-783, 683.
4. See ttps://nclalegal.org/philip-hamburger/.
5. This is not to say that delegation is unassailable in toto. In the criminal context, Justice Gorsuch in *Gundy* wrote a dissenting opinion seeking to revive the non-delegation principle in certain criminal cases.

Nevertheless, the Court's declaration in *Mistretta*, in a majority opinion by Justice Blackmun, remains hard to gainsay, especially if the regulatory details the opinion refers to are situated among politically divided forces: "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." Congress "cannot do its job" in reference to specific regulatory matters, all the more, when congress is riven with political division: every regulatory stricture would be subject to bitter and immobilizing contestation.

6. See Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2015) and his shorter, *The Administrative Threat* (New York: Encounter, 2017).
7. Maurizio D'Entreves, "Arendt's Theory of Judgment" in Dana Villa, ed., *Cambridge Companion to Hannah Arendt* (Cambridge, Cambridge University Press, 2000), 252-3.
8. D'Entreves, "Arendt's Theory of Judgment," 252-3.
9. D'Entreves, "Arendt's Theory of Judgment," 252-3.
10. D'Entreves, "Arendt's Theory of Judgment," 252-3. See also Hannah Arendt, *Between Past and Future* (New York, Penguin, 1968), 221.
11. D'Entreves, "Arendt's Theory of Judgment," 254.
12. D'Entreves, "Arendt's Theory of Judgment," 254; see also Kateb, *Hannah Arendt: Politics, Conscience, Evil* (Totowa, New Jersey, Rowland Littlefield, 1987), 14. See also, Robert E. Goodin, "Democratic Deliberation Within," *Philosophy and Public Affairs* 29 (2000): 81-109.
13. Kateb, *Hannah Arendt*, 18, 25; Arendt, "What is Freedom?" in *Between Past and Future*, 155.
14. Because so much of ordinary political life does not obtain within these parameters, Arendt's views are not unsettled by the deficiencies evident in everyday political affairs.
15. I do not advocate that judges be elected. The threats to the impartiality of the judiciary are in my opinion simply too great. Moreover, Dietlind Stolle's research also suggests that activity in one group (such as a political party) for a significant period of time reduces levels of interpersonal openness, flexibility, and other traits that are important for trial judges. Stolle, "Bowling Together, Bowling Alone: The Development of Generalized Trust in Voluntary Associations," *Political Psychology* 19, 3 (1998): 497-525, 521. Immersion in activities that simulate the context of political immersion as Arendt describes can be secured short of electioneering. In addition, the rotating engagement with a diverse array of activities can prevent against allegiance-building bias.
16. Stolle, "Bowling Together, Bowling Alone," 521. See also Joseph Prud'homme, "Vengeance and Virtue in Contemporary Criminal Justice," *Law, Culture, and the Humanities* 1, 3 (2005): 376-397.
17. Stolle, "Bowling Together, Bowling Alone," 521.
18. Whitman, "By Ontario's Blue Shore."
19. Kyron Huigens, "Virtue and Inculpation," *Harvard Law Review* 108, (1995): 1467-1469. He is focusing primarily on Aristotle, but his thought applies to the more general idea of good judgment in a highly fact-specific sense.
20. Huigens, "Virtue and Inculpation," 1469.
21. Aristotle, *Nicomachean Ethics*, trans. Martin Ostwald (New York, MacMillan, 1962), 1143b10.
22. See www.wisbar.org/wisconisninitiative; Press Release: News Release August 2000: Courts, Legal Profession, Community Join Forces to Improve Justice System: (wisbar.org).
23. Marvin Aspen, "The Search for Renewed Civility in Litigation," *Valparaiso University Law Review* 28 (Winter 1994): 513-530, 519-520. See also Peter Joy, "A Professionalism Creed for Judges: Leading by Example," *South Carolina Law Review* 52 (Spring 2001): 667-695, 686-689.
24. Paul Friedman, "Taking the High Road: Civility, Judicial Independence, and the Rule of Law," *New York University Annual Survey of American Law* 58 (2001): 187-202.