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MIKE LIVERMORE: Welcome to the Free Range podcast, I'm your host Mike Livermore. This episode is sponsored by the Program on Law, communities, and the environment at the University of Virginia School of Law. With me today is Jed Stiglitz, who's a law professor at Cornell, who focuses on administrative law and agencies. His new book is the reasoning state which was published by Cambridge University Press over the summer.

Hi, Jed. Thanks for joining me today.

JED STIGLITZ: Hey, Mike, glad to be here. Thanks for having me.

MIKE LIVERMORE: So as you are well aware, administrative agencies play a huge role in society in American society, including in the area of Environmental Protection, which is obviously a focus of this podcast but they also seem to be kind of perennially-- perennially under attack from various sides. So maybe just as an entryway into the conversation today, I was just curious your thoughts about what do you think accounts for the love hate relationship that American society seems to have with agencies like EPA? We love them in the sense that we give them lots of power and we expect lots out of them but also at the same time politicians just seem to be able to get away with a lot of what's sometimes called bureaucracy bashing and it seems to play to the voters.

JED STIGLITZ: Yeah, I mean, so the agencies do incredibly important things in our system of government, at EPA and many others. And there is this kind of a dual faced aspect to agencies where on the one hand, they're solving problems that really they are only equipped to solve. And they're also, as you say constantly criticized. So I think the first part of that story is pretty easy to understand in a sense that, that is agencies are doing things that other institutions could not do.

So understanding the benefits of agencies I think is relatively straightforward, although the mechanism the question of why they're uniquely situated is, I think, an interesting question that my book engages with and has a slightly different perspective than I think a lot of the literature. The question of why they're criticized is also an interesting question. And I think there are a variety of possible perspectives here.

One is that EPA is doing things that are consistent with its mission statutory objectives in large part and there's a diversity of views on those substantive questions in society. And some people have sincere disagreement with those statutory objectives and the like because they're creating winners and losers by many of their choices. And so the losers are going to be dissatisfied. And so it could be just a disagreement on those kind of economic grounds. It could be disagreement on a more ideological and a more ideological kind of way. And I think that's a lot of what you're seeing that agencies are doing more and more things. So naturally, they're going to be attracting criticism for doing more and more things. The more things that they're doing, the more trade offs that are integrated into their actions, the more criticism they're going to attract.

So the other part of it, though, is that-- So I think a big part of the criticism should be understood as a sincere disagreement about what they're doing. And the disagreement about the choices they're make that are implicating trade offs, creating winners and losers. And there's also a great deal of what you might call insincere disagreement as well I think where politicians are making something that there's a certain segment of society that disagrees with what say the EPA is doing.

But the politicians have an interest in generating controversy often and so part of what you're seeing is just sort of showmanship by politicians and so if we were asked the question of should we actually get rid of the EPA, could we make a commitment to that effect. I think that actually the people who would agree to that are relatively small.

So those on the right are EPA is one of the main agencies that people talk about getting rid of the EPA. I think Perry cited EPA energy and education, I think those are the three.

MIKE LIVERMORE: And some other ones that he couldn't remember, I think. [LAUGHS] And then he ended up running the energy department of course.

JED STIGLITZ: Right, exactly, so that's the irony of that situation. And that's-- so exactly politicians are always talking about getting rid of these agencies but a lot of it is just showmanship I think. And they're playing to the crowd and the like. And if we were actually asked in a way that would commit themselves to getting rid of those agencies, I think that the support for getting rid of them would be much, much smaller, in fact than it appears to be.

MIKE LIVERMORE: So-- So, yeah, as you mentioned in this book you kind of have a slightly different take or not slightly different I think pretty substantially different take that integrates some of the earlier perspectives on the advantages of agencies but you have your own perspective on it. Just to situate folks, I think the one common response to folks as you were saying is like why are agencies uniquely situated to deal with certain types of problems, like environmental, protection, or drug, oversight, developing like the way the FDA does is a question of expertise, right? Like we're not gonna-- we don't want Congress making decisions about whether to authorize new vaccines or we don't want Congress writing detailed technology based pollution control requirements because Congress is this generalist institution and the folks there don't have the requisite expertise. But your take is a little different than that doesn't-- don't find that altogether satisfying in the book, you're arguing that that's not the full story at least.

JED STIGLITZ: Yeah, I think that's I think that's right. So the conventional story is as you point out that-- look, the reason the agencies are uniquely situated in our society to solve problems is because they're more expert than other possible institutions, namely-- namely, Congress. And I think that expertise is part of the story in at least two ways. So I guess I should probably come back to that at the end. But I see, I see-- I see, it's not just a slightly, it is a quite different perspective on what is actually unique about agencies.

And the argument is that what agencies are actually uniquely able to do is to develop trust. And the way that they're able to develop trust is through committing themselves to forms of procedural regularity which include importantly reason giving norms and requirements of reason giving that are baked into the way in which regulatory policies are produced, as well as ex posts forms of review by third parties that is so after regulation has been promulgated by an agency. There's an opportunity for those who are upset by it to seek to go to a third party and say, hey, take a look at this policy, it's actually not justified either in terms of the statutory objectives that the agency is claiming to be pursuing or in terms of some factual basis that is at the foundation, the policy or the like.

And so through these norms and requirements of reason giving and ex-post third party review, which comes typically in the form of review by a court, the agencies are able to build trust in their policy outputs that is not possible in other institutional settings. So at core here is an information problem. But it's an information problem that exists as between the public or the voters and the policymaker. So if we see a policymaker say, choose policy A rather than policy B, in a complex society, we're going to have a really hard time understanding or coming to assessment of whether policy A or policy B is in our best interest. And that's the fundamental problem of distrust that exists in modern representative democracies.

And so again, so there's a trust problem. And the way that agencies help us is by resolving that trust problem by again committing themselves to procedural regularity and third party review. By contrast, legislatures have a lot of time committing themselves to procedural regularity. They're always making a procedure on the fly and they also don't expose themselves to third party review.

So generally speaking, you cannot challenge a piece of legislation in statute because it has improper factual foundations or that there's no real connection between what the legislature says it's trying to do and the actual policy means that it's chosen to pursue the stated objectives. Whereas by contrast, those are really core parts of administrative law where when an agency has taken an action, we really get to kick the tires on the policy to see whether the factual foundations are there to see whether there's actually a meaningful connection between what the agency, again says, it's trying to do and what it actually has done.

MIKE LIVERMORE: Yeah, yeah, it's interesting the as you said the legislatures really have a hard time committing themselves to the procedure. And this just reminds me sometimes, I don't if you've ever had this experience but in talking to legislative staff in Congress having to do with legislation that deals with administrative agencies or substantively like that. Sometimes, I'll hear them say, oh, do we have to worry that there's going to be an arbitrary and capricious challenge to this. And it's like, no, you don't because Congress isn't subject to that requirement, right? Like he can't sue. Congress for or you can't seek judicial review of a piece of legislation under the arbitrary and capricious standard, because that's it's a statutory standard. It's not something that applies to Congress it applies to agencies.

JED STIGLITZ: Yeah, that's right. And there are people who think that there have been arguments for decades that Congress should be exposed to these something like that formal review or that there should be it's often referred to as some form of legislative due process where we're just trying to create some regularity in the legislative domain that is reviewable in some sense by courts. And so those proposals have been around for a long time. But my view is that courts actually can't really-- can't really engage in that form of review. That is the courts are simply too weak to really do that on a systematic and regular basis.

And so one of the interesting things is that agencies have this form of credibility by exposing themselves to forms of judicial review. Precisely because they kind of fit a little bit awkwardly in our system of government. That is if courts routinely challenged the factual basis of pieces of legislation that they would be in a sense playing with fire because they are engaging with in a critical way. Another institution which has-- which has a firm constitutional basis in our system that has a form of legitimacy that it achieves through popular elections and the like-- And I think that is not a sustainable model of interaction between constitutional actors. And so this harkens to Hamilton's famous idea that courts are actually pretty weak institutions in our system. They have neither person or sword and so they're really just, they have the power of their judgment and moral suasion and that's about it.

So these weak institutions cannot review on a systematic or regular basis congressional actions on any kind of arbitrariness like grounds. So it's not it's not something that would exist in a political equilibrium, I think. But again, agencies by contrast, are these kind of funny institutions in our system of government. They're not sort of obviously founded in the same way in our Constitution and so many people suspect them. And it's this suspect nature that actually makes them more credible policy makers because courts are now in a great position to engage with them in a critical systematic and regular way on the foundations of their actions.

And so now we say, agencies you have to actually tell us what you're going to do, you have to give us reasons for what you're going to do, you have to have sound factual foundations for what you're going to do, and there's going to be this third party that comes in and looks at everything. And that commitment is actually credible in the agency context whereas I think it would not be in the legislative context.

MIKE LIVERMORE: So then it is kind of a funny ironic resolution to the question I asked earlier, which is, what explains the love-hate relationship. It sounds like what you're saying, essentially, is that we love them because we hate them, right? Because of their uncomfortable position in the constitutional order and the suspicion that we have towards them, because of issues like the attenuated relationship to electoral accountability, that's exactly the reason why we keep giving them more and more power, which is ironic.

JED STIGLITZ: Right. There is an element of irony there that exactly it's precisely their suspect nature the fact that they're not exposed to elections, that they're not envisioned in the Constitution in the same way that say the legislative branches or the like that makes them-- that makes them credible policymakers that it allows us to commit them to forms of regularity and third party review.

MIKE LIVERMORE: So one of the things I really like about this account is that it kind of brings together two threads in administrative law scholarship that have been around for the past several decades. So there's-- when you talk about reason giving, and judicial review, and oversight, these are really core normative concepts that drive administrative law. These are the things that administrative lawyers think about these are things that judges talk about in cases, having to do with administrative agencies. So it's very kind of traditional legal-- these are very traditional legal ideas that have been around since for many decades, part of the administrative state and discussed as part of the administrative state. But they're very normative, they're very kind of doctrinal ideas, and then so that's on the one hand, one branch of legal scholarship that that's interested in administrative agencies.

And the other branch is a little bit newer but still at this point has been around for 30 years. Uses tools from the social sciences, political theory, to think about administrative agencies in a more descriptive fashion kind of how do they come about, like administrative procedure. What explains administrative procedure or kind of a classic account by a group of political scientists, they go by McNollgast is that procedure-- is kind of Administrative Procedure is at least partially a way for Congress to kind of promote its power forward and facilitate oversight of agencies and the like.

So there's kind of a political story having to do with the incentives of various political actors, and they're kind of acting rationally and it's the rational interaction of these actors with in their environment that leads to the institutions that we have. And you bring that together in a really interesting way where these kind of provide a positive descriptive foundation for these normative principles that people have been talking about for a very long time.

And so one question that I think kind of naturally comes out of the account that you give is, like, how did we arrive at this state? Was there some where the set of smart kind of found or framer types around the growth of these institutions in the 19th and 20th century that we're thinking along the lines that you describe or was it just kind of a random process? How did how do we get to this kind of happy state where the institutions that we have kind of make sense almost as though they were rationally designed for the purposes that you describe?

JED STIGLITZ: Yeah. So I think-- thank you for pointing that out, that's I mean, this is one of the ambitions of the book is to try to provide a new positive theory of administrative law. And you're right that McNollgast have a theory, a positive theory of administrative law, which-- again, is trying to come up with an explanation that is not normative but instead is more descriptive in nature about why administrative law takes the form it does. And they'll do things-- they do things, like they say, well, what's the role of notice.

Normally, we think about that as sounding an ideas of due process or notions of fairness. McNollgast would say no, that's actually a-- those are normative ideas. What's the actual role of notice in our system? Well, it's to promote legislative control over agencies. So now agencies have to give notice about what they're about to do. And that gives time to members of Congress to mobilize opposition or the like to depending regulatory actions.

And the theory that I have in this book provides a positive theory of administrative law that sounds in the normative commitments that would be very familiar to lawyers. So the idea is of fairness, deliberation, rationality, these are all core ideas that really are in the scenes of administrative law. And my part of the argument in the book is that these actually serve actually an important political role to. Well-- and why? Well because it's precisely these forms of these norms of fairness, regularity, and the like that promote the political value of agencies that serve a critical role in developing trust that justifies the delegation of authority to them, which again has a political role because we don't trust Congress itself or legislatures themselves to make these choices.

So where do these virtuous institutions come from? I think that the critical period to think about here is less the new deal when we had an explosion of agencies. But again-- but a period that was slightly before that the Progressive Era where we had another explosion of agencies arguably like the initial or original explosion of agencies. And in the book, I argue that there's a couple critical components that came into the converged in the Progressive Era. One is that the economy became much more complex. And so now again, if we're thinking about policy A versus policy B, suddenly that becomes a harder thing for us to assess.

Another thing that happened is that we have for the first time in really massive companies firms. So that we have the scale of production increases dramatically in this period. And that is important because now we worry more about the activities of these scaled up firms. What exactly are they doing in the legislature and so that again builds distrust. And so it's no accident that it's at this time that we have the emergence of words like lobbyists in our vocabulary. There had always been corruption in our system but it became professionalized in a way at this period. And so that helped to build distrust in our legislative institutions and so generated an incentive to find some way around this problem of trust.

And the third factor is related and that is the advent and this is normally often a sort of elided in the literature. But I think is quite important is that there's a really fundamental change in the information environment. So now, we have a much more professionalized journalist class. And so here, we have the muckraking-- muckrakers, magazines like McClure's and the like which are doing investigative journalism for really the first time in our republic and shining light on all these abuses that existed in the legislative sphere. So again, building distrust in legislative institutions and providing an incentive for elected members to find some way around this problem of trust.

And so-- so what do they do? The argument is that they were kind of just trying to muddle their way through it to figure out ways that relieves some of the distrust, that relieved some of the problems that the problems of distrust were creating for them electorally and in terms of their careers. And so I don't envision these members as having any-- I don't see them as deities, I don't see them as being clairvoyant or the like. And so the metaphor that I think about in this context is less of them as being an engineer is trying to solve this problem and more as being explorers. This feeling around four different possibilities and figuring out what actually works in these to resolve these, relieve the problems we're facing this politicians.

And so it's a much more exploratory kind of evolutionary perspective. And so the early forms of delegation did not have all of the procedural forms of regularity that we later came to see in, for example the EPA, although you often see early variants of these same procedural forms. And so one act that I talk about in the book at some length is the Hepburn Act of 1906 where the Interstate Commerce Commission was given prospective rate making authority. And the kind of procedures that are integrated there forms of judicial review, which are very preliminary in a lot of ways, they're just prototypes.

But you can see members starting to figure out what might work to resolve problems of distrust. What kind of procedure should we attach to these investments in authority that we're giving to agencies. And so you see for example judicial review being the agency is being exposed to forms of judicial review. But the standards of review the courts would review the actions of agencies being poorly specified or unspecified. So that's just one example and the railroads I think are an interesting place to think about because they're both a potent symbol of modernity that is so characteristic of this increase in complexity around the turn of the last century that was building distrust in the system.

And here we also have some of the first administrative agencies trying to resolve these problems with prototypes of the kinds of procedures that later we became familiar with as administrative law specialists.

MIKE
LIVERMORE: Yeah, it's-- this kind of the story that you're telling and this question of how do these institutions come about, how do they relate to kind of design versus exploration so it's a very interesting analogy or a metaphor maybe is. It's almost kind of as a question about what counts as good social science theory or theorizing in a context like this where one of the things is kind of particular about this situation is. Of course there's just one US government and it changes over time but it's not like there's lots of different examples that we could try to draw lessons from we're really studying one institution as it unfolds over time.

And I could kind of imagine two different ways of trying to proceed in a sense with theorizing about the situation. And it sounds like maybe what you're doing is kind of a mixture of the two. So one is like a rational choice kind of approach, where we like a good theory is one that is consistent with rational choice. And maybe put aside the details of how institutions kind of come about and through historically contingent processes. But rather we just say, look, if we can provide inasmuch as we can understand these institutions as reflecting the rational choice of various actors. That's a good way of proceeding theoretically, the same way with respect to McNollgast, was we were talking about earlier as, understand these institutions as reflecting a response a rational response to the incentives of various actors, right? It's just kind of a parsimonious way of explaining things.

Another that it sounds more like what you're describing is we can think of what actors are doing is engaged as you said in exploration. There's a search space that they're moving over of possible institutions that they might design. As you said, there's kind of an evolutionary element to this, which we could say-- another way of saying that is maybe small changes are more likely than really big changes, right? And so the same way in your genome, it's not like hundreds of your genes simultaneously are going to mutate to create some new trait, right? All of our traits came about through very small mutations, right? That then accumulate over time.

And so in a situation like that, what I think we're looking for is more like an equilibrium or a kind of a local settling place where we kind of find our way to a spot in this landscape that any small step doesn't kind of make sense. So we it's like a gradient, we kind of walk along the gradient, we find ourselves in an area where it doesn't make sense to move out. So if we think of those two ways of proceeding through as we theorize about these kinds of institutions and how they come about. Do you have a-- do you see what you're kind of engaged in is a combination of the two? Are you really firmly in the explorer camp versus the rational-- the rational choice camp?

JED STIGLITZ: So I think of-- I mean, this is a great and a really rich, rich question. I think of the theory as being fundamentally a rational choice theory but in the sense that I'm describing how somebody might design a system of policy-making that is consistent with the incentives and threats to their well-being that they face. But I view that theory as kind of a shorthand or a summary of the forces at play. And when you zoom in on the behavior that generates these institutions. I don't think see people really-- the thinking designing something as an architect or as an engineer. But again, I think that they're facing these pressures that they respond to in an evolutionary and kind of unknowing or almost unaware kind of way.

And so why have this rational choice perspective? Well I think it serves this role of explanation in parsimony, which I think are really critical role features of a theory. So we want to have a parsimonious theory of institutions that explains why they look as they do. But when we zoom in on individual actors, I don't think that-- I don't think we're-- I don't think we're it's right to think about them as behaving as designers or as architects.

By analogy, I think there's an analogy to market behavior here. If we think about somebody who makes cupcakes for instance and they turn out to be the market leader in cupcakes and you interview them, like why did you-- like why did you make this business decision? Why did you invest in this plant to make so many cupcakes? You ask that person they might say, well, I was making the best cupcakes, mine tasted much better than the cupcakes of all the competitors. Without thinking through like oh, like how exactly do we fit into the market? What-- how are we going to make a profit? How do we justify this investment and the like?

Often, I think when you hear business leaders talk, it's more of the I just make good cupcakes variety and I wanted to make more of them. And so what you're seeing there is really somebody who is similarly just feeling things out and behaving this evolutionary way. Who we don't hear from are the cupcake people who were making delicious cupcakes but the market timing or their cost structure was not quite right. And so-- so they go out of business. And so we don't hear about the failed cupcake makers. And I think there's something like that for politicians to where we see the institutions that serve a function. But we don't see so much the failed efforts that is the people who don't quite feel their way to the right institutional setup. Why? Because well they lose their jobs there. They tend not to survive in the political system.

And so it's a shorthand I think about-- I think about the positive theory as a rational choice kind of theory where we set up the structure and explain behavior in terms of design or architecture. But when we think about human behavior, I think the more evolutionary perspective is often the one that feels more accurate to me.

**MIKE
LIVERMORE:**

Yeah, that all, that all. That makes a lot of sense. And it's an interesting project to envision that kind of coming the historical record for the institutional ideas that didn't go anywhere or that were tried out and limited form and fail. I mean, as you say, we kind of observe that there's a huge survivor bias in what we observe. So it would be interesting to do that although a difficult kind of undertaking.

One question that kind of comes to mind is going back to the kind of core claim of the book about these norms and procedures that we have in the administrative state as a way of facilitating trust and creating a platform for credible policy-making is how much do you-- does it does it matter if people about this or how much do we think that people about this? So if I walk up to the average person on the street and I ask them about administrative procedure and what EPA is required to do in order to issue rule makings, and the role of courts, and notice and comment, and the like obviously they're going to look at me sideways. And they'll have-- most people are going to have no idea just the same way they wouldn't have any idea about any other kind of specialized. They'll something about their specialized knowledge but they may be making cupcakes. But not necessarily about administrative procedure.

So is that a problem for your theory? I mean there's a huge and a really interesting part of the book. Again, as you just note one of the fun things about the book is that you draw on different fields and there's kind of some historical narrative and there's a bunch of social science modeling, but also actual experiments that you did. And so you kind of show in through the experimental setups that when people kind of know about decision making set kind of context or set up, things like reason giving and review. Do you affect how they view outcomes or what we might call the legitimacy of the decision making? But a lot of people aren't, they don't anything about the administrative state and its procedures. And so I guess the question is that a problem or if not, how is it that this trust function of these procedures works if it's kind of in the background and people aren't really keyed into what's going on?

JED STIGLITZ: Yeah. So I think it's a good question and a good challenge. I think that there are a couple responses. I mean, there are cases if you look at the history of the EPA, there were a number of articles in the New York Times for instance, around the founding of the EPA in the late 30s and early 40s that dealt with administrative actions and really focused on the administrative procedures that were used there. So I think it's not quite right to say that these things are totally invisible to the public that is that procedures in a direct way are invisible to the public and the like. It's also true as you point out that if people are aware of the procedures that it actually does affect their views of the legitimacy or satisfaction with the decision. And I think that finding is quite regular. That is-- it's in my-- it's in my experiments and it's also present in the literature more broadly.

So one thing is yes, they do-- newspapers and the like do report on procedures and the public seems to be responsive to this, that's one response. Another response though, is that it just happens in a more diffuse way so that even if the New York Times is not reporting on it that on the particular procedures that are employed, that there's a diffuse sort of legitimacy that occurs over time. So somewhere like the New York Times, the reporters themselves, for instance, New York Times may be observing a regulatory action. And the reporters will-- even if they're not articulating in their stories the procedures that are used, they are aware themselves of the procedures.

So they know for example, that there is a notice in common process. In fact, many of the articles will site to-- will site to the comments that are issued in the course of a regulatory proceeding as a foundation for the article itself that's a substantive foundation for the article itself. So are the authors of the articles are aware of the procedures. And they just like the respondents in my experiments or that you see referred to in the literature more broadly just like the response my experiments are positively affected by the procedures. The authors too of the New York Times stories and other journalists will be affected by their knowledge of the procedures. And that will transmit in subtle and diffuse ways that build over time into the stories that they write.

So I think it's a good challenge. And I don't-- I think that it's a little bit hard to pin down, like what exactly is the connection between the procedures and beliefs because many times, the beliefs about legitimacy are not connected directly to procedures but instead transmit through these sort of diffuse networks. But I think that that's-- I think that that's kind of how it operates.

MIKE LIVERMORE: Yeah, it's interesting. And it kind of puts me in mind of another situation. So there's in rule makings these days at least some of the time, not most of the time, not for most rule makings but occasionally, agencies will do a high profile rulemaking. The Obama administration's clean power plan to control greenhouse gas emissions from the electricity sector. The various iterations of rules to deal with internet governance and net neutrality that we've seen over the years. Sometimes, those kind of catch the public eye and we see what are sometimes referred to as mass comment campaigns where advocacy organizations go out and try to get people to write submit comments and to the EPA or to the FCC.

And-- So some people actually are very skeptical about these campaigns. They worry that it creates a false impression amongst the public that there's like a vote that's happening. And there's a question about what agencies should do with these comments, which are mostly kind of not technically sophisticated variety. And so they're not actually presenting the agency with new information or anything like that which is the debate that you're familiar with in administrative amongst administrative law scholars, about what to do with these comments.

But there's another story here, which is maybe they're doing the work of the administrative state by going out and just informing people that they can submit comments. And that just by alerting people to this kind of feature of the procedure for administrative decision making. They're actually kind of inadvertently shoring up the legitimacy of the institutions even if they disagree with the substantive content. So they don't like the FCC rulemaking, they go out, they try to get comments but it actually turns out that by even soliciting comments and alerting people to the procedure, they're actually increasing the legitimacy of the final decision.

JED STIGLITZ: Yeah, I like that. I like that quite a lot. That's a really interesting take on mass commenting, which you're right the literature is pretty skeptical of it viewing it as either useless or distraction, waste of time, or just basically a cynical effort by interest groups to raise money through these campaigns. But I think you're right, there is this aspect of just raising awareness of the procedures that are available through agencies. I mean the other thing I should have added to the last comment was that even though the procedures that are used by agencies may not be well known by members of the public. The fact that agencies are subjected to judicial review is pretty well known.

And so we're constantly hearing stories about agency actions being set aside for one reason or another of law and reasoning inadequate conditions factually for their efforts or the like. And the public will have I think a sense of that. And judicial review itself is really supported in a fundamental way by the procedural regularity that exists at the agency level. So if we imagine removing the procedures, judicial review itself would become much more difficult. And the public, I think would detect that over time in a diffuse kind of way.

MIKE LIVERMORE: So one of the kind of implications of the story that you're telling is-- it's really kind of straight forward implications that there's a lot of value that we're getting that the administrative state gets out of procedure. And that not just the administrative state but just our democracy in some sense that would just be very difficult for anyone to engage in policy making. If there weren't some way to create these kind of procedurally constrained agencies-- actors, don't have to be agencies I guess. But some actor out there and the environment that's constrained in this way and that facilitates democratic action in some sense.

But that doesn't necessarily mean more procedure is good always, right? And so I think and right now of course, there's a pretty substantial debate both amongst legal academics, but also within the broader public policy circles as well about exactly this that we've over procedural administrative decision making. It's too hard to do anything.

We have the National Environmental Policy Act makes it impossible to cite anything. No one can ever build anything because there's just so many hoops to jump through. Agencies can't make any decisions. So presidents come into office and they can't get anything done because it takes so long and that's a problem because it makes it impossible for the electorate to have its wishes vindicated, and then people frankly, I think a little silly but people still nevertheless do kind of look to outside the United States to states like China and will argue.

Well, look, isn't that wonderful? They can create a high speed rail so easily. And if they want to build the city, they build the city. And if they want to tear down a neighborhood, they tear down a neighborhood. And then they look with some envy at these states compared to the US where we've been building a new subway line on the East side of Manhattan for the last 50 years. And we can't build anything in San Francisco so there's tremendous or in the state of California-- so there's tremendous housing crunch and limited supply, leading to high prices. And so how do we get to-- how do we get to the Goldilocks level? How do we know? It just a question of an amount of procedure. Is it some procedures are more important or better than others. And where are we? Are we at the too much point? Are we? or again in light of the critiques of the regulatory state. Do we not have enough procedure? Or do we have the wrong procedures?

JED STIGLITZ: Yeah, so I think you're pointing to a lot of really rich again set of issues here. So I think you're right to say that part of the theme of the book is that agencies, even though they're not democratic fit into our democratic system of government in a way that we shouldn't necessarily be sorry about it. That is like we shouldn't worry too much about the fact, in my view that agencies are not democratic, that are not at least in the sense that they're not that we don't elect-- we don't elect the people who are making decisions at the agency level because again they're fitting into our larger democratic system of government in a really critical and distinctively useful way that promotes representative government largely broadly understood.

I also think that you're right that there's a-- procedure is political in a fundamental kind of way that the procedure-- I tell my students the procedure substance barrier is very permeable. And I think that's quite right. And so you can certainly have too much procedure or too little procedure. But one thing we shouldn't do is also on the other side of things is apologize or worry too much about the fact of procedure because precisely it's the procedural regularity that that really that is distinctive about administrative agencies that makes them special in our system of government. And that allows them to fill out their role and our representative system.

So we have to have-- it might be some procedure and we shouldn't apologize for having some procedure. There's an effort to radically de-proceduralized things along the lines you're suggesting. And my argument is that actually may be beneficial in the short term for people for your objectives but in the long term is not going to be, it's not going to support your objectives because that will undermine what is fundamentally distinctive about administrative state and its political value in our system. So we de-proceduralized, then over time we'll end up with a less delegation of authority to those agencies.

So the procedure is really critical to the foundation of the administrative state. That said you can certainly have too much procedure. And so precisely because procedure has implications for substance. There are going to be people who and we have many instances of people advocating forms of procedure in a kind of cynical way where it's not designed to resolve the problems of distrust that are at the foundation of the project that I worked on. But instead really the objective of injecting these procedures into the administrative process is again not to resolve problems of trust but instead to gum up the works in a sense and to prevent the agency from doing anything.

And so that is something one has to-- has to guard against. And I think that over time too that will have a political response, if that is the dominant mode of proceduralizations. Right now, I think we're in a kind of funny place where we have too much procedure in some ways that is the forms of the judicial review has in some cases produced such strenuous analytical requirements that agencies have a really hard time getting much done.

On the other hand, we have two little procedure in some ways too. So that agencies as they're responding to these requirements to amplify their analytical apparatus and the like. They're shifting out, there's trying to shift into modes of policy-making that are less exposed to judicial review. So for one of the forms of policy-making that has become really quite salient recently has been the use of guidance documents by agencies. These guidance documents are not formally understood. They're not formally understood creating new legal rights or obligations, they're instead just telling the public.

Here's some pre-existing legal right or obligation. Here's how we interpret it, think about it, plan to enforce it, et cetera in a non-binding kind of way. But the reality is that these guidance documents are often effectively kind of creating new policy. And that is creating new legal rights or obligations. And so that's an adaptation that agencies have made to the fact that they're being over proceduralized on some other dimensions. And so in a sense, we have put too much procedure and too little procedure at the same time, right now. And so it's-- and these are both messy political responses to the fact that procedure is that the procedure substance barrier is very permeable.

**MIKE
LIVERMORE:**

I think this is a kind of a related kind of from the last point. But certainly with respect to the kind of procedure substance barrier is I'm curious your thoughts on the relationship between procedure and politics. So a classic distinction in administrative law is between politics and administration, right? And there was a time when that was thought to be a divide that was meaningful. And on one side was kind of political decision making that should be left to electoral officials and Congress. And then what got delegated over to agencies was just kind of purely administrative decisions that were technical or expertise driven and not political. And of course, we now have known for decades that divide doesn't really make sense in the sense that administrative decisions on questions like how to whether and how to regulate greenhouse gas emissions or even something like whether a vaccine should be approved or not. There's gonna be values choices that are embedded in them. They're not purely empirical questions.

And so do you see-- so one way that someone, I could imagine, would tell the story would be, well, procedure is how we protect that administrative-- we protect administrative decision making from politics through proceduralization. And that's why we can trust agencies to make decisions credibly because we've created a mechanism to insulate agencies from political influence that would be kind of one version of the story. A complete alternative version would be-- we've made a big mistake by trying to keep this distinction and defend the border between politics and administration and we actually just should recognize that agencies are subject to political oversight in fact agencies should be able to make reference to their political directives. I mean that's an idea that's been circulated. The agency has to say the president told me to do it. That's why I'm doing it. And that court should accept that as a kind of reason.

So yeah. So these are all kind of debates that we've been having for a long time in administrative law. And I guess the question is, do you see that your book and your project is as shedding light on what's going on in the administrative procedure sorry-- administrative politics distinction or the administration politics procedure nexus? What-- is there a reconfiguration there or how should we think about those things?

JED STIGLITZ: Yeah, so I mean, I just I guess, I'm perhaps somewhere in between these two polar possibilities in the sense that I don't see the book-- I see the book as arguing against the idea that it should just be politics all the way down or that we should accept that or think about that as a viable possibility. I also, though want to argue against the idea that it's just a sort of technocratic endeavor to. And so I see the critical role of agencies in our system is to effectuate statutory objectives. And so at the-- critical for me that is that positive act of enactment that is the positive law plays a huge role in the normative structure of the thesis that is this is the way in which we should orient our arguments around. As is are the statutory objectives that are articulated through these enactments.

And that is going to be the creation of those statutory objectives is a admittedly purely political kind of enterprise. But it is one-- I want to argue that is relatively well regulated by the political system because statutory objectives. If they're done in the right way, they going to be formulated at a pretty high level that is passable by the public and for which members can be held accountable.

At the agency level then, there's also a role for politics but it's a form of politics that is regulated by the statutory objectives, that is it's not just a free wheeling kind of throw society into some kind of administrative process with all the different stakeholders having some input in an open ended way in coming up with a policy decision. Instead, it's a process that is governed by-- limited by the statutory objectives. And so there's going to be a lot of fighting and disagreement and you might say politics about what the statutory objectives mean, how they apply to various contexts and the like. But again it's all limited and regulated by the fact that those objectives exist.

And so the legitimacy or the appropriateness of an agency action should not be read against the idea. They write against the benchmark of was it a democratic process. But instead, how good was the normative question or query of interest should be instead, how well did the agency effectuate the objectives that it was given under the statute under it. And there's certainly a role for politics there but it's not a democracy first kind of perspective. Democracy happens but it's more in the objectives orientation.

**MIKE
LIVERMORE:** So I guess, what my one question I would have is a kind of follow up to that is there's going to be cases where the statutory objectives, they're often very broad as you know, right? So the SEC-- just to take some concrete examples, the SEC's ongoing rulemaking on the kind of information that it was going to require about climate change risk and how something like that fits up with the broader statutory objectives that the SEC is trying to vindicate, or the Environmental Protection Agency is deciding how to implement the National Air Quality standards and whether to update them in light of new information about particulate matter pollution. And the statutory objective there is to set the standards in such a way as to protect public health with an adequate margin of safety. And what does that mean about whether PM 2.5 should be set at x, y, or z parts per million?

So in and so-- the statutory is actually can themselves just be incredibly contestable and in fact contested. Regulating greenhouse gas emissions under the Clean Air Act whether the Clean Water Act should what the jurisdictional boundaries around the Clean Water Act should be. I mean just we could come up with 1,000 examples between the two of us if you gave us enough time, right? So then I guess to how does that reality fit in with the model that you're describing? So yes, there are these statutory objectives but they often require in order to vindicate them values choices to be made on the details of implementation. How to set, where to set the NAQ? How to set the jurisdictional boundaries around the Clean Water Act? whether to require disclosure of climate risks, how to deal with internet governance and whether there should be a net neutrality rule for wireless as well as whatever.

So then yeah. So in light of that, right? And then the place that you want to put on, how much help is the positive giving you there? I guess, it's the question in light of the open nature or the open textured nature of the question that the agencies are often dealing with the questions that they're dealing with.

JED STIGLITZ: But so it's going to place some constraints on it. There's going to be a huge range of discretion through. And that range of discretion is defined by the set of policy particulars that are justifiable in light of the relevant facts and statutory objectives. And that is going to-- then there's going to be huge range of discretion there often. But it is a limited range of discretion. And if we think about the book is called *The Reasoning State*, if we think about the unreasoning president, President Trump. He ran into continuously, the fact that this is actually a limited range of discretion.

And so if we look historically, the rate at which agencies are affirmed in the courts is something like 2/3 to perhaps 3/4 of the time. Agencies will have their actions affirmed. When they're challenged and-- for him it was basically the reverse. That is President Trump would try to do something through an agency. The agency would do it terribly in some way that is it would have the foundations that the factual foundations of the proposed rule that they were trying to implement or the action they were trying to take were flawed or they were outside of their statutory objectives the meaning of the statute or the like.

And so for Trump, the unreasoning president, the ratio was basically flipped. And so roughly 3/4 of the time he was losing in court actually. And so that I think demonstrates that this is not an unbounded range of discretion that there are real limits that are imposed by the reasoning state. And they bind it in a meaningful place.

MIKE LIVERMORE: Yeah, really interesting. And it's this I've made some kind of similar arguments in a totally different context but this notion that what administrative-- what the administrative state does, in some broad way, is provide guardrails or constraints. And then there is a legitimate role for values or politics. But then-- But it's not it's not unbounded as you said.

JED STIGLITZ: Yeah, it's with-- the politics and the like these debates occur within the bounds that are created by statutory meaning. And there's a lot of room there for legitimate debate. This is not a mechanical exercise but there but it's a bounded exercise.

MIKE LIVERMORE: Great. All right, well, we could obviously keep chatting about these issues probably indefinitely but we're basically at a time. So thanks-- thanks for joining me today, Jed, really interesting conversation. It's a great book. People should definitely read it, pick it up and read it. It is-- it's really fascinating and an important contribution so thanks, thanks again, Jed.

JED STIGLITZ: Thank you so much for having me, Mike. I really, really enjoyed the conversation.

MIKE LIVERMORE: And listeners, if you enjoyed this episode, let us know. You can give us like, a rating, subscribe to the podcast and follow us on social media. It'd be great to hear from you. Till next time.

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