



Making Sense of the Government We Have

ELIZABETH MAGILL SPENT FOUR YEARS ON CAPITOL HILL before she entered law school, and her interests and scholarship reflect that experience. Few think of Capitol Hill as a place that shapes intellectual attitudes, but Magill's scholarly approach owes something to the Hill. It was there that she became interested in fundamental questions about the architecture of government and the relationship among its institutions. It was also there that she began to appreciate the complexity of those relationships.

Magill joined the Law School faculty in 1997, after clerkships with Court of Appeals Judge J. Harvie Wilkinson III and Supreme Court Justice Ruth Bader Ginsburg. Magill's intellectual interests

are wide-ranging, as her teaching experience shows. She has taught ten different subjects in her time at Virginia, and has co-taught with colleagues on five separate occasions. In the same relatively short period of time, Magill has become one of the most admired and beloved members of the faculty.

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Magill has concentrated her scholarly work in her core fields of constitutional and administrative law. In her writings, Magill takes up large questions about the design of and relationship among governmental institutions, but she also pays close attention to the details and historical context of institutional arrangements. Her work, which has drawn considerable attention and accolades from other scholars, is notable for the creative perspective it brings to longstanding issues.

Magill's work in constitutional law focuses on the division of authority and relationship among the institutions of the national government. That focus has spawned several articles that, taken together, revise our understanding of issues that are both timeless and of increasing contemporary importance.

In "The Real Separation in Separation of Powers Law," 86 *Va. L. Rev.* 1127 (2000), Magill casts a critical eye on existing debates over legal approaches to separation of powers questions. She argues that the conventional understanding of what is at stake in those disputes is incorrect and, worse, a distraction from more pressing questions. According to conventional wisdom, courts and commentators are divided between two schools of thought, formalism and functionalism. Magill argues that, in fact, underneath this debate there is a hidden consensus about the substantive theory of separation of powers. Both formalists and functionalists, she contends, accept that separation of powers law can and should delimit three separate branches of government and maintain balance among them. Yet neither side in this debate, as Magill shows, has explained or defended their shared assumptions regarding the need for functional separation, balance, or the relationship between the two. After illustrating the shortcomings of traditional thinking regarding separation of powers, Magill lays out the challenge facing anyone wishing to construct a more convincing theory.

In "Beyond Powers and Branches in Separation of Powers Law," 150 *U. Penn. L. Rev.* 603 (2001), Magill takes up that challenge. She begins by explaining why the current theory that guides judicial resolution of separation of powers controversies is a failure. One pillar of that theory requires courts to distinguish between legislative, executive, and judicial powers.

But in most contested cases, there is no available method to make those determinations. The other pillar of the theory requires courts to police the balance of power among the branches, but that effort also fails. The most important problem with conventional theory is that it imagines branches as entities with unitary institutional interests that they are seeking to advance. But that is a fantasy. The branches of government are complex institutions made up of many subparts; those subparts have varying interests that do not always coincide with one another or with the posited interest of the overall branch.

Having identified where separation of powers thinking goes wrong, Magill then identifies how it could go right. At the most general level, she urges that our thinking about these questions must take account of the world we live in, rather than chase abstractions. Her insight that governmental power, instead of being distributed among three unitary branches is actually dispersed among a large and diverse array of decision-makers, holds important lessons for separation of powers thinking. Separation of powers theory has conventionally aimed at assuring the fragmentation of state power—at “balancing” the branches of government. But government authority is already extremely fragmented in our system. Many government actors share in the exercise of power, and they have varied incentives, reflecting different selection and tenure rules and diverse constituencies. Further, they are located in institutions and sub-institutions with distinct internal organizations and norms. Such actors can be counted on to protect their slice of decision-making authority and, in that way, to work against concentrations of government authority.

Conventional separation of powers approaches have also been aimed at identifying and labeling exercises of power as “legislative,” “judicial,” or “executive” and at assuring that power is exercised by the appropriate governmental institution. Magill argues that in contested cases, that effort is fruitless. She also suggests that understanding the actual ways in which governmental power is exercised paves the way for a more useful set of questions. Instead of trying to identify the nature of the power being exercised, the law should ask *how* that power will be exercised. That question

requires us to look, not at the lofty abstractions of branches and powers, but at a level that is more meaningful. We must ask about the relevant decision makers, the context in which they act, the process by which they reach their decisions, and the constraints on their actions. Understanding how government actors are likely to exercise authority will not be easy, but focusing the doctrine in this way will at least move it in the right direction.

Having clarified, criticized, and offered an alternative vision of separation of powers thinking, Magill's most recent contribution to that literature asks a different sort of question. She asks why separation of powers doctrine looks the way it does. In "The Revolution that Wasn't," 99 *Nw. U. L. Rev.* 47 (2004), Magill asks why the Rehnquist Court made a serious effort to revise federalism doctrines, but did little to alter the basic approach to separation of powers cases. Many would expect developments in these two areas to mimic one another, but, in the Rehnquist Court, they did not.

Magill explains that the factors that drive doctrine in federalism and separation of powers cases are quite distinct. The incentives of judges in the two areas vary because federal courts have a much more direct stake in separation of powers controversies than they do in federalism controversies. In addition, the provisions of the Constitution that govern separation of powers controversies are more specific than those governing federalism issues. This makes it less likely that federal courts will do what they have done with respect to federalism disputes, that is, treat some of the most important questions as nonjusticiable.

The external influences on the two doctrinal regimes are also different. To take one example, consider the difficult problem of squaring the vast administrative state with the provisions of the Constitution that establish the three branches of government. After the end of the *Lochner* era, administrative regulation became a far more established feature of American governance, and courts were reluctant to use traditional separation of powers doctrines to declare vast swaths of the administrative state unconstitutional. They had more than enough opportunity to tame the exercise of bureaucratic power through their interpretations of statutes, such as the Administrative Procedure Act, that governed administrative agencies. By

the time the post-New Deal constitutional settlement receded—the point in time at which the Rehnquist Court began self-consciously to revive federalism—the administrative state did not need taming.

Finally, Magill argues that another key to understanding developments in the two areas lies in recognizing that the political valence of federalism and separation of powers questions is quite different. Altering the law governing structural arrangements at the federal level may seem dramatic, but it is still re-arranging authority within a federal political system. Transferring power away from the federal government to the states, by contrast, is to transfer authority to genuinely distinct political systems. The stakes, in other words, are higher to changes in federalism doctrines than they are with respect to separation of powers doctrine. Higher stakes means that the pressure surrounding the doctrines—either to change them or resist changing them—will be greater.

Magill's other scholarship is in the field of administrative law. Her most important article, "Agency Choice of Policymaking Form," 71 *U. Chi. L. Rev.* 1383 (2004), was recognized by the American Bar Association Administrative Law and Regulatory Practice Section as the best piece written in the field in 2004. The article has renewed interest among scholars in neglected but important questions about agency behavior and practice. Magill starts with the observation that an administrative agency which has been delegated some task—to protect the environment, assure the integrity of the securities markets, or improve auto safety—might be able to carry out that obligation by adopting a legislative rule, bringing or deciding a case, or announcing an interpretation of the relevant statute in which the authority was delegated. In fact, an agency might choose to rely on all of those quite distinct policymaking tools in the course of implementing its statutory mandate. Not only will an agency be permitted to choose its preferred policymaking instruments, but under long-settled administrative law doctrine, it will not be required to explain to courts why it chose one instrument or the other.

This phenomenon is well-known and generally treated as unremarkable. But, Magill argues, it *is* remarkable. Most government actors are not

free to select from a menu of policymaking tools. The legislature adopts statutes; prosecutors bring cases; courts decide cases brought to them by parties. Confining legislatures, prosecutors, and courts to particular jobs is no accident. Those assignments spring from the most essential aspects of the Constitution's design. But most administrative agencies are not so constrained. Many can rely on policymaking instruments that look like legislating, enforcing, *and* adjudicating.

One of Magill's primary achievements in the article is to persuade her readers to critically examine agency decisions that are now considered unexceptional—indeed, have been ignored in the legal literature for many decades. Magill demonstrates that agency choices of procedure are both theoretically and practically significant. The choice among the agency's policymaking tools determines the process the agency follows, the legal effect of the agency's action, and the availability and nature of judicial examination of the agency's action. Having explained why this choice is important, Magill turns to the issue of why agencies choose one form or another. Unfortunately, scholars have little sense of how agencies' actually choose their policymaking form. In the article, Magill constructs a preliminary hypothesis about how an agency might choose among its available policymaking forms, identifies what might worry us about those choices, and articulates what responses might be available to respond to those concerns.

One method to respond to concerns about agency choice of procedure, of course, is judicial review. According to orthodox doctrine, courts will not require an agency to explain why it chose one policymaking form instead of another. As Magill demonstrates, however, courts *do* "review" agency choices of procedure, albeit in a roundabout way. Agencies are permitted to choose their form of policymaking, but the elements of the policymaking tools they choose are fixed by statutes and judge-made law. Moreover, judge-made law has played an important, even decisive, role in shaping the consequences that follow from an agency's choice of means. Courts are the primary architects of the standards by which agency action will be assessed; they have leeway to determine who can bring a suit to challenge agency action and when that suit can be brought; they some-

times have the ability to fix the legal effect of an agency's action; and they have some power to shape the procedures that an agency must follow when it relies on a policymaking tool. By adjusting the consequences of choosing one form or another, courts have the opportunity to articulate concerns about an agency's choice of procedure. Magill demonstrates that courts can, as a theoretical matter, respond to almost any concern about an agency's choice of procedural form. She also provides three examples of judicial developments that should be seen as examples of judicial regulation of agency choice of procedure, albeit in the indirect way Magill identifies.

It is an important step forward to understand that, contrary to what the black-letter doctrines would suggest, courts actually do react to (and thereby review) agency choice-of-form decisions. It raises the question, though, whether this *sub rosa* review of those discretionary agency decisions is a sufficient response to the larger issue of agency choice of policymaking form. To answer that question, scholars must first take up the challenge of constructing a convincing positive theory of agency choice of procedure. Magill's preliminary positive hypothesis paves the way for that analysis, but much more work must be done to determine just how agencies choose among their available options.

Magill's current project combines both the interests and inclinations she has demonstrated in her prior work. She is writing a book on the health, safety, consumers' rights, and environmental regulatory revolution of the 1960s and 1970s. Three significant developments combined in this period to produce a genuinely new regulatory order. The first development came from the halls of Congress. Starting in the middle of the 1960s, Congress embarked on what counts as the third major wave—the earlier two being the Progressive Era and the New Deal—of regulatory innovation in the 20th Century. This third period, often called the new social regulation, rivaled if not exceeded its predecessors in scope. Social and political movements organized around health, safety, the environment, and consumers' rights demanded action, and Congress obliged. The political branches created brand-new regulatory agencies, including the Consumer Product Safety Commission, the Environmental Protection Agency, the National Highway

Traffic Safety Administration, and the Occupational Safety and Health Administration.

The second development occurred in the legal profession. Regulated parties had long turned to the courts when confronted with regulation. For as long as federal regulatory bodies existed, those they regulated had challenged their actions in court. But in the 1960s, a new group of parties began to appear in court. Watchdog lawyers—who followed, critiqued, and challenged agency activity on behalf of “the public”—appeared and pursued their missions with vigor, both inside and outside the courts. Such public interest lawyers—now on the left and the right, but then mostly on the left—are so much a part of the contemporary fabric of regulatory disputes that it is hard to appreciate how recent they are. Most of the groups that now routinely litigate in the health, safety, environment, and consumers’ rights arena started litigating in this period.

The final development was in the courts. Between the middle of the 1960s and the middle of the 1970s, courts transformed their own relationship with agencies. They required agencies (old and new) to be open, participatory, and reasonable. Courts broadened access to judicial review of agency decision-making. They did so by expanding standing doctrine, establishing a presumption that agency decisions were subject to review, and permitting pre-enforcement review of agency rules. When they reached the merits, courts required agencies to adhere to the statutes that governed them, but they did much more than that. They were demanding about both the process and substance of agency decision making.

In seeking to understand this era, Magill will once again combine her interest in large questions—here, what is really the birth of modern public law—with her characteristic attention to the details of that development. In Magill’s view, embedding large questions about governance in the practicing details of governing institutions is the best way to advance our understanding of her primary fields. It is also, for her, a constant source of scholarly pleasure and inspiration. ❀

EXCERPTS

Beyond Powers and Branches in Separation of Powers Law

150 *U. Penn L. Rev.* 603 (2001)

THE SEPARATION OF POWERS PROVISIONS OF THE CONSTITUTION are understood as a way of controlling the exercise of state power by fragmenting it among three different institutions and guaranteeing that fragmentation. Conventional separation of powers analysis relies on two mechanisms to achieve and maintain the dispersal of state power: separating legislative, executive, and judicial power in three different branches and preserving a balance among those branches. These ideas are not just the stuff of high school civics class; legal doctrine governing separation of powers questions is built around them. ... There is vigorous disagreement about the proper characterization of each of these examples, but there is little controversy about the proper framework within which that debate should proceed.

There should be. The embarrassing secret is that both commitments at the center of separation of powers doctrine are misconceived. The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers. The available strategies for identifying those differences—and, given the centrality of the question, there are surprisingly few—either rest on formalistic rules that have no content and fail for that reason, or consist of vague normative judgments that cannot work in concrete cases. While there are other possible methods for answering this question that are not yet fully developed in the literature, upon examination, they are not promising. The honest assessment is that we have no way to identify the differences between the powers in contested cases, and we are not likely to have one soon.

The effort to maintain balance among the branches fares no better.

An obvious difficulty is that the claims made in the name of inter-branch balance—for instance, that a development has upset the balance of power between the branches—are made without conveying why we should care about that balance. Such claims rest on assumed salient differences between the branches of government; the distribution of authority among the branches matters because those institutions will not decide questions in the same way. That intuition about inter-branch difference is taken as truth, but it is weakly supported and open to question. Nonetheless, understanding why we should care about this question is a step forward. It does not, however, rescue the concept. Indeed, it is a hopeless enterprise to talk about balance among the branches of government. We have not come close to articulating a vision of what an ideal balance would look like. Even if we had tackled that normative question, we have no way to measure the distribution of power among the branches at any point in time and no method to predict the effect of an institutional arrangement. In short, we do not know what balance means, how to measure it, or how to predict when it might be jeopardized. All these deficiencies are partly explained by the final and most fundamental difficulty with this idea. Inquiring about inter-branch balance is incoherent because it assumes that branches of government are unitary entities with cohesive interests, but that is not true. The institutions of the national government are made up of individuals and sub-institutions with varying incentives that do not neatly track the institution within which they are located.

This Article argues that the two central commitments of contemporary separation of powers law are a failure. Fine-tuning these ideas will not redeem them. Abandoning these ideas, as we must, will make room for new ways of thinking about separation of powers law.

Reconstructing separation of powers law will be no easy task. Taking seriously the failings of current law offers at least two important lessons for its reconceptualization. The most significant lesson is that if one is interested in fragmenting state power and assuring that it remains fragmented, the failure of the conventional approaches is of little moment. Those approaches seek to disperse the three powers in three balanced branches,

in part, so that no single institution controls too much state power. That effort fails. But in the course of noticing that there is no such thing as three essential powers exercised by three undifferentiated branches, we will also notice that government authority is fragmented, widely so, albeit not according to the three-powers-in-three-branches formula. Instead, government authority is diffused among a large and diverse set of government decisionmakers who have a hand in the exercise of state power. The extent of that diffusion of state power is more than sufficient to put to rest any concerns about dangerous concentrations of government authority. And the character of that fragmentation is such that state power is likely to remain widely dispersed. Because the decisionmakers who share in the exercise of government authority have varied incentives—owing to their diverse constituencies, institutional locations, and ways of doing business—there is little chance that they would collude to concentrate government power in a few hands. If diffusion of state authority is what we are after—and that is what conventional approaches in part are seeking—we have it.

Understanding the character of the distribution of government authority also offers a second lesson for separation of powers law. That law aspires to something more than general diffusion of state power; it seeks to match the exercise of particular powers—legislative, executive, judicial—with corresponding institutions that are best suited to exercise those powers. The criticisms offered here suggest that current efforts go about this ambitious undertaking in exactly the wrong way. Conventional thinking about separation of powers operates as if it is meaningful to talk of powers and branches. But our system does not operate at those levels; government authority cannot be parceled neatly into three categories, and government actors cannot be understood solely as members of a branch of government. An effort to match particular state powers with particular government decisionmakers must start with an understanding of how those decisionmakers might exercise that authority. That requires a fine-grained appreciation of the forces that push and pull government actors in one direction or another. A doctrine built around such understandings will offer no easy answers, but it will at least ask the right questions. ❁

Agency Choice of Policymaking Form

71 *U. Chi. L. Rev.* 1383 (2004)

AN ADMINISTRATIVE AGENCY DELEGATED SOME TASK—PROTECT the environment, assure the integrity of the securities markets, improve auto safety—might carry out that obligation by adopting a rule, bringing or deciding a case, or announcing its interpretation of the statute. In fact, it might rely on all of those quite distinct tools in the course of implementing its statutory mandate. Agencies are unique institutions in this respect. Most government actors are not free to select from a menu of policymaking tools. The legislature adopts statutes; prosecutors bring cases; courts decide cases brought to them by parties. Confining legislatures, prosecutors, and courts to particular ways of doing their jobs is no accident. Those assignments spring from the most essential aspects of the Constitution's design. But the typical administrative agency is not so constrained. Most agencies can rely on policymaking tools that look like legislating, enforcing, *and* adjudicating.

This strange state of affairs, oddly enough, is considered normal. To be sure, the peculiar mix of powers—part legislative, part executive, part judicial—that Congress is constitutionally permitted to bestow on administrative agencies generates much of the heat in the debate over their constitutional status. But that is usually where interest in the issue ends. The nonconstitutional dimensions of agencies' ability to rely on a mix of policymaking tools generate little interest or investigation. This Article aims to rectify that by identifying, evaluating, and coming to terms with the phenomenon of agency choice of policymaking form. That phenomenon can be simply stated: the typical administrative agency is authorized to use a range of distinct policymaking forms to effectuate its statutory mandate and its choice about which tool to rely on appears, at first glance at least, to be unregulated by courts.

A typical administrative agency is authorized by statute and case law to use a range of policymaking forms to address problems within its purview. ... [An agency like the Securities and Exchange Commission might engage in legislative rulemaking, administrative adjudication, judi-

cial enforcement action, and guidance.] The agency's choice among these policymaking forms matters because each is distinct. The differences are significant and they run along three dimensions: the process the agency follows, the legal effect of the instrument, and the availability and nature of judicial examination of the agency's action.

That agencies often have multiple tools available to effectuate a given policy objective is interesting in itself. But the judicial reaction to this fact heightens the intrigue. That judicial reaction, at least at first blush, can be simply described: hands-off. An agency can choose among its available policymaking tools and a court will not require it to provide an explanation for its choice. This judicial reaction is out of step with the rest of the law of judicial review of agency action. Courts usually demand that agencies provide reasoned explanations for their discretionary choices, but there is no such reason-giving requirement when agencies select their preferred policymaking form. [There is no satisfying explanation for why courts might treat this exercise of discretion differently than other exercises of discretion.]

[A close examination of the structure of administrative law, however, reveals a surprise:] Courts have the ability to react to agency choices of procedure without demanding that an agency provide an explanation for its choice. That is because courts have a surprising degree of control over the consequences of an agency's choice of form. Courts are the primary architects of the standards by which agency action will be assessed (arbitrary-and-capricious, substantial evidence, reasonable interpretation of law), and they also have leeway to determine who can bring a suit to challenge agency action and when that suit can be brought. In addition, courts have some ability to shape the procedures that an agency must follow when it relies on a policymaking tool. By adjusting the consequences of choosing one form or another—for instance, intensifying the standard of review, permitting a party to sue at a particular point, or shaping the procedures that must be followed—courts have the opportunity to respond to whatever concerns they might have about an agency's choice. [Not only do they have the opportunity to do so. Several prominent developments in the law of judicial review of agency action demonstrate that they have done so.] This judicial freedom to design the elements

of an agency's procedural form explains the otherwise puzzling vitality of the principle that agencies are permitted to select their preferred policymaking form without providing an explanation for that choice. It is not that courts permit agencies to choose their form without evaluation; courts in fact review those choices, but they do so in a roundabout way.



THIS ARTICLE HAS TAKEN AS ITS PRIMARY FOCUS A BACKSTAGE phenomenon in administrative law and practice. Everyone knows that agencies choose their policymaking forms, that they choose differently across time and across agencies, and that courts do not directly inquire into that choice. But these facts are not considered worthy of attention. This Article is, first and foremost, an argument that they do merit our attention and investigation. It has argued that agency choice of procedure is both crucial and little understood as a positive matter. It has also demonstrated that judicial reaction to that choice is not, as it first appears, hands-off. Courts do in fact review such choices—albeit indirectly—by altering the consequences of those choices.

This Article has answered some questions, but it has raised others. The indirect form of judicial review identified here not only provides an explanation for the vitality of long-standing administrative law doctrine. It also opens a window onto another model of judicial review of agency action, one that should be understood to stand alongside the conventional approach to judicial control of administration. The comparison between the two models of judicial review—one direct, the other indirect—must await future investigation. This Article has also laid the groundwork for an effort to come to terms with agency choice of form as both a positive and normative matter. The normative analysis cannot be fruitfully undertaken without a good theoretical and descriptive account of how agencies actually choose among their available options. This Article has started us down that road, but there is a long way to go. Many questions have thus been raised by this investigation. But the effort will have succeeded if it has convinced the reader that this backstage player should be invited out onto the stage. ❁

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