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If Federal Regulators Aren't Experts, The Entire Administrative State Is Suspect

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“The main reason Progressives like [Woodrow] Wilson no longer shared the older liberal suspicion of government power was the new view that politics and administration could be neatly and cleanly separated, with administration entrusted to scientifically trained and disinterested experts, who by their very expertise should be insulated from political pressure.”

--Steven F. Hayward, "The Threat to Liberty," *Claremont Review of Books*, Vol. XVII, Number 1, Winter 2016/17. .

The legitimacy of top-down rulemaking and planning by Administrative State experts rather than lawmaking by Congress is largely uncontested.

One professor at a leading national law school, with a platform in the *New York Times*, dismissed constitutional “originalists” as offering “homilies to olden times,” and disdainfully pronounced the Constitution a mere “theory of government invented in the 18th Century by men wearing breeches and powdered wigs.”

The rationale for today's all-encompassing Administrative State regulation is that government actors are non-self-interested experts, and that political mechanisms are fairer and better at advancing well-being than private markets and interactions. The shift from the Framers' classical liberal view that most complex problems are not public policy questions at all and are best solved voluntarily by individuals -- to the view that large government is essential in all walks of life -- has been remorseless.

A major recent case (*Kisor v. Wilkie*) in the Supreme Court retains the concept of mandatory deference to these "experts," albeit when when heightened restrictions are met. Along with the continued insult to separation of powers (via re-legitimizing at the highest possible level the concept of delegation of lawmaking responsibility and authority) a problem with failing to revoke deference entirely is that so much agency guidance and interpretations never go through the formal Administrative Procedure Act rule-making process at all. The inadequate APA is all that remains when Article I is cast aside.

An even deeper non-legalistic problem: If the unchallenged presumption that expertise primarily resides at federal agencies is wrong, so is the entire Administrative State concept.

The Administrative State holds no monopoly on talent and expertise. Nor is it reliably the safeguard of citizens' interests. Regulations do not always mimic competition (such as through

antitrust intervention), nor guarantee fair prices, assure privacy and other values, nor necessarily even promote safety or environmental amenities. Information on which regulation is based can be flawed incorrect. Regulators can be hardheaded.

Among many conceivable examples, consider the bungling but non-apologetic Federal Communications Commission. Economics professor David R. Henderson, describing Thomas Hazlett's book *The Political Spectrum*, notes that:

[T]he FCC has, for over 80 years, set itself up as a central planner, creating the usual problems that central planning creates. The planners are in the dark about the best uses of the electromagnetic spectrum, but that hasn't stopped them from planning. Hazlett shows how FCC regulation slowed FM radio, cable television, and cellular phones by decades, destroying many hundreds of billions of dollars of value."

Sectoral regulation can screw things up like that all by itself; but worse, the drags they create can propagate across the economy. Agencies and sectors are siloed by regulators such that cross-sectoral expertise cannot emerge in the first place. A current simple example is the frenzy of rolling out 5G, while ignoring the obvious simultaneous need of placement of drone-recharging stations and electric car charging modules that (conceivably) could be co-located alongside 5G cells in certain instances, and for certain compensated private property owners. Classical liberals regard knowledge and expertise as dispersed, not concentrated. Interconnectedness in the economy requires the ability to rapidly react to local market signals available only to individuals, not central experts (See F.A. Hayek's *The Use of Knowledge in Society*). Over-aggressively introducing such complex network-oriented technologies in the populated areas first rather than rural and more isolated areas, working primarily with governments rather than property owners, can be another problem.

By artificial siloing, the regulatory apparatus can *delay* the development of expertise and in turn the innovation based upon it, tying down the new to current administrative frameworks. Unlike the Woodrow Wilson vision of scientific disinterest, we observe regulatory frameworks being presumptively extended into new sectors such that frontier technologies are prone to pre-capture, to being "born in captivity."

The alternate vision is one of advancing institutions of liberty, of diligently protecting the ability to opt-out, leaving a path clear for innovators to chip away at centralized, top-down administration. Technological advancements can allow contractual innovations and property rights in complex and frontier sectors (airsheds, airspace, watersheds, spectrum, commercial space activities) to overcome longstanding market failure justifications for central regulation. Expertise entails developing and protecting rights and contracts rather than replacing that evolution with permanent top-down regulation, which is the unfortunate default. There is often an ignorance and need to learn that that false agency expertise assumes away.

In moving toward a classical liberal society, the body of private activity subject to "expert" regulation should decline rather than increase, but agencies are not configured to yield as new human institutions emerge to discipline risk, uncertainty or market power. Guardianship of that evolution, removing barriers to ordered laissez-faire and new forms of property wealth creation and risk management, is what would constitute genuine expertise.

There is no expertise-enabled default step-aside in the Administrative State, but the process should begin. A 1998 Cato Institute Policy Analysis recommended, for example, that: "The federal government should consider transferring regulatory functions such as certification, inspection, monitoring, and product testing to independent parties; it should also consider allowing independent parties to compete with federal agencies in setting standards."

Expertise means stewarding minimalist regulation in such a way that when market resolutions of public good, risk, or other alleged problems emerge, *the regulation yields*. Complexity does not necessarily call for a government solution. For example, dealing with industrial waste and pesticide residues is normally seen as a problem for government experts; but exploratory independent remedies like those just noted may be more ambitious, particularly since pollution is often rooted in failure to establish markets and property rights in the first place.

Genuine expertise means ensuring that administrative escape valves from regulatory central management are provided. It means ensuring that the once-public and centralized endeavors of mankind are (or can be when ripe) transferred into more advanced institutions of the voluntary, competitive marketplace. Blueprints for the de-escalation of central power is the essence of what should count as agency expertise. Policymakers must always choose between political vs. competitive discipline; expertise in part consists of striving to maximize the latter. Worthy administrative law would spend most of its time on this very task. As noted by Fred L. Smith Jr., "Capitalism and markets do not operate in a vacuum. Rather, they require a support structure consisting of the rule of law, a tolerant society, property rights protections, and an extensive system of enforceable contracts. These institutions evolve in free societies, but the activists of the original Progressive movement started to derail that process."

As a simple practical reality undermining the notion of centralized regulatory expertise, the fact that an agency's entire mission can flip with the change in administrations underscores the Administrative State's inherent unsuitability as the repository of expertise and regulatory wisdom. In a republic with a term-limited executive, the boss and the philosophy may change at four- to eight-year intervals. Judge Harvie Wilkinson, for example, noted an instance of the National Labor Relations Board reversing positions three times on the question of whether graduate students qualified as "employees" under the National Labor Relations Act. On another practical point, expertise concerns also can conflict with politically appointed heads; even within agencies at the decision-making level, "it is not 'scientists and engineers' in regulatory agencies who make the ultimate regulatory decisions, but political appointees," as Case Western Reserve law professor Jonathan H. Adler has noted.

Interestingly the Progressive view of expert rule is at odds with the movement's own populism. "[B]y far the greatest contradiction was the idea that Progressivism would be more populist and elitist at the same time," according to Steven Hayward, "Practical democratic reforms such as the direct election of senators, initiative and referendum, and so forth, were intended to give more voice to the people, while the doctrine of scientific administration sought to seal off a larger and larger portion of government from the people."

Interestingly, as society and technologies become more complex, the matters preoccupying federal agency experts often seem not to be the actual problems needing resolution, such as identifying and expanding complex institutions of property rights and private as opposed to public management and custodianship of expanding resources. But with the profusion of wealth

creation at stake, it is a good time to reconsider the presumptions of the Administrative State, even as courts continue to defer to it.