The Janus-Faced Nature of the Executive

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Blake Emerson, *The Public's Law: Origins and Architecture of Progressive Democracy* (Oxford University Press 2019)
Margit Cohn, *A Theory of the Executive Branch: Tension and Legality* (Oxford University Press 2021)

Introduction

Over the last few years, the executive branch has been put front and centre again in the minds of citizens and scholars alike. Most prominently, the pandemic has forced governments around the world to take extraordinary measures, sometimes even declaring a state of emergency. These measures were usually taken by the executive and, while they were often seen as necessary, they were also subject to feisty critiques. Meanwhile, in many jurisdictions, parliaments and other representative institutions struggled to keep up with the fast-paced developments, especially in the earliest days of the pandemic. But even before our societies were ravaged by the menace of the coronavirus, the executive has increasingly been asked to shoulder greater responsibilities. The growing complexities of modern governance have made the task of administrative agencies more difficult, but the demands of the public have not been lowered in a corresponding fashion. In contrast, it sometimes seems that the agents of the modern welfare state are expected to be omniscient.

The legitimacy of the administrative state and the executive more broadly are thus increasingly questioned and the subject of debate. Two (relatively) new books offer us fresh insights relevant to these debates. Blake Emerson, a professor

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at UCLA, has written *The Public's Law*, a book based on his dissertation in Political Science. Margit Cohn, professor at the Hebrew University of Jerusalem, is the author of *A Theory of the Executive Branch*. Emerson's approach is more historic, concerned with reconstructing a normative framework to strengthen the foundations of the administrative state, built on Progressive legal thought. It contains a hopeful vision of the emancipating and liberating potential of the administrative state. Cohn offers us a more descriptive account centred around the novel concept of fuzzy legality, but it is also more critical of the growth of the administrative state and reflects a scepticism towards providing the executive with too much discretion.

Their rivaling perspectives – reflecting their different positive and negative visions of the role of the executive in contemporary government – will be a recurring theme in this review. I will start by summarising the results of their ambitious undertakings, before I place their works in dialogue with each other. I will then show how the books fit into a broader debate on the legitimacy of the executive by comparing their insights to the work of Adrian Vermeule, an influential scholar with whom they fundamentally disagree. Finally, I will argue that some of the differences between Emerson and Cohn might be explained by their different perspectives on the functioning of deliberative and participatory democracy. In the conclusion, I will offer some thoughts on the specific form that this deliberative and participatory democracy may take.

The Progressive Defence

Emerson takes up the mantle of defending the Progressive legacy, which he ultimately boils down to the belief that the administration has the potential to not only limit, but also to *enhance* human freedom. He is not the first author to try and save this legacy, and he pays homage to the work of Richard Rorty, William N. Novak and K. Sabeel Rahman. While he lauds their efforts, he also identifies key weaknesses in their accounts. Rorty did nothing to flesh out the substance of an actual Progressive system of government and Novak is not nuanced enough in his depiction of early twentieth-century German legal theory; he conflates the ideas of Hegel and Weber in one big continental bowl of soup. Rahman's work seems closest to Emerson's project, but Emerson worries that it downplays the deliberative elements involved in Progressive governance (p. 16-18).

In *The Public's Law*, Emerson takes up the challenge of filling these voids by grappling with the age-old question of how the actions of unelected bureaucrats can be democratically legitimated. Whereas the laws promulgated by the democratically accountable legislature promise us certainty, the administrative

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state, by necessity, requires discretion. It is hard to bind the executive to the legislature's rules that are democratically legitimated because the agencies of the executive can only do their job effectively if they have a certain freedom to wield the powers delegated to them by the legislature. It is this fundamental tension, 'between democratic politics and administrative organization', that Emerson tries to resolve in his work (p. 2).

He kicks off this project with a robust nineteenth-century intellectual history of German public law theorists, and their conceptions of the administrative state. Drawing most prominently on the work of Georg Wilhelm Friedrich Hegel, Emerson stresses the emancipatory dimension of the state in this tradition. The role of the administrative state was not only to uphold the classical liberal rights of property and contract. It was much more expansive than that. Hegel recognised that while these classical liberal rights were instrumental in guaranteeing individual freedom, they also threatened this freedom. Left to its own accord, the liberal market economy would produce economic and societal inequalities that prevented citizens from recognising each other's status as political equals. It fell to the state to remedy these inequalities, by providing the lower social classes with material support and by regulating the unfettered markets that created these social divisions in the first place (p. 25-37).

Emerson goes on to describe how nineteenth century German jurists ran with these ideas and used them to justify the interventionist character of the administrative state. The theorists he identifies, such as Rudolf von Gneist and Lorenz von Stein, shared Hegel's belief that the ideal *Rechtsstaat* was not a strictly formalist creature but rather possessed 'a concrete ethical commitment to preserving freedom in modern civil society' (p. 40-42). Emerson, however, also offers us a critique of these thinkers. He laments that Hegel's German heirs left virtually no room for the public to participate in running the administration. In their conception, wielding the force of the administrative state remained the prerogative of the Crown and, at best, other elites (p. 42).

Despite these misgivings, Emerson is relatively kind to these Hegelians, because at least they recognised the ethical commitment of the administrative state. This insight was lost in Germany at the beginning of the twentieth century, with the positivist turn in German legal thought. Emerson notes that these positivist ideas could not easily be reconciled with a Hegelian ethical commitment. This positivist turn is best exemplified by the sociologist Max Weber, who acts as something of a bogeyman here, and for whom Emerson reserves most of his wrath in this first chapter. In Emerson's telling, Weber's instrumentalist vision on the bureaucracy was completely incompatible with the Hegelian belief that the administration had the responsibility to mitigate social clashes. In Weber's view, the bureaucrat does not need to develop and utilise his judgement; he simply needs to possess the required technical skills. Weber is also

blamed for solidifying the idea that there is a strict separation between the administration and the public over which it exercises power (p. 44-47).

Having provided us with this illuminating insight into continental legal history, Emerson then moves across the Atlantic to focus the second chapter on what he describes as the 'American Progressives'. These are the intellectuals who had been influenced by Hegelian ideas, but Emerson emphasises that these Progressives also rejected the Hegelian tradition in an important way. They tried to democratise Hegel by paying heed to public sentiment and by including the public in the administrative state's affairs. Emerson summarises this belief by citing the Progressive reformer Herbert Croly, who argued that 'the administration itself must be democratized at once by its organization, its methods of recruitment, its behavior, its sympathies and ideals' (p. 62-64).

However, the democratisation of Hegelian thought inevitably led to philosophical tensions that could not easily be resolved. On the one hand, close attention has to be paid to public opinion. The administration must be guided by the views and preferences of the people. On the other hand, however, the administration has to ensure that everyone can contribute to the process of democratic will formation. It might be possible to fulfil both of these demands at the same time, though this is not necessarily the case. After all, the latter goal requires the state to act in a way that counters existing socio-economic inequalities, but upsetting the socio-economic order might not always be politically expedient. In other words: combating inequality might be necessary, but it might not be popular.

Emerson shows these tensions by contrasting the political philosophies of W.E.B Du Bois, the great African-American sociologist, and Woodrow Wilson. Du Bois provides us with an account of Reconstruction, the period of post-Civil War America in which the federal government undertook several attempts to strengthen the socio-economic and political position of freed Blacks. His analysis emphasises that Progressive democracy requires the state to actively emancipate marginalised groups to prevent them from being dominated. On the other hand, Wilson stressed that the administrative state required popular support for its actions. In practice, that meant that Wilson – the president who famously re-segregated the civil service – had no interest in questioning the racial order in society (p. 66-84).

The other American Progressives that Emerson deals with – John Dewey, Mary Parker Follett and Frank Goodnow – all grappled with this 'tension between democratic populism and democratic equality in Progressive political thought' (p. 72), in their own particular way. Emerson ultimately synthesises their work in a formulation of Progressive governance that emphasises the complex and seemingly paradoxical nature of their ideology. For Progressives, it was the administration's central task to facilitate a process of rational deliberation of citizens and officials, thus fostering a public sphere that would allow a truly democratic public to flourish. In order to achieve this, the administration needed

to create the contexts in which members of the public could take part in this deliberation. But for the state to understand what exactly these democratic requisites *entailed*, its officials needed the input of the people they served. And that input might not always be the result of calm and rational deliberation in which every citizen is heard and respected. In a way, it is the ancient chicken-or-egg problem redux, and the Progressives struggled to resolve the tension. They did not believe in a separation between '[t]he substance and the procedure of democracy'; they 'had to complement and constrain each other' (p. 111-112).

Popular participation in government may thus have been the holy grail of Progressive government, but merely committing the state to involving the public in the work of the administration does not, in itself, resolve the central tension that Emerson has revealed to us, and the final part of his historical analysis serves to underline this. Here, in the third chapter, Emerson looks at the modern era, and he discusses several twentieth-century social programs from the New Deal and the Civil Rights Era (or as Emerson calls it, the Second Reconstruction). During the New Deal Era, programs that focused on providing marginalised communities with material support were paternalistic in nature, and those who implemented it failed to empower the people they tried to help. At the same time, the programs that tried to include the public were unsuccessful because they were only receptive to the opinions of the upper (middle) class (p. 118-130).

And yet, the Gordian knot could be untied. Emerson claims that Lyndon Johnson's War on Poverty successfully resolved the tension. This era saw the implementation of several programs that were capable of creating both 'democratic requisites' *and* 'democratic contexts' – because these programs truly allowed for the benefactors of the policies to help administer and shape the program (p. 130-142). This resolution is obviously appealing: if we don't have to choose between providing democratic requisites and democratic contexts, we can have our Progressive cake and eat it too. This historical discussion of the legacy and continued influence of Progressive thinking throughout the twentieth century is Emerson at his best. We don't have to settle for hierarchically-minded Weberian techno-bureaucrats, he tells us. We can choose to empower a civil service focused on deliberation, infused with democratic ideals.

Emerson rounds off his ambitious project by 'reconstruct[ing] a normative theory of the administrative state' in his fourth and final chapter (p. 149). He wants to use his historical account to defend the legitimacy of the administrative state, which is always under assault. This is vitally important for Emerson, because he believes most popular defences to be woefully insufficient.[1] His main argument in favor of the superiority of the Progressive defence is that it

[1]He dismisses 'arguments from efficiency' (p. 152), 'arguments from constitutional norms' (p. 154) and 'arguments from republicanism' (p. 157).

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recognises that the goals and the process by which these goals are achieved cannot be separated (p. 150). In Emerson's words: '[the Progressive account] draws an intrinsic link between the purpose and structure of administration' (p. 21). It retains a strong belief in the emancipating power of the administrative state – the Hegelian idea that the state is the 'actuality of concrete freedom' (p. 27). But it is also cognisant of the reality that the administrative state needs to have a fundamentally democratic character: agencies need to structure and facilitate processes of rational deliberation, of interactions between officials and citizens (p. 163-176). It is a powerful defence, and it reflects an optimistic vision of what the administrative state is capable of.

Fuzzy Law and the Internal Tension Model

By contrast, Margit Cohn's *A Theory of the Executive Branch* contains a much more sceptical view of the executive. In the book, Cohn argues that the role of the executive is wildly undertheorised. While national executives have received their fair share of attention in the literature, there have been no attempts to construct a universal theory that transcends these domestic contexts. She also notes that these studies have a strong normative character: either they wield the normative claim that the executive should not be curtailed by the law, or the inverse, that it should be fully subjected to it. The studies by scholars who are members of these rival camps tend to lack a sound theoretical underpinning (p. 26, 42). To fill the void left by these scholars, Cohn has developed the 'internal tension model', an explicitly descriptive model (p. 42-43, 55-57).[2] This model holds that the executive should be conceived 'as straddling the line between subjection to law and dominance beyond law' (p. 42-43). To Cohn, this seemingly paradoxical nature reflects the executive's complex position: it serves as a co-equal branch devoted to executing the laws promulgated by the legislature, but also as the 'dominant decision-maker in the political sphere', the true nexus of government (p. 43).

Cohn insists this is not a paradox: it is simply a recognition of the 'multidimensional nature' of the executive, an institution so intricate that it even defies clear definition.[3] The executive has to defer to the legislature, but it also possesses an autonomy that allows it to ignore the wishes of this rival branch of government. For Cohn, these assertions can both be true. Sometimes the executive faithfully executes the will of the legislature, at other times it might

[2]Cohn is also happy to dismiss several competing theories, in her case, 'The Subservient Executive Model', 'The Imperial Executive Model' and 'The 'Bipolar' Model' (p. 43-55).

[3]This focus on interactions is also why Cohn is unwilling to provide us with a clear definition of the subject of her studies: the Executive Branch. She believes this would be untenable, and argues that her focus on political interactions makes a dry definition superfluous (p. 8).

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choose to ignore it. Cohn thinks that this tension is inherent to constitutionalism and cannot be resolved: 'The tension between legality on the one side and political and social realities on the other side cannot be settled in favour of one of these social interests' (p. 55-56).

After presenting us with the internal tension model, Cohn then turns to a pivotal question she raised on the first page of her book, where she wondered 'what can be done to ensure, as much as possible, that social needs do not justify the abuse of power?'. The internal tension model does not seem to promise us much certainty in that regard, as it recognises that the executive cannot be subjugated by the legislature. But it makes the question what can be done to prevent the executive from abusing its powers all the more pressing. Answering this question, however, requires some additional theoretical legwork. Luckily, Cohn is well up to the task, as she introduces us to the intriguing concept of 'fuzzy law' (p. 66-69).

Fuzzy law refers to all the forms of law that allow the executive to manoeuvre on the edges of legality, to push the boundaries of what is lawful and what isn't. These forms of legality can be generated by the constitution, by statute or by the executive itself, and they can take many forms (Cohn identifies no fewer than 13 different variants). Examples are open-ended constitutional provisions, statutory grants of discretion and the executive's 'selective enforcement and creative compliance' (p. 69-97). Cohn's concept of fuzzy law allows us to move away from thinking about the executive's actions in strictly binary terms, by judging its activity as either 'lawful' or 'unlawful', 'legal' or 'illegal'. This, as Cohn rightfully asserts, does not accurately capture the complexity of reality. (p. 57). On that front, her descriptive internal tension model is more successful.

The next two parts of Cohn's work mostly deal with case studies from the United States and the United Kingdom, which Cohn uses to illustrate the workings of specific forms of fuzzy law. These studies are insightful, especially the chapters on constitution-generated fuzzy law, but it is the fourth and final part of the book where Cohn really gets going. This is where we re-encounter the ghost of normativity. Cohn criticises the executive's reliance on fuzzy legality on two grounds: because its vagueness violates core principles associated with the rule of law, and because it is fundamentally incompatible with the ideals of a participatory and deliberative democracy. The first point is somewhat obvious: the rule of law, in all its different conceptions, demands that the law is clear, accessible and applied consistently. The second point is also well-taken: drawing on the work of thinkers such as Hannah Arendt and Jürgen Habermas, Cohn ably shows that the 'unilateral rule-making' that takes place under fuzzy legality sabotages the functioning of the Habermasian 'discursive process' that is required for laws to be accepted by the people as legitimate. Fuzzy law leaves no room for the people to participate in shaping the norms by which they are governed, as Cohn rightly notes (p. 257-265).

So where does that leave us? Cohn believes fuzzy law poses a serious threat to democratic self-governance. Yet she also thinks the existence of fuzzy law is inevitable; in fact, her internal tension model *needs* it to exist. How, then, do we prevent the executive from using fuzzy law to leave the realm of legality behind? What could be an adequate counterbalance? For Cohn, the answer is clear: judicial review of administrative actions. Judges, in her view, are well-suited to limit the excesses created by the executive's deployment of fuzzy law. Cohn's foray into the field of judicial review means that she suddenly risks finding herself walking a well-trodden path, and some of what she writes on the subject could feel a little trite to people who are familiar with the traditional debates. She does, however, raise some original points when she claims that judicial review of fuzzy law is necessary to uphold the ideals of participatory and deliberative democracy. Here, she presents the judge not as a final arbiter, but as a negotiator of sorts, who gives interested parties the opportunity to contribute to the process of deliberation. This defence, which builds on the work of scholars such as Mark Graber, Terri Perretti and Susan Lawrence, reflects 'a view of the judiciary as intermediator and promoter of active citizen participation and deliberation', and it still feels somewhat fresh (p. 289-319).

Judicial Review and Instrumental Rationality

Cohn portrays the judge as a checking mechanism to counteract executive dominance and its reliance on fuzzy law, but in her conception judges also serve as intermediators that enhance the public's capacity to contribute to the process of democratic will-formation. This raises the question of whether there is room for judicial review in Emerson's Progressive defence of the legitimacy of executive action. One might reasonably expect the Progressive account, with its relentless focus on deliberation and participation, to be open to a conception of judicial review that could foster the citizen participation Cohn speaks of. This, however, is not quite the case, because the Progressive defence already has a lot of confidence in the ability of *administrative agencies* to ascertain the views of the public and create policies that reflect this. If these bodies take their role seriously, they *already* serve as fora where citizens can directly engage in the process of shaping 'the Public's law'. In that case, there might simply be no need for a judicial panel to sweep in and play the role of 'intermediator' as Cohn would have it (p. 176-177).

Emerson is also distrustful of the judiciary because judges have a tendency to employ 'instrumental rationality', by which he means that they accept the premise that there is a rational way by which an agency can achieve a certain goal. That disproportional focus on efficiency can lead them to neglect the role of other important values that may have been considered by the public in the deliberative

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and participatory stages. This instrumental rationality also fetishises expertise and fosters technocratic ideals of government. In that way, judicial review can be detrimental to the processes of deliberation and participation more broadly (p. 177-180).

One particularly striking example of the effects of this judicial instrumental rationality Emerson provides relates to the development of the 'major questions doctrine' in American administrative law.[4] This doctrine holds that, when it comes to 'question[s] of deep economic and political significance', administrative agencies are only allowed to operate if they possess a clear Congressional stamp of approval by way of an explicit delegation. To Emerson, the emergence of this doctrine strongly incentivises administrative agencies to downplay the political consequences of their actions and the values that lie behind them. They are instead forced to present their normatively-laden decisions as the neutral outcomes of technical, clerical, bureaucratic processes. Deliberation and participation fade into the background (p. 180).

All this does not mean that courts do not have a role to play in the Progressive defence, but only in the sense that they should demand that the decisions of agencies have been properly motivated by the wishes and demands of the public. Courts must ensure that all the proper procedures have been followed and agencies are not simply reasoning backwards; they have to be able to show convincingly that they are being guided by the people. This results in a narrow and formal conception of judicial review, exemplified by Emerson's warning that courts should be very careful 'not to displace or discourage participatory processes of which agencies are uniquely capable' (p. 176-177). The long and short of it is that the Progressive theory has more faith in the executive than in the judiciary to facilitate processes of deliberation and participation, so the role of the judiciary can be limited if the agencies do their job well.

Schmittian Struggles

Despite this, Emerson is well aware of the dangers of an unrestrained executive. This also shines through in his criticism of the work of Adrian Vermeule, in which

[4]The doctrine was recently reiterated by Chief Justice John Roberts in his majority opinion in *West Virginia* v *Environmental Protection Agency,* 597 U.S. ___ (2022): 'Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. [. . .] To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.' Emerson has written about this in greater detail in B. Emerson, 'Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation', 102(5) *Minnesota Law Review* (2018) p. 2019.

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he finds himself on the same side as Cohn, who also categorically rejects Vermeule's ideas. Firmly operating in the tradition of Carl Schmitt, Vermeule believes that the executive is the dominant political actor, and that this primacy can no longer be contested by the other branches: *das war einmal*. The development of the modern administrative state has created a world in which the courts and the legislature are fundamentally reactive actors that lack the executive's capacity to rapidly respond to the demands of the public. Vermeule thus heralds the demise of legal liberalism, the idea that the executive could be trusted to faithfully execute the laws enacted by the legislature. What makes Vermeule special is that he, like Schmitt, *approves* of this constellation: he struggles to conceive of a better alternative than an unrestrained executive whose authority is only limited by the informal laws of politics and public sentiment. As such, he expresses no concern over the existence of fuzzy law in his work.[5]

Although they both criticise Vermeule's ideas, Emerson and Cohn approach the issue from slightly different angles that nevertheless lead them to similar conclusions. Cohn rejects Vermeule's line of thinking because she believes Vermeule mistakenly falls victim to the belief that 'is' implies 'ought': just because the usage of fuzzy law is unavoidable doesn't mean its existence can't pose a threat to our democratic systems of governance. In Vermeule's 'seeming capitulation to politics', Cohn merely detects a failure to grapple with 'the principles of justice and fairness that legitimate law's coercive nature' (p. 256). When faced with the prospect of an executive overstepping its boundaries, we can't just *shrug* and accept that *executives will be executives*. We have to consider the effects this has on our rule of law and democracy's participatory dimensions.

Like Cohn, Emerson dismisses Vermeule's account because it does not take the prospect of executive overreach seriously enough. But he adds that Vermeule, just like Schmitt, fails to recognise that the vast delegation of powers from the legislature to the executive that is required for the success of the administrative state is perfectly *compatible* with legal liberalism. Vermeule suggests that the necessity of delegation closes the door on the legal liberal framework of a co-equal legislature and executive, but Emerson notes that the Hegelian tradition has always recognised that the executive needs a certain discretion that allows it to move beyond the law (p. 14-15, 195). To borrow Cohn's terminology: Hegel was not blind to the need for fuzzy law. But just as the administration can only

[5]Emerson and Cohn both cite extensively from Vermeule's works, especially: A. Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press 2016); A. Vermeule, 'Our Schmittian Administrative Law', 122(4) *Harvard Law Review* (2009) p. 1095; and E. Posner and A. Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press 2011).

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function if it has some wiggle room in how it chooses to apply the law, the law can only function as long as the administration is able to twist it a little bit according to the needs of the time and place. Emerson describes this as the 'mutually reinforcing relationship between legislative generality and administrative particularity' (p. 195). The administrative state can thus exist within the paradigm of legal-liberalism because the Progressive defence does not subscribe to the idea of a Schmittian struggle for supremacy between executive and legislature.

Conceptualising the relationship between the executive and the legislature this way allows us to recognise the dynamic interplay between the two branches of government. It also underlines the futility of trying to determine whether the executive or the legislature is the 'superior' branch. They need each other, and their mutually reinforcing relationship brings benefits to them both. In this way, Emerson's analytic framework turns out to be quite similar to, and certainly compatible with, the internal tension model Cohn develops in her work – in which the executive branch also walks the fine line between 'subjection to law' and 'dominance beyond law' (p. 42-43). More than Vermeule's corpus, the books of Emerson and Cohn both allow for the existence of gray areas and general ambiguity, which does a better job of capturing the reality of everyday governance and adds to the sophistication of their arguments.

Progressive Fuzziness

While there is serious overlap between the positions of Emerson and Cohn on the threat that executive overreach poses to democratic self-government, their critiques of Vermeule also reveal that their positions are not quite the same. These differences are nuanced, but they are there, and juxtaposing their visions of democracy can elucidate them. As mentioned above, there are two core reasons why Cohn views fuzzy legality with suspicion. The first is that it allows the executive to move beyond the democratic will. In addition to this, however, she also laments its existence because it has the potential to impede the participatory and deliberative structures of democracy. Fuzzy law means that citizens struggle to grasp the meaning and application of rules, which means they cannot meaningfully contribute to the process of rulemaking; they simply lack the knowledge (p. 265-267).

At first sight, it seems like fuzzy law would thus be fatal to the Progressive dream of administrative agencies as fora for rational deliberation, where citizens play the role of legitimate interlocutors. Emerson certainly would reject the scenarios that Cohn depicts of executives using fuzzy law to implement and administer rules in a unilateral way. But I think Emerson is slightly more comfortable with the realities of fuzzy law than Cohn is, and it might be because

Cohn's conception of the deliberative process might be a little too static to fully fit into the Progressive mould.

The picture Emerson has painted of a Progressive administration is that of an executive that cannot succeed without a little fuzziness. It needs the rules to be a little malleable, their interpretation and application not set in stone but constantly up for debate. Feedback on how the rules play out in practice needs to find its way back to the organs of the administration, which will need to adapt to these new insights. It is democracy by praxis, which is ultimately forward looking at least as much as it is backward looking.[6] As Emerson himself puts it: 'Progressive deliberation does not remain an abstract inquiry into shared norms but instead becomes an experiential examination into the felt consequences of rules' (p. 164). Rules are something akin to experiments, to be tried and tested, and to be changed if found insufficient. Emerson approvingly cites Dewey's suggestion that 'policies and proposals for social action be treated as working hypotheses, not as programs to be rigidly adhered to and executed' (p. 164).[7]

Cohn might be uneasy with this, as it may require the executive to operate with more discretion than she is willing to allow. She explicitly rejects the idea that employing fuzzy law will lead to better outcomes, and once again points to the risks of abuse: 'Fuzzy nodes of law may serve as repositories of power employed for the public good just as much as they can be sources for abusive government action' (p. 267). As we have established, Emerson is not unreceptive to the threat of an overstepping executive. But his outlook is ultimately more hopeful, and the aspirations of democracy are intertwined with the functioning of the executive.

It is this profound optimism that is arguably characteristic of the ideas of the American Progressives, and it invokes the spectre of another one of its key figures, the great judge Learned Hand. Hand, an exponent of the pragmatic tradition, also possessed an unwavering commitment to democracy in spite of the risks that came with it. He once famously wrote that democracy 'is a stern creed, and we do not prophesy the outcome; we carry no passports to paradise; we accept the chance that it may prove a creed too Spartan for men to live by'.[8] It was, however, a risk he was willing to take, and the same optimism permeates the Progressive defence that Emerson has sketched out for us as it regards the executive. The practice of democracy will always be a grand experiment, and success is not

[6]Emerson is explicitly choosing to look forward: 'We do not ask whether prior deliberations were adequate to fully justify the policy but whether the policy has allowed the next round of deliberations to be more informed and inclusive than the last. When it has, that is progress' (p. 164).

[7]I found the citation at Emerson p. 164, the original citation is from J. Dewey, *The Public and its Problems* (Ohio University Press 1954) p. 203.

[8]L. Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand* (The University of Chicago Press 1977) p. 259-260.

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guaranteed. At the same time, if properly channelled, the energy this experiment unleashes can be a powerful and liberating force.

The First Thing We Do, Let's Hire All The Lawyers?

In April 1917, president Woodrow Wilson went before Congress to ask for a congressional declaration of war against the German Empire. In his speech to the joint houses, he stressed that America would not be waging a war of conquest or seek to subjugate other peoples. The key to his address was his famous claim that an American entry into World War I was necessary because 'the world must be made safe for democracy'. He continued that a lasting peace could only be built 'upon the tested foundations of political liberty', after German imperialism, that 'natural foe to liberty', had been vanquished. That is why America would fight the war 'without selfish object', not for power, money or national glory, but solely 'for the rights of nations great and small and the privilege of men everywhere to choose their way of life and of obedience'. In the Wilsonian view, the nations of the world could only be safe to chart their own destinies once certain conditions were in place, otherwise they would simply fall victim to the 'natural foe of liberty', the imperialistic desire of the strong to dominate the weak.[9]

The famous Progressive commitment to self-determination that shaped Wilsonian foreign policy is not that far removed from the ideas of the Progressive Hegelians, who, in a way, believed the purpose of the administrative state was to make the country safe for democracy. These American heirs of Hegel applied the Wilsonian foreign policy outlook to the domestic context. It led them to a conception of democracy that encompassed more than an electorate expressing their wishes through elections. By fighting economic and social inequalities, the state could create the conditions under which a real democracy could take shape, buttressed by a strong public sphere in which, as Mary Parker Follett put it, 'the experience of the people may change the conclusions of the expert while the conclusions of the expert are changing the experience of the people'.[10]

The appeal of this prospect as Emerson has relayed it to us is undeniable. But we cannot completely ignore the reasons why Cohn might want to slam on the brakes. Can something be done to make 'the Public's law' slightly less fuzzy, to limit the potential for executive overreach? To answer this question, it could help if we had a better sense what the specific work of this administration would look

[9]Joint Address to Congress Leading to a Declaration of War Against Germany (1917), https://www.archives.gov/milestone-documents/address-to-congress-declaration-of-war-against-germany, visited 4 August 2023

[10]I found the citation at Emerson p. 172, the original citation is from M. Parker Follett, *Creative Experience* (Longmans, Green 1924) p. 212-213.

like, which remains hard to conceptualise after reading Emerson's book. In this regard, another text by Emerson might be of use.

In a response to a somewhat critical review of *The Public's Law* by Mark Seidenfeld, Emerson offers a crucial piece of the Progressive puzzle. One of Seidenfeld's criticisms of Emerson's Progressive defence is that administrative officials are not trained to foster the kind of debates that Emerson envisions and that these bureaucrats are unfamiliar with this type of moral deliberation.[11] Emerson's response is that, on this point, he sees a crucial role for the *lawyers* that staff these agencies. Lawyers, after all, are specifically trained to translate between everyday experiences and the legal reality (or legal fictions). Lawyers, he writes, 'can use the same skills to deliberate with affected parties about the normative and practical consequences of various regulatory proposals and actions', as they 'have the professional training, and often the formal authority, to reason with the affected public about the value judgments that are implicated in the agencies' policies'.[12]

The added benefit of this approach is that, if these lawyers are trained to the highest professional standards, it might mitigate the dangers of the executive overstepping its boundaries. It could help foster an institutitonal culture of restraint in which executive action is not just reviewed by a judge, but has also passed the critical eye of jurists at the level of the agency. If administrative agencies are staffed with lawyers that have been imbued by this ethos of forbearance, that are cognisant of the risks posed by fuzzy law, the executive might be more likely to colour within the lines and would refrain from pushing the boundaries of fuzzy law as far as it can. Of course, this can not completely defuse the inherent dangers of fuzzy law. At the same time, it also places a very significant responsibility on the legal profession, and the profession will not always be up to the task. But we might nevertheless be temped to believe in the hopeful vision of executive governance that Emerson has portrayed, while we acknowledge that the possibilities of abuse remain present. We carry no passports to paradise.

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[11]M. Seidenfeld, 'The Limits of Deliberation about the Public's Values', 119(6) *Michigan Law Review* (2021) p. 1111 at p. 1130.

[12]B. Emerson, 'The Values of the Administrative State: A Reply to Seidenfeld', 119 *Michigan Law Review Online* (2021) p. 81 at p. 87-89.

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