

## [Transcript] The Ezra Klein Show / How Liberals — Yes, Liberals — Are Hobbling Government

I'm Ezra Klein, this is the Ezra Klein Show.

So one thing I've been exploring on the show over the past year is what I've come to think of as the divided soul of American liberalism.

See the cliché of American politics.

Democrats, they like the government, they want it to be powerful to do big things.

Publicans, they don't.

Then you dig into how government works in places where liberals control it and you realize something big is missing in that story.

Because in places where liberals govern, government often has a lot of trouble getting things done.

And you look a little deeper, why?

And it turns out to be all these bills and processes and systems that liberals put in place.

And it's really important to say this, often for very good reason, because government can be dangerous, because it can be captured.

But they did it to restrain the power of government.

This is this unacknowledged troubling, this complexity within liberalism's relationship with the government, within the processes it has built where it governs.

And that's really coming to the fore right now.

I've been talking a lot about this idea of a liberalism that builds.

And at the core of that is simply that liberalism is going to need to build a lot of stuff in the real world.

It needs to build houses, clean energy capacity, transmission lines, mass transit, semiconductor manufacturing facilities, childcare centers, all this stuff, all these buildings and all this infrastructure, if it's going to achieve its aims.

And is it really built right now to do that?

Can it actually do that?

And if it can't, and I don't think it can at the moment, then what does it need to confront inside itself to get there?

One contribution to an answer comes from Nick Bagley.

Nick is a law professor at the University of Michigan.

He's the former chief legal counsel of Michigan governor Gretchen Whitmer.

And he's written this pretty incendiary law review article about liberalism's procedure fetish.

The way liberals have tied the government down to procedure under the view that you make government legitimate by tying it down to procedure, rather by making sure it can actually achieve what it sets out to do.

And he argues really interestingly and provocatively that liberals understand that when conservatives

try to bury the government in paperwork and process that they're trying to handicap it.

But what liberals don't see is that when they do the same thing, even if they do it with different intentions, it has the same or at least can have the same result.

Nick is a liberal law professor.

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He trains young lawyers and he goes really all the way with his arguments.

One of his arguments here, and we talk about it, is that liberalism actually has a lawyer problem.

That one of its difficulties is that it is too dominated by the legal profession and the way the legal profession thinks.

The beginning of this one, it's a bit weedy because we have to talk about and define the administrative state, but it is really worth sticking with it.

This is an argument you're going to want to wrestle with.

As always, my email is replancho at nytimes.com.

Nick Bagley, welcome to the show.

Thank you for having me.

So let me ask you the sexiest, most alluring question I've gotten to open a podcast with.

Tell me about the administrative state.

What is it?

The administrative state.

The administrative state is the apparatus that government uses to achieve its ends.

It's the tool through which we govern.

And as a practical matter, what that means is the assortment of agencies and departments and commissions that Congress has established, the less state legislatures have established to carry out its public mission.

So give me, I don't exactly want to say a couple of examples, but what is something that is a profound political contest we have, something we fight over, we think about, but where the action is really in the administrative state.

Oh gosh.

Environmental regulation is top of the list.

We have strong views about whether we ought to be protecting the environment or favoring economic development, but the fact of the matter is that a lot of the nitty gritty decisions about how stringently to regulate new sources of pollution or how strictly to regulate discharges into waters, those choices are often made not by Congress or by state legislatures in the first instance, but by bureaucrats on the ground, usually informed by a lot of scientific expertise and background, trying to weigh a whole host of different factors to come to a decision that achieves all of our sometimes conflicting goals.

There's also a weird way, and this goes to your and my history together.

I mean, I've mostly talked to you repeatedly through the years in your guise as a healthcare law obsessive who helped guide us all through the many, many court cases, but I covered

the Affordable Care Act very closely, and one really striking thing is that for all of the debates and conflicts over that bill, what happened the day the bill passed, is it a huge amount of what the bill would mean and what was essential health insurance coverage and how would different things be administered, it was all kicked to these agencies and these regulatory processes.

People used to say that the bill, I forget how many pages it actually was, but it was a big Republican talking point that it was this many pages, but when you then add it on the regulatory and administrative decisions, I mean, there's orders of magnitude more.

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So there's also this weird way in which I think people think that when we pass a bill, like the bill is written, the decisions are made, but a huge amount of what's in these bills is telling which part of the administrative state to kick off what kind of process to actually make the decision.

Yeah, there are too many decisions for legislators to make when they can't drill down on the details of every type of Medicare reimbursement or every detail about how the healthcare exchanges are supposed to be run or the details of how the Medicaid program is supposed to be administered. So they do, they punt lots of those decisions over to bureaucrats and there end up being a lot of, there can be high-profile disputes about what bureaucrats do, but there are an awful lot of low-profile wars being waged all the time over the content of federal register notices and rules that are adapted in the Code of Federal Regulations.

And a lot of that doesn't see the light of day, a lot of it's super boring, technical and driven by experts, but the decisions can be massively consequential on the ground and can have huge effects on people's lives, questions about who gets health insurance and who doesn't, what it covers and what it doesn't, you know, a lot of those decisions end up getting filtered through these agencies.

There are many ways an administrative state could be designed and could work, but I want to quote your description here at you.

You write that inflexible procedural rules are a hallmark of the American state, the ubiquity of court challenges, the artificial rigors of notice and comment rulemaking, zealous environmental review, pre-enforcement review of agency rules, PICU and legal rules governing hiring and procurement, nationwide court injunctions, the list goes on and on.

Justify that description for me that the administrative state is more complex and procedural and inflexible

than it should ideally be.

Yeah.

So when you're thinking about federal agencies, there's a lot of anxiety in our political and legal culture about their status, how do they fit into the Constitution?

They wield executive and legislative and judicial powers all under the same roof.

They aren't directly accountable to the public.

They have all this power to make decisions that matter so much on the ground.

So how do we make sure that those agencies are in fact serving the public interest?

And a lot of that anxiety in the United States has been filtered into the creation of really strict procedural rules to discipline agencies.

And stricter rules that are in place in many other developed countries.

And part of the reason is that we think those rules are necessary to give agencies a kind of legitimacy to make them accountable.

And when we're anxious about the exercise of state power and there's a lot of anxiety about state power running through the American political culture, the thought is that these procedures can cleanse the bureaucracy of some of the things that make us nervous about it.

You make this point in the piece that to even levy some of these critiques of the regulatory state as inflexible, as overbearing, it's very coded in American politics as right wing.

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That even saying the words regulatory reform, regulatory reform is something Republicans want to do.

It isn't something Democrats want to do.

Tell me a bit about that asymmetry you're pointing out.

Yeah.

Well, look, it makes a ton of sense for a political conservative to be pretty suspicious of the exercise of state power and to raise concerns about red tape, to raise concerns about over-regulation, about the possibility that regulators are going to stymie free enterprise. All of that makes a certain kind of sense.

And the response on the right has tended to be, look, what we need to do is add more procedural rules to make it harder and harder for agencies to act without due care for a variety of private interests.

And as you layer procedure on procedure, part of the goal is to get agencies either to water down what they're doing or just to give up before they even start trying.

On the left, you might have thought that seeing the way that procedures are deployed to frustrate government.

You might have thought that the left would see that and say, well, gosh, if procedures are so obviously sort of attractive from the perspective of slowing government down, making it dysfunctional, maybe we should be cautious about trying to achieve good outcomes by layering procedures on top of agencies.

Maybe we should be rethinking some of the procedures that we put in place so that agencies can actually, I don't know, maybe do the kinds of things that the public demands of them. And you don't see that kind of move being made on the left.

There's instead, I think, a fair amount of buy-in on the left that procedures are good, that getting rid of them is risky, and that we'd be better off keeping the ones we have than experimenting with an administrative state that maybe has a little bit more leeway to operate without being tied down by all sorts of rigid procedural obligations.

Let me ground this in an example. Tell me about the Reagan administration's executive order that required a cost-benefit analysis for every major agency role.

Yeah, man, this is sexy stuff, Ezra.

So this is why people come to the podcast.

It's a great way to while away in afternoon.

So in practice, OIRA, the Office of Information and Regulatory Affairs, as it was used under the Reagan administration, became a device for thwarting pretty much any regulation whether it had positive benefits or not.

And the reason for that is you created a bottleneck.

You made every single rule pass through a particular office where there was only a couple of dozen reviewers who could actually dig into the details.

And so these rules would get up to the office and they just sit on people's desks for months, for years, sometimes purposefully, just never actually coming to see the light of day.

And so it's the institutional arrangement that we created to enforce compliance with cost-benefit analysis that ended up having the effect of just making it impossible for lots of agencies to do their jobs even when they were adopting rules that benefited the

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public.

So I think that's the move that I want people to sort of think harder about, which is, I mean, the underlying commitments that we've got to public notice, to cost-benefit analysis, to accountability, to environmental protection, those are all positive.

But the institutions we create to enforce compliance with those can actually stymie government action in a way that can be inimical to those very goals.

This gets, I think, to the difficulty liberals are having grappling with a bunch of these rules right now.

Let's take the environmental rules as an example.

You have bills like the Clean Air Act or the National Environmental Policy Act or in California, the California Environmental Quality Act.

And in different ways, they empower people, groups, institutions to sue the government if something is being done and what something is has expanded over time, housing developments and other things.

If there might be an environmental impact of the development or the change and force different kinds of environmental assessments, many of them are quite difficult.

And people argue back and forth over whether or not these are good.

But one thing I notice sometimes is in the defenses of why they are good, they'll try to look at, well, okay, why do so many organizations, so many agencies seem so burdened?

And they'll come back and say, look, the problem isn't the bill.

The problem isn't the analysis, the problem is state capacity.

The problem is that the relevant regulator or office in the state of Minnesota or California or Missouri or wherever, it needs a lot more people, it needs more capacity in order to respond to all this, but you're wrong to make this about the rule or the law.

And this I think gets to what you're talking about, which is when you create a situation where you need a giant amount of state capacity to just fend off all of this sort of regulatory paperwork and analysis, that at some point you have to deal with the question of have you made your government unable to act within sort of the reasonable confines of how many people like actually work for it.

Yeah, yeah.

Look, you've got a fixed pool of people that you've got to draw on to try to move the ball forward.

And the head of an agency has choices about what kinds of people to hire.

And do you want them to be hiring compliance officers and lawyers and folk who can respond to deluges of comments?

Or do you want to hire somebody who knows something about environmental regulation or housing or whatever expert domain you're talking about?

My preference would be to focus on the big picture, like what are we trying to achieve here and to make sure that whatever compliance burdens we're putting on the agencies are modest enough that they can do their jobs.

I mean, there's a temptation to think like, oh, well, just hire more people.

And the fact is state budgets are constrained and there are limits to what we can do with the current resources that we have.

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So we have to make smart choices.

And I do fear that we're not making optimal choices about where our agencies are devoting their time and attention.

So this gets, I think, to the key move you make in your argument.

And I want to quote you here.

Conservative reform proposals travel under an array of names and acronyms, but they embrace a common tactic.

They stack procedure on procedure to create a thicket so dense that agencies will either struggle to act or give up before they start.

And then you go on to say, quote, Democrats have generally opposed these anti-status measures, which would frustrate their efforts to protect the environment, consumers and workers.

But Democrats do not usually ask the obvious follow-up.

If new administrative procedures can be used to advance a libertarian agenda, might not relax existing administrative constraints, advance progressive ones.

So tell me about that flip you're making here.

Constantly in Congress, I'm watching Democrats fight off an effort to make it harder on behalf of Republicans for the administrative state to act, to bury them under paperwork.

You're making the point that Democrats then never say there's anything about the status quo that should be rolled back under that same logic.

Why?

Yeah, well, I think it has to do with the way that Democrats have actually internalized a lot of stories about anxiety, about state power that used to be the domain of the political right.

So during the New Deal era, the progressive heroes were administrators, they were folk who actually worked in agencies.

You had Francis Perkins at the Labor Department, you had James Landis at the FTC and the SEC. And all of these new dealers were acutely aware that strict procedures and intense traditional review of what they were up to was going to frustrate their efforts to remake American society.

And Franklin Roosevelt was quite explicit about this.

He said that, quote, substantial justice remains a higher aim for our civilization than technical legalism.

But that kind of positive vision of the American state really withered in the 1960s and the 1970s.

It was the confluence of the Vietnam War, the civil rights movement, it was all capped off by Watergate, and there was a newfound skepticism in the air that maybe the federal government didn't really speak for the public.

Maybe the federal government itself was part of the problem.

And then you got a new generation of progressive heroes who came to the fore.

You got Ralph Nader, you got Rachel Carson, you got Thurgood Marshall.

And they didn't work at federal agencies or state agencies.

They stood outside of government.

They held it to account.



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They did the hard work from the outside.

This new generation created these nonprofit organizations that we're now so familiar with.

And the goal of these NGOs was to bring lawsuits, to bring public pressure, to get the government to serve their vision of the public interest.

And because they're on the outside looking in, these groups had internalized the story that maybe government power is something to distrust.

And they were pretty enamored of procedural rules that gave them a hook to get in on the inside, right?

They wanted leverage, and they took advantage of procedural opportunities to get that leverage.

And they looked to the courts, they looked to all sorts of tactics to try to bend the administrative state to their will.

And over time, if you're an idealistic, left-leaning young lawyer, you want to join the nonprofit organizations that serve the public interest.

When you hear somebody describe themselves as a public interest lawyer, what they're saying is not usually, I want to join the government, which is, I would have thought like the place where the public interest is directly represented.

What they mean is they want to work outside the government.

They want to throw stones and say, do better government.

And that's valuable work, but it is premised on a deep distrust of these institutions that we've created.

And I think at the end of the day, that kind of distrust is corrosive to our joint project of trying to actually achieve something through government.

So when you just talk about suspicion of government, I think that frames this very ideologically.

And I'd like to hear you steelman the other side of this.

You put yourself back in the position of a liberal reformer, just a liberal in 1955, 1965, 1975.

You've got the Jim Crow South that you've been at war with for quite some time.

You've got, you know, in the case of maybe a Rachel Carson, the really, really profound degradation of streams and land and air, I mean, smog quality in Los Angeles.

You've got in the case of San Nader, a government that often is very much in bed with corporations and doesn't want to make moves towards public safety.

And so there is, I mean, when we talk about the government, you can have many types of governments, but you also can have a lot of government capture.

And I take a lot of what is worried about here as the sort of constant reality of captured government.

You've got Robert Moses, of course, and as happens in many cities, a lot of building transportation infrastructure and other kinds of infrastructure through black and brown communities.

So throw yourself back a little bit.

I mean, what make the case for me that the government does actually need to be restrained?

Yeah.

When you go back to the 1960s and the 1970s, the reformers are responding to extremely real pressures and extremely real excesses on the part of government.

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And the question is not whether we should eliminate all skepticism of government. Obviously, government wields extraordinary powers, not only the power of the purse, but the power over the ability to condemn your property, the power to put you in jail for violation of its rules.

And those kinds of powers are not the sorts of things that private corporations tend to wield.

And we want to be a little bit cautious before giving too long a leash to government agencies to do whatever they think in their infinite wisdom is best.

We all know that experts can get it wrong.

We all know that agencies can fail to see the big picture when they're moving to address the particular problem that they aim to pursue.

And we all know too that agencies can cater to the interests of well-organized groups at the expense of the broader public.

I think of it as a calibration issue, which is how much do you distrust?

And what sorts of rules do you put in place to make sure that your agencies are actually living up to what you'd like them to do?

And as a calibration problem, I think we veered too far in the direction of distrust.

And we've lost sight of the importance of making sure that the tools of governance that we've created can actually do what we want them to do.

What's always interesting to me about this is that I think it reveals something that we often hide in our folk understanding about American politics, where you have, in theory, Republicans who don't trust the government and Democrats who do trust the government. But in the 20th century, at least, back after the 20th century, and then now built into the government itself, I think you actually have this pincer of critiques.

So the right mistrusts the government, at least on certain issues.

And I think if you want to take the strongest version of the critique, would say, you can't have these regulators in Washington who know nothing telling businesses in Austin, Texas or Poughkeepsie what to do and what the right trade-offs are to make in their communities. And on the left, you have this fear of capture.

And I don't want to just say fear, the reality, because both these critiques have reality in them.

The reality that government often does cater to the rich, it often does cater to the organized. And it often is very, very non-representative.

And so the administrative state has this hostile critique on the right.

And this, I think what sees itself as a friendly critique, right, an effort to make government government again, but that often ends up, in some ways, maybe even being more impeding because it is not treated as a threat that needs to be beat back on the left.

But there is no faction in American life that is actually just sort of pro-government.

There's a left critique and a right critique, and we don't always talk about the left critique. But it's really there built in now in the innards of American governance.

Yeah.

I mean, I think that's right.

And I think what I see that disturbs me is not so much a misidentification of the problem.



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I think capture is a serious concern.

Well-organized groups do punch above their weight.

There's no question that agencies can do bad things and can act without due care.

There's no question all of that is true.

What's a concern is what we put in place to try to protect against those risks.

And I think far too often we've defaulted to lawyerly procedural rules to try to get agencies to do better.

And I think we haven't been reflective enough about the possibility that, look, if you've got an agency that isn't living up to your expectations, layering a bunch of procedural rules on top of it and subjecting it to judicial review, it's probably not going to help all that much.

But we've got problems.

We want to be thinking much harder about institutional design, about adequate budgetary support, about making sure they've got a clear statutory mandate, about getting good leadership, about fixing management problems.

There's a whole host of things we could do to improve the functioning of the administrative state.

And too often we say, well, you know, just go through notice and comment and that'll make you publicly responsive.

And I think I'm not sure that's commensurate with the scope of the challenges you've identified.

So I want to hold there.

You make a very specific argument in your various pieces here.

So let's look at the captured concern.

Right?

There's this idea that government can be captured.

It's overly responsive to corporate interest, look at how much money is donated, et cetera, and so you create these regulatory processes.

Anybody can sue or not anybody, but lots of people can sue.

Lots of organizations can sue.

There is notice and comment to these explicit spaces where you can comment and make sure you are heard before the agency, there are public hearings, there's all kinds of things out there.

And the idea is that you are creating explicit space in the process where communities and affected groups can be heard, they have a space of their own, or at least a space they can use, and a way that people who are affected can try to throw the judicial system in front of the government and get a hearing in court.

And you write, it is simply wrong to assume that more procedures will discourage capture.

Your argument, and you have some evidence to this, is that you actually have more capture in these processes.

So substantiate that for me.

Yeah.

So you can have more capture.

I want to be a little bit clearer.

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What you want to know is how these processes and procedures play out on the ground. And one thing we know from loads of empirical research is that well-organized small groups with a vested interest in the outcome of a particular government decision, they tend to participate at much higher rates than members of a diffused public where what an agency does for you as an individual probably doesn't make a huge difference, certainly not enough to justify you reading a very, very turgid, federal register notice and trying to understand the issue well enough that you can make your voice heard.

And so the imbalance ends up replicating itself when it comes to the moment at which the procedural opportunities are taken advantage of.

So taking advantage of a procedural opportunity takes time, it takes resources, it takes attention.

And so the very entities that you are concerned might be capturing the government are those entities that can exploit those procedures with more efficacy.

And so if you're not careful about how you design your procedural rules, you'll end up getting kind of replicating the very imbalance you're trying to solve for.

So one example of this is the way we structure notice and comment, not only at the federal level but at the state level as well.

Agencies are supposed to put their rules out and say, hey, what we're thinking about doing, can you offer feedback?

And if you look at the empirical research, when agencies do this, private entities participate at rates something like 10 to 100 times more than representatives of the broader public interest.

And it depends a bit on which agency and which issue you're looking at.

But the representational imbalance seems to yield differential regulatory outcomes as well.

It turns out agencies are a little bit more responsive to those entities that are participating more aggressively in the process.

And unless you are doing something to try to even out the participation imbalance to make sure that the public's voice cuts through, well, agencies are going to attend to the folk who are going to make the biggest noise if they don't get what they want, the folk who potentially could mount a litigation campaign against the agency.

And so the procedures that you put in place can actually make it easier for the capture dynamic to take hold.

You see that also with something like the Freedom of Information Act, which is a law that says anybody can file requests with agencies for the information that the agencies may have.

And you think, well, that's good.

It's a good transparency norm.

Everybody thinks that's a terrific idea.

If you actually dig into the details of who submits these FOIA requests, it's big corporations. They're looking for competitive advantage over folk in their industry.

They're looking to find out what the agency is thinking about doing.

It ends up diverting a ton of agency resources into compiling paperwork and passing it over.

And although there are some benefits from the Freedom of Information Act, it ends up

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serving in practice as a kind of major corporate subsidy.

And again, that's not an inevitable feature of a transparency regime.

We could have lots of mechanisms that look different than FOIA for sharing information.

But the way we've structured it is that it's formally equal, which means that those with the money and the resources to take advantage of it do.

That was such a striking fact to me because as a journalist, I think of Freedom of Information Act requests as something that my industry dominates, that it's there for us.

And to find out that most of them are done by corporations is really interesting.

I also want to read out a piece of this to you because I think some of the numbers here in studies are useful.

So quote, one study examined 40 rules across four agencies and found that business interests submitted nine times as many comments as did public interest groups.

Those comments were also of higher quality and appeared more likely to provoke changes.

Another study of 90 environmental protection agency rules governing the release of air toxins found that industry submitted 81% of all the comments with public interest groups submitting just 4% and that EPA's rules were more apt to be weakened as a number of comments increased.

There are other studies that show things like this.

And I want to note here because you can hear that and say, well, maybe what that is telling us is that the industry is right, that maybe they actually have good points to make.

And I want to hold that as a real possibility here.

But there is just something here about the resources.

They can bring to bear to participate in these processes.

And what's on the other side of that in these studies is public interest groups, which is also importantly a little bit different than the public.

So can you talk about what the sort of balance of institutional forces actually is in terms of who has the kind of firepower to participate in the administrative state kind of participation process?

Yeah.

I mean, I think we have this vision of the informed citizen offering thoughtful comments about issues that matter most to him or her, but most of us have lives and kids and responsibilities and aren't going to spend our time educating ourselves about rules that probably won't have a big effect on our individual lives.

And so in order for the public's voice to really crack through, you need some kind of organizational representation.

You need a group that's willing to say, hey, I represent a bunch of people who have lives and are doing other things right now, but they really care about the environment or they really care about healthcare or they really care about filling the blank.

And those organized groups are the entities that are really trying to provide a counterweight to the deluge of information you tend to get from private industry.

And one of the real tricks if you're trying to figure out how to create a system that's more balanced where you deal with the overwhelming advantage that private corporations tend to have in the process.

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You want to be strategic about how to invite information in, about how to make sure that certain voices and groups are heard, you want to hold listening sessions, you want to set up conference calls, you want to reach out to experts, you may want to be a little bit more proactive as an agency instead of being purely reactive at the notice and comment phase.

And of course, agencies do this to some extent all the time.

And indeed, as the protectors of the public interest, they too are supposed to be taking a broad perspective, but they're dependent on information they get from outsiders.

And so, at least in the way we've currently structured it, the fact that there is a stark participatory advantage for private interests is a pretty big problem.

Something that you footnote here is a work of historian Paul Saban in his book, *Public Citizens*, which has also influenced me quite a bit.

And in that he's tracking not just this sort of mid-century move in liberalism towards some skepticism of the state, but the rise of this public interest group complex, and in particular the way that liberalism functionally created a huge wing of its own movement that was aimed at the government.

I mean, what this sort of whole area did was create laws under which you can sue the government and then create institutions that sue the government.

And I mean, my first political internship was at the ACLU, you know, when I read histories of liberalism in this era and wanted to be somebody involved in liberalism, like, this is where it seemed like you should go.

So I just be curious to hear a little bit about your read of the history in that book and sort of what role, part of you as somebody who works within the liberal legal complex.

I mean, you're a law professor, like what its sort of ideas are, its mythologies are, the kind of pull it exerts on your students is like, what is the role of this sort of whole fairly new actually wing of liberalism?

Yeah, you know, I came to law school with something of the same idea, you know, the goal was to bring big impact litigation to affect change on the ground.

I'd been involved before law school and some of the education reform efforts where, you know, litigants tried to use state constitutions to funnel more resources to schools.

Some of those efforts worked, some of those efforts were valuable.

And I think most of my students who are public interest oriented come to law school with the same idea that we're going to take on the man.

And the man is not only big corporations, but also big government.

I think some of my own sort of changed thinking on this happened when I joined the Justice Department at the beginning of my career as an appellate attorney and found myself in the civil division defending the government against lawsuits brought by outside groups.

And one thing that became very clear to me is that most of the folks I was fighting against, they weren't the ACLU, they weren't the Sierra Club, they weren't the NRDC.

They were sometimes, but they were private interests with their own grubby agendas seeking to exploit the rules that have been put in place for the protection of the public interest.

And these were not lawsuits that I thought, you know, folk who believed in government ought to be aligned with, but the tactics they were using are the same exact tactics

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as the public interest organizations, they're the same exact procedural rules that they're seeking to exploit and they're all looking to the courts to try to achieve their ends.

And I just started to come to the view and more firmly come around to that view over the past decade, 15 years, you know, that's a dead end.

Courts are good at saying, no, procedural rules are good at gumming up the works, but if you're a progressive, like the status quo isn't good enough, like the status quo isn't what you should be okay with that, that what you want to be doing is pushing for genuine lasting change.

And I don't think you can do that from outside the government.

I think these groups play an important role.

I don't think we should just get rid of them all overnight.

But I do, I do wish that more of my students came to law school thinking government service is an honorable profession.

It's something that advances the public interest.

It is every bit as virtuous as signing up in the ACLU to protect constitutional rights to join up with a federal agency to say, you know, I'm serving the public.

You know, it was a thrill to me to be able to stand up in court and say, I represent the United States and I want my students to feel that same kind of thrill.

I want to key in on something you said a minute ago, which is that what the courts do is protect the status quo.

And I think one piece of the shift here is it in some really both substantively important and then within the story of liberalism important moments, that's not been true.

I mean, they desegregated the South or at least really began that legal process.

Obergefell, they made a constitutional right to or saw a constitutional right to same sex marriage in the environmental litigation area.

You can look at moments when they, for instance, made clear that the Clean Air Act required the regulation of greenhouse gases that I think particularly in a political system where it's hard to make big legislation happen, though they're not actually impossible.

There really has been a view that you can use the courts to do things that aren't just blocking but are very affirmative.

And those moments when that has been done, I think are some of liberalism's most treasured stories for better or for worse.

Yeah.

I think mostly for worse, all of your examples are, of course, important and significant and it'd be too blunt to say that courts can never affect positive social change.

But *Brown v. Board* didn't desegregate schools in the South.

That didn't happen until the 1964 Civil Rights Act and until the executive branch said, we are actually stepping in to make this happen on the ground.

When the U.S. Supreme Court came in to say that EPA could regulate greenhouse gases, that was the term I was clerking for Justice Stevens when he wrote *Massachusetts v. EPA*.

What came of that was, to a first approximation, nothing.

EPA moved to try to regulate greenhouse gases and during the Obama administration, the Bush administration didn't do anything, and the courts struck that down.

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So when you're thinking about affecting widespread, long-lasting social change, I do think the methodology is that we want to look to the courts, they can save us.

And I think it's a hollow hope.

I really do.

I'm borrowing the title of a book about *Brown v. Board of Education*, which does a good job like exhuming the historical record for going through the historical record to demonstrate that actually it's not the courts that were the ultimate arbiters of this.

Again, I don't want to deny the importance of some of the changes that we've seen from the courts of *Bergesell* was an enormously impactful decision at the same time.

The country was moving that direction anyway.

And by putting so much faith in the courts, I do think we're arming a pretty status-co-oriented institution with a lot of power over American life.

That's only more so with the supermajority of conservative justices, but I think it was true even before.

I'm Anna Martin, the host of the *Modern Love* podcast.

In every episode, we peek into an intimate corner of someone's life and learn about what love means to them.

35 years with another person, I've never spent that much time with anyone else.

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My advice is that it's okay if it's hard.

A lot of the way that you manifest your love for your children is through cooking.

And I remember just looking at them in awe almost, like, wow, you know so much that I couldn't even dream of knowing about my brother.

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This next bit is tricky because some of my best friends, some of my best family members, definitely a large audience for this podcast are lawyers who do really great work.

And again, you're a liberal lawyer who also trains lawyers at a law school and is working in government.

But you say that, quote, if America has a procedure problem, it may be because it has a lawyer problem.

What's the lawyer problem?

We have a lot of lawyers and a lot of lawyers and positions of power.

So the numbers are pretty arresting.

Back in 1960, there was one lawyer for every 627 people in the U.S. and today it's about one out of 250 people, which may not sound like a lot, but it puts us at more lawyers per capita than any other country in the world.

And a lot of idealistic young lawyers are young people are getting law degrees because they see lawyers as catalytic agents.



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You go to law school so that you can affect change, you can make your mark. Lawyers make up less than 1% of the population, but they make up a third of the House of Representatives, make up half the Senate, fully half of the last 10 presidents were lawyers, about a third of the officials in states as governor, lieutenant governor, secretary of state, they're lawyers. So we've got lawyers everywhere. It's a high status profession and we're channeling a lot of talent into it. And that has consequences for the kinds of institutions we create. Maybe it's no surprise that we're creating institutions along much more legalistic lines than folk in other countries do and that we put a lot less faith in bureaucracy, in expertise and a lot more faith in the kinds of procedural rules that lawyers are familiar with and comfortable with. And it's worth noting, I think, this is, even within those numbers, this is quite tilted towards the democratic side of the political system. I mean, lawyers lean liberal for a bunch of different reasons, but I went back and looked at this and every democratic presidential nominee since Carter has gone to law school. Is that right? And I say that, yeah, I say that specifically because Al Gore went to law school and dropped out, but he did go to law school. And I'm curious why you think that is. I'm not sure I've got a totally satisfying answer for you, but how about this, which is, if you're a good lefty, you are looking for opportunities to make positive change. And when you look at the people who have done that, you look to the examples that stick out in your mind. You look to *Brown v. Board*. You think about the success in *Obergefell*. You think about the movies you see on TV of the lawyer standing up for the dispossessed and the trampled upon. And you think to yourself, I don't really know what to do with my life. I'm a little bit lost. I'm a little bit unsure. But one thing I know is that if I want to affect positive change, being a lawyer is a path to doing that. It's a high status profession in the United States. It's not the case in every country in the world. It's a place you can go if you're ambitious, but not entirely sure where you fit in. So I don't know, does that code to you? I think it does. And maybe I'll take it a step further with my own memory of this. So I remember being in college, and I was a young, very politically active. I'd already begun blogging at that point, a very politically active person. I wanted to be involved in politics. And there isn't exactly a be involved in politics career path.

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It isn't totally obvious what to do.

And basically, everybody, both who I could see in politics, as I mentioned, and they're all lawyers, basically in liberal politics.

But around me, it seemed that the thing you should do is go to law school.

That's what I was told.

It was also I was told, look, you go to law school, that's what people do for politics.

But also then you have this great fallback option because you're a lawyer.

And I mean, God bless my brother and sister-in-law who are great lawyers and sat me down and said, if you do not want to practice law, do not go to law school.

And like in one night, probably changed the entire course of my life.

But if not for them, I would have gone to law school.

Because that's what everybody tells you to do if you want to be involved in politics.

There's an incredible amount of gravitational pull.

I mean, Ron Klain, who just left as chief of staff, he's a lawyer.

Joe Biden, of course, is a lawyer.

Brian Deese, who is stepping down as head of the National Economic Council, he finished his law degree during the Obama administration, even though he'd already been working in the White House by that time.

He still went back to finish it.

So if you're this kind of kid, there's a lot of pressure on going to law school.

It's presented as both somehow your idealistic option, your save the world option.

And somehow also your safety, your fallback.

And a lot of us know the story of what happens if the fallback makes you fall too far back, right?

It's a loss and a diversion of your once utopian or do-gooder dreams.

But also, I think this is a point you're making, which is a little bit more subtle than the culture of law school and the legalistic ways of looking at things are unbelievably dominant within the circles of American liberal politics.

Yeah.

I think that's exactly right.

And if you are asking your group of lawyers how better to run a big institution, you're asking the wrong group of people.

You know, lawyers are very good at managing legal rules, at understanding the ins and outs of statutory construction, at crafting regulations.

They're good at that kind of thing.

They're not very good at running organizations.

They're not very good at pulling people together and saying, this is where we got the place we've got to get to.

And some, look, I don't want to overdraw it.

Some lawyers are terrific at that.

They have a natural skill set that they're able to bear, but they're able to bring to bear, but you're not trained in it.

It's not something you learn in law school, how to run a government agency, or, you know,

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it's just not part of the skill set.

And I do think that the dominance of lawyers has sometimes limited our political imagination about what we can do to potentially, like, achieve our common objectives.

Lawyers are very comfortable with just another procedure, just another court hearing.

And sometimes the answer is, we just got to get stuff done.

And lawyers too often stand in the way.

But it's not just procedure here.

I mean, a lot of your initial article, which is published in a law review on the subject, is I would call it a critique and attack on the principle argument within the legal profession for this kind of structure and this kind of proceduralism within the administrative state.

And you locate a lot of that in concerns about legitimacy.

So give me first, I guess, the dominant conventional view of the relationship between procedurally intense administrative state and the legitimacy in the eyes of the public of the state's actions and behavior.

Yeah.

So it's a common refrain in lawyer circles that the legitimacy of the administrative state rests on its procedural regularity.

And the conventional view is, look, agencies bring executive and legislative and judicial powers under one roof, they're not elected, they wield all this power.

So we want to make sure that they are mining their peas and queues.

And only if they mind their peas and queues will the public accept them as legitimate, like that there's otherwise just such baked in skepticism of the state that if there's not that kind of procedural regularity, the public is going to start getting suspicious.

They're going to start not complying.

They're going to start basically undermining the very institutions that we've created to advance the public interest.

And so what we as lawyers are going to do is create these rules and create judicial review and create all these obligations for agencies to follow so that we can be sure that when they act, they have thought it through carefully, they've done everything they needed to do, they've sought all the input they needed to seek, they thought of all the alternatives they needed to consider, they've checked all the legal niceties so that the courts are going to be happy.

We've done all that.

And at that point, people will accept the outcome that the agency decrees, but only at that point.

That, I think, is something like the conventional picture.

I think of this part of your argument as the most obvious and radical thing you write.

You write that legitimacy is not solely, not even primarily, a product of the procedures that agencies follow.

Legitimacy arises more generally from the perception that government is capable, informed, prompt, responsive, and fair.

And I think the reason that's very important is something you're setting up through the piece and something that my reporting, I think, suggests is true, is that there can actually

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be a tension between these two sides of legitimacy that you layer on all these processes, you layer on all these structures, all these checks, all these balances, and that's great.

Every one of those has a good principle justification for it.

But then you make a government that is not able to execute against a lot of what the public wants.

It moves slowly.

That makes decisions that seem incomprehensible.

Everything is too bureaucratic.

And people get angry and angry at it.

And you can also get into the beneficiary cycle where they trust it less and then hamper it more and then trust it less and then hamper it more.

So talk to me a bit about the way those two end up in tension and where in the liberal agenda right now, do you see the strongest friction on this count?

Yeah.

I think you nailed it, right?

There are procedures that when you employ them, degrade the ability of agencies to carry out their functions.

And this isn't all that complicated a point.

This is the same kind of argument that private businesses make about red tape, where it's not that one rule is so overwhelming, but that we've got hundreds and hundreds of rules that we're trying to comply with all the time, and it makes it hard for us to do our business.

Same thing is true for agencies.

The more of these procedural rules you encrust on top of them, the harder it becomes for them to do their jobs.

And I think it's a, at least in some circles, a reasonably well accepted criticism that we've bogged agencies down so much that they're often unable to act or if they do act, they act in, as you say, strange ways or in ways that if you're actually just asking what do we want from this agency are a little hard to understand.

But what I don't see on the left with maybe a couple of small exceptions is a whole lot of energy or attention being paid to rethinking the procedural burdens that we've placed on agencies.

And maybe the place where I see this that just concerns me the most touches on the need to move to renewable energy.

You've written, lots of other people have written about the scope of the investments that need to be made and the scope of the land use decisions that have to be made in order to site big solar farms, big wind farms to make sure that we can get the kind of renewable energy we need in order to combat climate change.

And all of those decisions are going to be made, not just by the federal government, but locally by state governments, city governments, municipal governments of all kinds.

And lots of them are bogged down by the same kinds of procedural rules that we have targeted at federal agencies.

And unless and until we streamline the process for developing some of this green infrastructure, I think it's very hard to see how we actually achieve our climate goals.

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So even if what you care most about is environmental protection, you ought to be worried about the kinds of procedural rules we've adopted, some of which are designed to protect the environment that maybe they're going to actually inhibit our ability to achieve a really important objective.

I did a story about this earlier this year or last year now, I guess, that really sticks in my mind, which is that New York state has decided in 2019 to move towards congestion pricing for New York City.

It's a long fought battle, and it has been done in other places, it is a straightforwardly really good for the environment kind of play.

You reduce car use, you move that money towards public transportation, like when you want to do something as an environmentalist, what you want to do often is move towards congestion pricing in urban centers.

And it has been held up for years in environmental review.

It still is, right?

It still is.

And I've done a fair amount of reporting on this now.

They're working with the Biden administration, and everybody wants this to happen.

And when I talk to the people doing it, they just say, look, we are having all these notice and comment meetings.

And what they say is that we have to do it at this level of rigor, because otherwise this thing is going to get sued to high heaven, and it will get blocked, or there will be an injunction.

And this does happen.

I mean, there was a ban on single-family zoning, I believe it was in Minneapolis.

And I don't know what its current status is, but an injunction was laid down on it because it didn't have enough environmental review, a ban on single-family zoning, and that case was in part brought by the Audubon Society over there.

So there is a real, it's not just the actual things you have to do, but the fear you have that if you don't dot an I or don't cross a T or miss something, that you're then going to have two or three or four or five more years of delay, or maybe the whole project will simply collapse on the other side of it because of this.

And it is often, I mean, not always.

A lot of these environmental bills have done great work, but you really do in a way that is disconcerting to someone who is liberal and cares about these issues, you really do have environmental bills being weaponized constantly against pro-environment legislation. And now where you have to move faster on things that have to change in order to preserve something

like our current climate, the burden of this has become really, I think, salient.

Yeah.

Well, and think about all the projects.

I mean, congestion pricing is a good example of a project that's in the works that may actually end up happening.

But think of all the projects that are never even contemplated because there's just no

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way that they could possibly make it through the gauntlet.

Think about all the projects that die long before they're even at a white paper phase.

We're really limiting our imagination if we are unwilling to take some risks and to move a little bit more quickly.

One thing that I found really disconcerting, I'll be curious if you felt the same way, there was a fairly modest set, or what I regarded as a fairly modest set of permitting reforms attached to the, I think it was the Inflation Reduction Act at the end of 2022 that Joe Manchin was in support of.

And he paired that with a pipeline that he wanted to get approved.

But these permitting reforms would still have required environmental review.

They would have just shortened some of the timelines and made it a little bit faster.

And it was shouted down on the left from environmental groups as a betrayal of our environmental commitment and it was dimied on the right for what seemed to be narrow political reasons.

The fact that something as common sense as let's speed up environmental review seemed to have no hope in Congress, I guess I found that disconcerting.

I think that was a really interesting and complicated case because, so yeah, so this was part of Manchin's deal with Schumer that he was going to get this permitting package attached to some must pass legislation later on as part of his vote for the Inflation Reduction Act and it was a mixed package in the sense, as you say, it had some modest accelerations of environmental review.

It had, I think, very importantly some really useful permitting reform around pipelines.

This was a really interesting case.

So Manchin, he got a deal with Schumer that he would have this attached some must pass bill as part of his price for voting for the Inflation Reduction Act.

And it was this kind of weird mixed package where you had some modest accelerations of environmental review.

You had him getting a special carve out for this natural gas pipeline that he wants and you had an important good part of the bill, like an actually good part, which was permitting reform, substantive permitting reform around energy transmission, electrical transmission, which we need to build a lot more of.

And I would have voted yes on that package net net.

I think some of what happened in the house had to do with just fury at Joe Manchin and the number of prices he exacted.

But what I thought was very telling was that there was never a progressive counter offer on this.

So okay, you don't like Joe Manchin's package.

You don't want to vote for the Mountain Valley Pipeline fine.

But you still need to do something here if you want the Inflation Reduction Act to build the amount of decarbonizing infrastructure that we need at the pace you say we need it.

And the House Progressive Caucus doesn't have a permitting reform package.

They don't have what the liberal, aggressive decarbonization version of this looks like.

The Biden administration weighed in for Manchin's bill and they definitely back channeled me a lot that they're for this, but they have never come out with their package.



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And so one thing I worry about here is that this is getting a little toxic because of Joe Manchin, who is a very complicated figure for liberals for very obvious reasons. But this isn't just some weird thing he wants.

I mean, if you talk to people in the energy construction space, they will tell you, we need something like this.

We need something big.

And in some ways, like the worst part about the Manchin bill was that it was small. Like that little Manchin package was not going to do all that much.

But nobody seems to be thinking about what does need to be done.

There isn't a liberal vision on how do you get all this stuff built in the way that there is on how much stuff should you build or how much money should you appropriate in order to build it?

Yeah.

In frustration, I sometimes wonder if the intensity of the commitment to dealing with climate change isn't matched by a hard-nosed recognition of what we need to change in order to achieve those goals, that it's long on promises.

It's even long on promises of funding.

But the fact is that if every locality can say no to new renewable facilities, if they can say no to every electric transmission line that you want to put in, I'm not sure how you make that kind of transition.

And I'm not sure there's an agenda on this.

There's a wonderful paper by JB Ruhl and James Saltzman called The Green New Deal Meets the Old Green Laws.

And their thesis is just that simple, that if what you want is the Green New Deal, then you've got to deal with the burdens that the environmental laws that we've had on the books for 50 years have now placed on new development.

And if you don't do it, it's hard to get from here to there.

I'm definitely going to read that paper.

But I want to go back to the point here for a minute about legitimacy, because something that is very salient, I think, for liberals right now, for Democrats right now, is the fear that liberal democracy is losing, maybe not legitimacy, but support.

And there's a book by William Howell and Terry Mow, a political scientist called President's Populism and the Crisis of Democracy.

And they basically make this argument that one of the things that creates fertile ground for populist authoritarians, which you see in many different countries, but Trump represents here, is this sense that government doesn't really work anymore.

And I've probably said this on the podcast before, but I've always thought that liberals really underplayed the power of Trump saying, I alone can fix it.

What they heard is, I alone, it's semi-fascist, it's ridiculous, it's scary.

But what a lot of people heard in that was, can fix it.

And a difficulty for liberal government, this is particularly true, I think, at the end of the Obama administration with continuity into potentially Hillary Clinton, is once people start getting disappointed in how much or how fast government can deliver, then the

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people who are most enmeshed in the government and its rules and its current structure are not that compelling when they say they're going to deliver more.

And if they lose people's trust in being able to make government do what they want it to do, then it's the people who are from outside the system and don't respect any of or many of the system's niceties or rules or principles who become more credible in at least being serious about saying they're going to do things differently.

Yeah, it's a pretty vicious cycle or put it differently, it's a self-fulfilling prophecy.

If you, out of anxiety for government overreach, you impose so many rules that government can't function appropriately, people notice that government isn't doing what it needs to do.

And they lose faith in the very institutions that need our collective faith in order for them to do their jobs.

I wish I knew there was a cleaner and easy solution.

I wish there was a good political home for sort of the arguments that we need to reinstall a different attitude toward governance that we should measure the legitimacy of the American state, not by the number of rules that it labors under, but by its ability to actually achieve our common goals.

I think we've lost track of that.

I want to go back to something you said a few minutes ago, which is that you notice in a lot of your students that it isn't really a ambition to go work in government.

Maybe it is to work at the top of government.

I suspect many of them would like to be a member of Congress, a US senator, the head of an agency at the top of the DOJ civil rights division, something like that.

But I see this among a lot of people I've known who would love to take a very high up position in government, but the work of being at the mid-agency level is considered to be very frustrating, very unglamorous.

And it does seem to me to create a talent problem, not that there aren't many, many, many talented people working in the middle of agencies because there are, but that if you're somebody who wants to do a lot, like get a lot done, there are places that have that aura.

I mean, you go to Silicon Valley and move fast and break things, but you don't want to go work on infrastructure or decarbonization or whatever as a civil servant because you're going to spend all your time wrapped in procedures and weird rules.

And I know a lot of people who are the people I want to see work in government, and they do it, and they decide that it's very, very frustrating in a way being outside the government, including at things that are suing the government constantly, like the public interest groups is not that frustrating.

And I'm curious if that rings as true to you.

It does ring as true, although I'll maybe qualify it a little bit.

I was a civil servant in the Justice Department for a few years, and there is a dignity in being a civil servant, and it is frustrating at times, and you're trying to deal with a big complicated government that is trying to do work for a big complicated country.

And it means that it's not always easy to push forward with a single unitary purpose.

It's not always easy to push through all of the constraints that make it hard.

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At the same time, that is the work of government.

And I think we need to value and extol the virtues of that slow, patient, hard work.

The other way I'd qualify it is just by saying that I've now had the fortune of working both in the federal government and here in Michigan State government, and I am consistently struck when I work with agency officials at the commitment, the caliber, the thoughtfulness, the care that they put into their jobs.

They're not unerring, but they're an extraordinary and extraordinarily talented group of people, and we have too often overlooked them, and I think not held them up as the kind of examples that they really ought to be.

They are every day serving the public interest, and it is, and it can be, frustrating.

But they are entitled to our regard, I think.

You wrote this set of pieces before you went into Michigan State government working for Governor Whitmer, which I know because I contact you to come on the podcast, you're like, oh, no, I can't, I'm working for the government now.

So this was all pretty fresh in your mind, and then you went to work as a lawyer for Michigan State government.

So what did you see?

What was that experience like from the perspective of some of the arguments you're making here? Did it cause you to rethink anything, double down on anything?

What changed?

Yeah, changed my perspective in the following sense, which is just if you care about state capacity, the ability of government to get stuff done, we need to be focused a lot more on state and local governments and a lot less on the feds.

I say that partly because even when it comes to federal programs, it turns out that the actual work of governing happens disproportionately at the state and local level.

So Medicaid is implemented by the states, unemployment insurance is implemented by the states, environmental permitting under the Clean Water Act and the Clean Air Act that happens at the state level.

All that infrastructure spending that we're getting out of Congress right now is going to be spent by states and localities.

So seems like a lot of the action when it comes to state capacity really needs to be we need to be turning our attention to state and local governments to a greater extent than we have.

I also think that some of the procedural rules that we've adopted for the federal government are especially pernicious at the state and local level.

So the decline of local reporting is real.

It's really hard to get people to focus on what's happening in Lansing or Sacramento or Albany or what you will.

And that just means that there's even less public attention paid to decisions made at the state level.

And that gives more opportunities for interest groups to lobby for what they want to push for what they hope to receive.

And so procedural rules that come up the works a little bit at the federal level can end

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up being insurmountable hurdles at the state level.

I guess the other thing that struck me in my time working for the governor who I think does have a real vision for bringing jobs to the state, creating new development for permitting reform.

We've done executive orders trying to streamline the process here in Michigan.

One thing that's become clear to me is that the private sector depends on an effective public sector in order to achieve its goals as well.

So right now we've got a ton of money coming in both private capital and also public capital for new investments in semiconductors and electric vehicles and renewable energy facilities.

So all this money sloshing around.

But all of these facilities require permits from the state.

They require financial support in some cases from the state.

They require literally parcels of land that the state often assembles.

Not to mention which they depend on a workforce that the state has educated.

They depend on a robust infrastructure like transportation infrastructure on water.

If you are a private company looking to expand, looking to build these new businesses of the 21st century, you need a functional state and crippling the state is bad for business.

And I think the Whitmer administration has that in focus.

I think it's just a hard problem to fix in a very short period of time.

So let me make sure I touch on some of the obvious points of pushback here.

And I think one place to begin is imagine you unwound a lot of this.

You made a lot of the rules easier.

You gave agencies a lot more autonomy.

Maybe you changed civil service protections.

You can hire and fire much more easily that you try to make a much more unleashed government because you believe legitimacy will come from the government carrying out its promises not being bound by a lot of procedure.

And then you imagine Donald Trump in charge of that government or maybe somebody more focused on Donald Trump.

You imagine Ron DeSantis in charge of that government.

There can be an argument here that, yeah, maybe you don't like these rules, but they are protection against the entire apparatus being used for ill.

How do you take that?

I mean, there's an element of truth to it, which is why these arguments are so alluring.

But it sounds to me like an argument for crippling government because we simply can't trust it and can't ever trust it.

And that starts to sound to me like an argument about how we've lost faith in democracy.

And I think I'd rather some Democratic misfires.

I'd rather run the risk of a capable government with a bad steward than run the risk of a government that can't live up to what we want from it.

It sounds to me like a council of despair, not a council of hope.

So another is that the government really is untrustworthy and particularly the administrative state really is untrustworthy that we've taken the left-wing critique, I think, more seriously

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in this conversation, the right-wing critique, but you have bureaucrats, which I don't mean as a dirty word here, but who are often far from what they are regulating, often don't have a ton of practical experience to take the left-wing critique, often are involved in industry, maybe they want to go work in industry at some point.

And the truth of the matter is this is not a system you can trust.

And just not having agencies have much power is actually the best outcome.

I mean, yes, maybe it'd be better if you had perfectly expert, perfectly public-spirited, perfectly knowledgeable regulators, but you don't.

And because you don't, you actually want the government quite hindered.

Yeah, I mean, this is the classic right-wing critique and it, again, has some force to it.

And I think I have a couple of responses.

One is that the scope of the challenges that we're confronting today, we can't simply look to the private sector to address them, right?

If we want to fix, we want to address climate change, the externalities are such that private entities aren't going to take it into account, they're not going to worry about the possibility that their emissions today might cause climate change in 10, 20, 30, 40 years.

We need collective action.

If we want to protect against financial catastrophe like what we saw in 2008, 2009, we can't just depend on the private sector to do that.

And I think for all of the fears about government overreach, we've also seen extraordinary successes.

Los Angeles isn't the polluted smoggy haze it was when I was growing up and air pollution in this country really is better.

And that's yielding health and outcome dividends that are enormous.

So I think it's true that agencies can screw up, agencies aren't omniscient and like any other human institution, they fail sometimes.

But just because agencies fail doesn't mean we should cripple them.

I think our response to that should be, let's try to improve them, let's try to make sure they fail as rarely as humanly possible, not that they are completely incapacitated.

That picks up on another sort of pushback here, which is I'll often hear from lawyers who work on environmental litigation and they'll say, look, of course you can find examples of good things being stymied by NEPA or by CEQA or by whatever clean air and water and environmental bill you choose.

But on net, these things have blocked much more terrible stuff than they have blocked good stuff.

And look around, look at how much cleaner the water is, look at how much cleaner the air is, look at how much good has come of this.

And you have no idea when you help channel discontent against them, you have no idea what forces you're actually working with here and what you could unleash that the fossil fuel industry would love nothing more than to be freed from some of these strictures.

So how do you think about that?

The attention on misfires is actually misleading us to the overall success of this whole structure.

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I think that criticism may have resonated more 20, 30, 40 years ago when we saw lots of the upsides and a lot of the downsides weren't immediately apparent, but we've got an extraordinary housing crisis in this country because we simply won't allow construction, we won't overcome local resistance, we won't reduce the procedural hurdles that developers have to jump through in order to put up new housing and new buildings.

So we've seen the effect of governments being hamstrung, playing out on our streets as homeless populations explode as more and more of folks paychecks are getting gobbled up by housing costs.

So when I think about, oh, we've prevented bad things, sure, but we've prevented a lot of good things.

And right now, we need some of those good things, we need more housing, we need it desperately. And hoping that it will happen with the same old laws in place and doing the same old thing we've done for decades, I don't think it's a recipe for success.

I mean, one way I think about it is that we can be complacent about some of the damage our procedural rules have caused because we're the beneficiaries of some of those restrictions. We all, in our own way, kind of like the status quo, we all, in our own way, don't like to see a lot of change.

And so that complacency is kind of baked in to some extent.

But the people we're hurting are often unseen.

They're the future generations.

They're the kids who are going to grow up and have a hard time affording a house, hard time making ends meet.

They're kids who are going to grow up in a world where climate adaptation is going to cost us billions and billions of dollars.

They're kids who are going to grow up in brittle financial markets.

Then there's this critique, which I think is important because it seems to maybe be the dominant view on the Supreme Court now, which is to have a lot of concentrated power and to have a lot of autonomy in the hands of the administrative state or the federal bureaucracy.

It conflicts with our constitutional culture or the original meaning of the Constitution in a way that is going to lead to the Supreme Court consistently knocking down things that try to create it.

So how do you think of that on the substantive merits in terms of the reality of the Constitution?

But then how also do you think of it tactically?

Yeah, I have zero patience for these constitutional arguments.

They are almost always a historical.

They are reading into the very general language of the Constitution restrictions that are very hard to find in the Constitution.

When you go back and actually try to piece out what the framers thought about delegated power, the delegated authority all the time, the delegated wide authority to an array of actors without a whole lot of guidance from Congress.

And of course they did so, right?

It's through delegations that we carry out the work of government, and that's how it's



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always been and how it always will be.

There's got to be an expiration date at worrying about the fundamental compatibility of our constitutional structure with federal agencies and by any measure that date has passed. So I am impatient with those conversations.

They often seem to me like cover for a deregulatory, often libertarian, inflected agenda. But as to the blunt fact that a supermajority of the U.S. Supreme Court holds those views and is going to make it harder to affect progressive change, I think the answer to that is, yes, absolutely.

I wish I could tell you that that wasn't going to be a problem for progressive objectives going forward, but it will be.

And I think the only answer to that is to win electorally and to keep winning electorally and to change the conversation.

And over time, probably a long period of time, probably decades, change the composition of the court.

It's hard work.

I wish there was an easy fix, but this is long, hard, difficult work.

So putting the court to the side, give me your what is to be done.

If you have the power or advising administration with the power to change some of this, what would you do?

I've thought a lot about this, and I wish I had a better answer for you.

And I wrote this paper in part to try to change some of our ideas about what it means for government to be legitimate and accountable, to make us think about a more positive vision of the administrative state, to think that the public interest is first and foremost advanced by the government that we have collectively created.

And I think that kind of change of ideas is probably at bottom what we need.

And it's a hard sell.

There's a lot of distrust on both the left and the right of bureaucratic institutions.

There's less trust in institutions generally today than there has been in a long time.

If I was thinking forward to what I'd hope to see, I'd hope to see a political party emerge, hopefully the Democratic Party with a more full-throated and unapologetic embrace of the need for effective government and for government to be responsive, quick, and not to be burdened by endless, needless red tape, but even just saying that there are going to be elements of the Democratic infrastructure, the folks who are friends and allies who have a very different attitude about government power.

And I'd like to hope and like to think that they'll eventually come around to the view that an approach that constantly seeks to fetter our agencies is not well suited to achieve their objectives either.

And then always our final question.

What are three books that have influenced you that you'd recommend to the audience?

Well, one you mentioned.

So Paul Saban's Public Citizen, Saban is a historian at Yale and the book charts the rise of the public interest movement in the 1960s and 70s.

It really focuses on Ralph Nader, but shows how Nader skepticism about government came

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to be so firmly embedded in our national, political, and legal culture on both the left and the right.

I'd recommend Michael Lewis is the fifth risk.

This is now a few years old.

But Lewis used the transition to the Trump administration to offer an accessible and actually moving account of the often unseen work that our federal agencies do.

It's one of the rare books that I can think of that kind of popular books that extols government bureaucrats instead of bashing them.

And I think it's a useful corrective to the dominant narrative.

Completely unrelated to my work, my teenage daughter and I just finished reading Babel or The Necessity of Violence.

It's just a novel by R.F.

Quang.

I don't know if I'm saying her name right, but it's a fantasy historical novel set on an alternative Oxford.

It's all about themes of colonialism and translation and it's dark and it's magical and it's just a ripsnorter of a good story.

Nick Bagley.

Thank you very much.

Thank you, Ezra.

The Ezra Clans is produced by Emma Faggau and Galvin Jeff Gellbroshek Karmet and Kristen Linn.

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