Fisheries Management and Rule of Law

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Abstract. Fishing is one of the most intensively regulated industries in the U.S. economy. Theoretically, regulating an industry means subjecting it to the rule of law: treating those with an interest in the resource fairly while preserving the public interest in public order, economic efficiency, and conservation. There are, however, two opposing concepts of "rule of law," each with deep roots in U.S. legal culture, that conflict with each other and frequently stymie efforts to regulate fisheries successfully. One of these concepts is the classical liberal idea of autonomy, which stresses the individual's right to pursue his/her self-interest free of state interference. Rule of law here means that the state should guarantee private ordering, treat everyone alike, and promote private enterprise. The other is the Jeffersonian, or republican, idea of participation, which stresses the equal participation of all citizens in self-government. Throughout U.S. history, these two norms have co-existed uncomfortably with each other as sources of legitimacy for regulatory regimes. Liberal thinking predominated in the nineteenth century, although it clearly underlies limited-entry and other property-oriented regimes today. Republican thinking has emerged more recently in co-management regimes that stress the participation of user groups in data-gathering, policymaking, and enforcement. Somewhere in between is the New Deal style of governance, on which the Magnuson Act of 1976 is based.

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1. INTRODUCTION

Fisheries are among the most intensively regulated industries in the economy. They are also among the most ineffectively regulated industries in the economy. Elsewhere I have attributed this paradox to the dichotomy between nature and culture: in nature ecology, harvesting, and regulation each intertwine with the others, while in any number of ways our approach to management sets them in conflict with one another. Ecology is something that we can understand and manipulate more or less scientifically, objectively, while the fishing is the object of manipulation by lawmakers and police. Out of the contradiction between the facts of nature and our limited perspective on management arises what we perceive as "The Tragedy of the Commons," or "The Fisheries Problem."

This paper leaves the ecology aside to focus specifically on relationships between the industry – the people who do the work – and the state – the people who do the regulating. Here, the problem lies in establishing what we call "rule of law" over the enterprise. "Rule of Law" means that the industry is subject to a system of reasonable constraints that everybody understands and to which everybody more or less consents. In the United States, people generally view state authority as legitimate so long as it conforms to deeply-seated ideas about what "rule of law" means. Rules perceived as arbitrary, capricious, or tyrannical do not, in our culture, command obedience.

Herein lies the problem, however. In the United States, since the very beginning of the republic, there have been two competing visions of "rule of law." One of these visions I'll call "liberal." Liberalism is a political philosophy that matured over the course of the nineteenth century and remains the dominant principle in Anglo-American law to this day. The other vision I'll call "republican." Republicanism is a highly unstable political philosophy (think of the French Revolution); it underlay our own revolution but has since fallen under the shadow of liberalism. Each of these visions, at various times and places, have legitimized different fisheries-management regimes in the United States. Our current regime, which dates from the New Deal, is predominately liberal, and is currently in decline. In the end, while republicanism is an unstable and unscientific political philosophy, it may be in some measure essential to fisheries management because it tracks, better than liberalism ever has, the interdependency between fishery workers, fishery ecology, and fishery regulation.

2. LIBERALISM: CLIPBOARDS AND GUNS

Americans have carried all kinds of political philosophies around in their heads, from Communism to Fascism to Antinomianism to Feminism. The two dominant approaches to rule of law, however, have been liberalism and

republicanism, and of the two liberalism has been by far the most powerful. For a liberal, law is legitimate when it establishes a neutral, abstract framework that protects private property, guarantees private contracts, and promotes private activity in the market. Society consists of individuals who are rational and self-interested, not to say alienated and paranoid. A state governed by "rule of law" is one that guarantees the autonomy of the individual in her pursuit of the good life, however she may conceive it. Liberals span the right-left spectrum, from Margaret Thatcher to Edward Kennedy. As a political philosophy it has a lot going for it – freedom, tolerance, entrepreneurship – but conservation of natural resources is not one of them.

State and national governments in the United States did not begin to regulate fisheries until the second half of the nineteenth century, by which time liberalism was well developed as a philosophy and dominated most people's thinking about how a state should behave toward its citizens. Before then, fisheries were either the private property of someone like the English Crown or the property of nobody (Moby Dick). Early state efforts to regulate fisheries rested on a rudimentary theory of "state ownership," as if fish and game were the state's property and subject to its absolute, arbitrary control. The theory never worked well and ultimately proved unconstitutional. If government could not manage its fisheries as property, then, over the late nineteenth and early twentieth centuries it did so by subjecting them to rule of law.

During this period, the liberal rule of law meant synthesizing scientific research into the biology of fisheries with centralized enforcement of whatever regulations the research suggested – what might be called a "clipboards and guns" approach. Legislatures and agencies enacted controls over seasons, allowable gear, and sometimes over end uses. The approach reached its high mark during the Progressive Era, 1900-1920, when people in government most fervently believed that science had the power to determine policy issues objectively and thus to preserve rule-of-law values in resource management, not to mention human relations. Science provided the objectivity that liberalism required in the twentieth century the way property rights had in the nineteenth. The dream lingers to this day: the best modern example of a "clipboards and guns" agency is the U.S. Forest Service, although you see the liberal model of law at work whenever an agency enforces scientifically-derived rules top-down on users who otherwise have little say in the process. Another modern example is the theory of optimum yield, which holds that privatizing rights to fish and allowing users to maximize their net income will automatically restrain harvests below the biologically sustainable maximum.

While liberalism's emphasis on free individuals and free markets was well suited to an industrializing society, it was largely incompatible with environmental and other collective values. Economic individualism inevitably led to the market failures and other externalities that make up "The Tragedy of The Commons." People who worked fisheries and other public-domain resources were far from passive in the face of Progressive Era, "clipboards and guns" lawmaking, so that regulatory enforcement was all but ineffective in many cases, however "scientific" the laws were in their promulgation. In fisheries particularly, regulatory problems often reached beyond the bounds of contemporary knowledge, so that lawmaking became more a political exercise than a scientific one in any event. As it turned out, fish and wildlife populations in the continental U.S. reached their historic lows around the turn of the twentieth century, just as classical liberalism reached the peak of its ideological power.

3. REPUBLICANISM: VIRTUE V. VORACITY

Like liberalism, republicanism is a collection of ideas about law, life, and human nature that people carry around with them and that they use to guide their lawmaking, their politics, and their institution-building. Republicanism was the dominant ideology of the American Revolution; it remains dominant in France today, although its power in the U.S. declined steadily over the nineteenth century. Even today, though, Pennsylvania's official motto is "virtue, liberty, independence:" virtue meaning good citizenship, or what the French would call "brotherhood," liberty meaning the individual's freedom to make the most of herself in the community, and independence meaning the autonomy of the community from outside control. The emphases on community and virtue are what distinguish republicanism from liberalism: in a republic citizens decide collectively, politically, what visions and values the community will espouse, while to a liberal "rule of law" means precisely that values are left to the individual and are no business of the state. They also make republicanism a highly volatile system of thought that can as easily give rise to the slave republic of South Carolina, a mafia, or the Commonwealth of Pennsylvania, depending on the virtue of the citizenry.

American history is full of examples of people organizing themselves into little republics, particularly on the frontiers of society and law where collective defense of property was the only defense available. Gold rushers in California and pioneer farmers in Wisconsin organized themselves into claims clubs with elaborate codes of law to repel speculators, arbitrate disputes, and regulate production. Most were ephemeral and disappeared as soon as formal authorities took over, although some of the rules these "little commonwealths" produced made their way into case law and

legislation. Fishing people were unusually tenacious in their self-government: they tended to be isolated from the rest of society, were typically immigrants, and had long-established, customary ways of doing things. Some of them were more virtuous than others, ecologically speaking, but all of them came under attack by clipboards-and-guns regulators, whose liberalism allowed them to see the individual fishers only as pirates and the collectivities only as mafia.

Such collectivities of fishers continue to exist, doing their best to keep the law at bay and more or less regulating themselves in the long-term benefit of the group as a whole. James Acheson studied a group of Maine lobster fishers whose ability to keep outsiders off their grounds enabled them to maintain healthier stocks than those of their less-organized neighbors. Tuna skippers out of Southern California , while less successful at conserving their resource, nonetheless maintain an insular community, do their best to keep formal authorities at bay, and maintain clear standards of conduct for themselves and their peers. Indian tribes are a special case: while they had neither republican ideology or structure before subjugation, nonetheless maintained dominion over their fisheries, regulated them intensively, and managed them for the long term good of the community. Nowadays, many tribes much more closely resemble little republics: several of the environmental statutes treat them like states insofar as they may develop pollution-control and resource management plans on their own, subject of course to trump by the federal government. Again, these little fishing commonwealths may be more or less ecologically virtuous; the point is that their idea of what "rule of law" means differs from that of state and federal authorities and that relations between the two systems, liberal and republican, are typically hostile.

As a model for rule of law, republicanism holds as many or more pitfalls as does liberalism. The best example is the French Revolution – an extremely bloody affair run by a group of radicals compelled by a sense of virtue but subject to no rule of law – although there was plenty of republican excess in our own revolutionary period, between 1776 and 1789. Republican legislatures gave away state lands, printed money with abandon, and waged economic war on each other. Republican politics do not guarantee the civic virtue of the participants: indeed, in many cases quite the opposite is true. Organizing the fishing industry on republican principles would bring together harvesters who might otherwise enter a death struggle to take every last fish, but nothing would prevent the group as a whole from behaving like any other voracious monopolist. At the same time, both ecology -- which knits each fishery into the world beyond its territory – and capitalism – which inevitably dissolves social boundaries and subjects everyone and everything to market discipline – together undermine harvesting communities' ability to define and pursue their own vision of the collective good.

The two visions of rule of law – liberal and republican – are in many ways incompatible with each other. Liberalism emphasizes individual autonomy, the privacy of personal value choices, and a limited, "night-watchman" role for the state. Republicanism, on the other hand, emphasizes community responsibility, the political nature of values, and the role of the state in promoting civic virtue. While their relative strengths in American culture have shifted over time, the two have always coexisted, in tension with each other. Subjecting any economic enterprise like fishing to the rule of law, then, inevitably means – consciously or not – choosing between the two as a source of operating principles for the regulatory regime.

4. A NEW DEAL FOR LIBERAL CAPITALISM

The Great Depression of the 1930s brought capitalism to its knees around the world. Liberalism itself perished in Germany, Italy, and Japan. In the United States, however, the Roosevelt administration worked the traditional ideologies, liberalism and republicanism, into a new synthesis that testified to the creativity of the tension between them in American legal culture. In so doing , FDR's New Deal set the pattern of governance that the country would follow through the end of the century. As modern and scientifically forward as they seem, the environmental laws of the post-1970 period conform to the New Deal model of a kind of reformulated, modernized, twentieth-century liberalism as opposed to the nineteenth-century laissez-faire, law-of-the-jungle kind that had left the nation's economy in ruins. By the same token, the current problems of environmental law – including fisheries management – are those of liberalism, and current efforts at form bear a marked republican influence.

The New Deal order began with a very strong republican emphasis. Roosevelt's first inaugural brimmed with republican imagery, from references to community values to paraphrases of the Declaration of Independence. Early New Deal statutes tried to reorganize the economy on republican principles: the National Industrial Recovery Act called on each industrial sector to govern itself, while the Bituminous Coal Conservation Act allowed miners to vote on minimum wages and hours. Such measures so far invaded traditional liberal notions of the boundary between private right and public authority that the Supreme Court held them unconstitutional. Thereafter the New Deal took on a distinctly more liberal cast. Administrative agencies like the FAA, the SEC, and the Fish and Wildlife Service got greatly enhanced power to regulate economic activity, although private control over investment and production

remained intact. Congress got near plenary authority to regulate economic affairs, although its power to invade the private rights of individuals was correspondingly curtailed. Together, these changes amounted to a New Deal for liberal capitalism.

Congress established the bulk of U.S. environmental law in a remarkable burst of activity that began in 1969, with the National Environmental Policy Act. The Magnuson Fishery Conservation and Management Act was one of the last of these statutes to pass, in 1976. In between came the Clean Air Act, the Clean Water Act, the Endangered Species Act, to name a few, along with similarly-structured statutes covering workers' health, automobile safety, and employment discrimination. All of these statutes fit the New Deal pattern: they set up public agencies with investigative and enforcement arms – clipboards and guns – and charge them with promulgating rules that apply equally to everyone and that promote the public interest in worker safety, or equal employment, or fishery conservation. The Magnuson Act differs slightly from its fellows in that it calls for multilateral councils in each of the nation's regions to aid the Secretary of Commerce in developing fishery management plans. Still, the Secretary approves or disapproves the plans and thus exercises the ultimate authority; the Magnuson Act thus only distantly resembles the experiments of the early 1930s in republican, industrial self-government.

The New Deal vision of rule of law, in which legislatures have near-absolute control over economic affairs while the courts trump efforts by the other branches to invade rights of privacy, religion, speech, and so on, began to dissolve after 1980. Increasingly conservative courts eroded both legislative power and personal freedoms. Economic globalization undermined the power of the unions that had supported the New Deal coalition. Not least, however, the edifice of New Deal law began to collapse of its own weight. The pollution and waste-control statutes so deeply invade private industry's control over investment and production that the liberal distinction between public authority and private right seems to many to have disappeared. Together, the environmental statutes have spawned enormous and powerful but clumsy bureaucracies, chiefly within the Environmental Protection Agency. Resource management, like antidiscrimination law, seems at times to have degenerated into a postmodern, French nightmare of competing rights claims.

Social disintegration and regulatory gridlock are liberal pathologies that are particularly visible in modern environmental law. In the interstices of the law, however, one can find experimental reforms with a distinctively republican flavor to them. Some Indian tribes have developed co-management regimes in which tribes and outside authorities cooperate in generating scientific data, in developing management plans, and in enforcing them. Because the tribes participate in the process, they are less likely to obstruct it. Under the Endangered Species Act, Clinton Administration officials have cooperated with landowners to conserve species and their habitat without going to the extreme of listing them under the Act. Again by Administration initiative, local neighborhoods have assumed a greater role in the siting and design of hazardous waste dumps under the Superfund law. What marks all of these initiatives as republican is that they replace the arm's-length relationship between regulators and regulated with a cooperative one that allows citizens to participate in defining public goals and in designing the means to reach them.

U.S. citizens became aware of environmental problems and demanded action on them in the early 1970s, just as New Deal constitutionalism reached its zenith. Our environmental law corresponds to the New Deal model of governance: public agencies, advised by citizens and scientists, promulgate rules under Congress's expansive authority to regulate commerce. Recent attacks on the environmental laws, by the same token, have knit closely into attacks on other parts of the New Deal regulatory legacy. Although the environmental statutes have thus far escaped repeal, pressure to amend them one way or the other has been building for some time. What will replace them is anyone's guess, although it is likely that, as before, both liberal and republican visions of what constitutes "rule of law" will influence the outcome.

5. CONCLUSION

Ideologies are not real things. They neither vote, fight wars, or catch fish. They do, however, influence what people do in the world by shaping their perceptions of what is possible and impossible in the world, what must be lived with and what must be changed. Liberalism and republicanism, the two most powerful strains of thought in American history, have conditioned the ways in which Americans have used and managed their resources no less than they have shaped abstract debate in the halls of power. Liberalism places the individual pursuit of happiness above all else: it has been a powerful engine of progress but too easily encourages people to waste resources. Republicanism gives priority to civic virtue: it gives the community an active role in teaching people to behave responsibly but can just as easily legitimate collective insanity.

What makes American political culture unique is that the two systems of thought have co-existed throughout our

history, in constant and creative tension with one another. Indeed, some of the political actors who most capture our imagination are those who synthesized the two; kept them together in their heads and built political strategy on that basis: James Madison, Abraham Lincoln, Franklin Roosevelt, and Martin Luther King. None of them were particularly known as fishers or fishery managers, but they all articulated deep truths about American political culture that earned them our loyalty. Strategies for environmental management that synthesize these two fundamental approaches to public life, likewise, will more likely earn the adherence of resource users and thus, inevitably, work to the advantage of the resources themselves.

6. REFERENCES

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