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In Pursuit of Democratic and Prudent Water Governance in the Apalachicola-Chattahoochee-Flint River Basin

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In Pursuit of Democratic and Prudent Water Governance in the Apalachicola-
Chattahoochee-Flint River Basin

By

Elizabeth Whiting Pierce
M.Div., Vanderbilt Divinity School, 2012
B.S., Trevecca Nazarene University, 2008

Advisor: Ellen Ott Marshall, Ph.D.

An abstract of
A dissertation submitted to the Faculty of the
James T. Laney School of Graduate Studies of Emory University
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Abstract

In Pursuit of Democratic and Prudent Water Governance in the Apalachicola-
Chattahoochee-Flint River Basin

By Elizabeth Whiting Pierce

For nearly thirty years, the states of Alabama, Florida, and Georgia have disputed how the waters of the Apalachicola-Chattahoochee-Flint (ACF) river basin should be allocated. This dissertation evaluates whether one approach to resolving this conflict deserves further attention and political support. That approach—which reflects the institutional design prescriptions of Adaptive Governance (AG)—involves the creation of a transboundary river basin commission capable of adaptive management. This dissertation utilizes two procedural goals as evaluative standards of this approach: environmental prudence and democratic legitimacy. This dissertation assesses whether building a river basin commission that reflects AG design prescriptions could, on principle, enhance the environmental prudence and democratic legitimacy of ACF water allocation policies. To the degree that this approach meets those criteria, it deserves further political support in the ACF basin.

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My doctoral education has given me the chance to accrue many happy debts of gratitude. I would like to express thanks first to my advisor, Ellen Ott Marshall. If only all graduate students could so lucky as to have a peacebuilding scholar as the chair of their dissertation committees. Her clear communication eased my anxiety and smoothed many potential administrative roadblocks, even when my completion deadline was abruptly moved up a full six months. She has also been unfailingly cheerful and kind.

Liz Bounds was my first advisor in graduate school, and she gave me a tremendously helpful, old-fashioned talking to early on in my program regarding calendars, email, and whatnot. That conversation has made *all* the difference in my ability to collaborate effectively. Also, her Theories of Justice course provided me a fascinating introduction to the subject of political philosophy. I had no idea one could make patently secular arguments about how the government should work. I've been hooked ever since.

During a particularly difficult season, Edward Queen hired me as a graduate assistant to the D. Abbott Turner Program in Ethics and Servant Leadership. That was one of several votes of confidence Dr. Queen has given me over the last five years. Each one was a source of courage when I needed it. Many, many thanks.

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Lance Gunderson not only generated a great deal of the scholarship on which this dissertation is based, he was kind enough to help me participate in it. I am grateful for the subject matter of his research and even more for his example of purposeful interdisciplinary work. Studying Adaptive Governance has been a very hopeful venture for me, and I look forward to utilizing its insights as a citizen.

My ability to incorporate environmental science into my scholarship was also aided tremendously by the Religion and Ecology Collaborative. I am especially grateful for Becky Copeland and Johannes Kleiner. Without your scholarly and administrative gusto, that first class would never have happened. I have relished your company ever since then.

The Office of Sustainability Initiatives provided me a chance to learn how to incorporate environmental concerns not just into scholarship but into the day-to-day-patterns of an academic institution. Ciannat Howett, Taylor Spicer, Kelly O'Day Weisinger, and Akelia Hypolite run OSI with grace and effectiveness that is not to be believed. Also, Ciannat Howett introduced me to Bradley Currey, whose insights on the ACF Stakeholders have been invaluable.

My writing partners Kristyn Sessions and Sarah MacDonald have made dissertation writing feel almost like a team sport. They read many ambling pages, found the nuggets, noted the murky spots, and asked the questions that helped me write the next paragraph. I am so grateful to have you two in my corner.

Since one cannot write all the time, I have been delighted to have Layla Karst nearly next door. She has been a wonderful colleague and an even better confidante and fellow extrovert.

In my sophomore year of college, Christis Farrell "all but packed Liz up in a FedEx box and shipped her to Whidbey Island, WA" for an ecology field studies program He also informed me, emphatically, that women *do* have time for graduate work. Thank you for your hope and faith in students and for your perception of grace in the natural world. Thanks are also owed to several persons at my undergraduate institution, Trevecca Nazarene University, without whom I would not have had the confidence to pursue graduate studies: Timothy Green, Dan Boone, and Steve Hoskins.

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I am grateful to my father, Brian Whiting, who taught me how to read and to think (the reading took a while). He was and is one of my favorite people to think aloud with, especially about the quirks of institutions. You were a wonderful parent to me as child, but you are an even better parent to me as an adult-child. Thank you for being the loudest cheerleader of my professional development.

I am grateful to my mother, Susan Whiting, who taught me how to laugh and cry and endure. She made graduate school possible, by giving me the gift of stability. She also kept my nerves extremely well-myelinated and my feet well-shod. I love and admire you tremendously.

I am also grateful to my grandmothers, Glenna Hughes and Sylvia Whiting Mallory. I am proud to be related to such smart, strong, fun women. Thank you for all your stories and support.

Last of all, I am grateful for my spouse, Matthew Lawrence Pierce. I am so glad I got to ride out the twists and turns of the last few years with you. You filled these years with French social theory, road trips, potlucks, and exceedingly long hikes. You introduced me to environmental planning and policy, the subject matter of my dissertation. You told me my work mattered when I needed to hear it. You told me I was a hard worker when I needed to hear that. May we never, ever do this again, but I am so glad I got to do it with you.

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Chapter 1

Justification of Research Question

How should we make our laws? How should our lawmaking institutions work? These questions—usually hidden beneath layers of bureaucratic procedure—press upon us in times of political conflict. The 2016 US presidential election certainly raised them. Around the election swirled questions about the different kinds of access experts, elites, lobbyists, journalists, foreign governments and/or common people respectively should have to lawmakers, the authority of facts and opinions in policy deliberation, and how electoral representation should work. The discipline of normative political philosophy exists to enrich and sharpen this kind of real time moral debate. It does so by supplying, clarifying, and correcting the norms we use to judge exercises of power and the political structures that support those exercises. At its best, normative political philosophy sustains the pursuit of justice by enabling its students to craft compelling accounts of justice's living form and content.

This dissertation belongs in that tradition. It addresses a political challenge with which the states of Alabama, Florida, and Georgia and the federal government have struggled for nearly three decades: how should policies be made that allocate water usage from a body of water spanning two or more states?[1] The body of water in question is the Apalachicola-Chattahoochee-Flint river system. The US's federalist system of government supplies three mechanisms for allocating interstate waters. First, Congress can allocate interstate waters via a federal statute. Second, the Supreme Court can

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[1] I use the term "policy" as an umbrella category to include statutes (federal and state laws passed by legislatures and approved by presidents or governors), ordinances (laws made by counties or cities), rules and regulations (regulatory agencies' interpretation and application strategies of the laws they are mandated to implement).

adjudicate states' disputes over interstate waters. Third, states can develop their own plan

to allocate interstate waters by creating an interstate compact. Critically, states may use

interstate compacts to establish river basin commissions which undertake water allocation

policymaking in an ongoing manner. For reasons that will be discussed later in this

chapter, interstate compacts are generally considered the best approach to interstate water

allocation policymaking. Regrettably, the state governments of Alabama, Georgia, and

Florida have thus far been unable or unwilling to sustain a viable interstate compact for

the ACF, choosing instead the path of Supreme Court litigation. Though unfortunate, that

history need not extend indefinitely; the states may eventually generate the necessary

political will to craft and fulfill interstate compacts. This dissertation anticipates that

possibility. It probes what kind of river basin commission an ACF basin interstate

compact should establish.

Figure 1-1
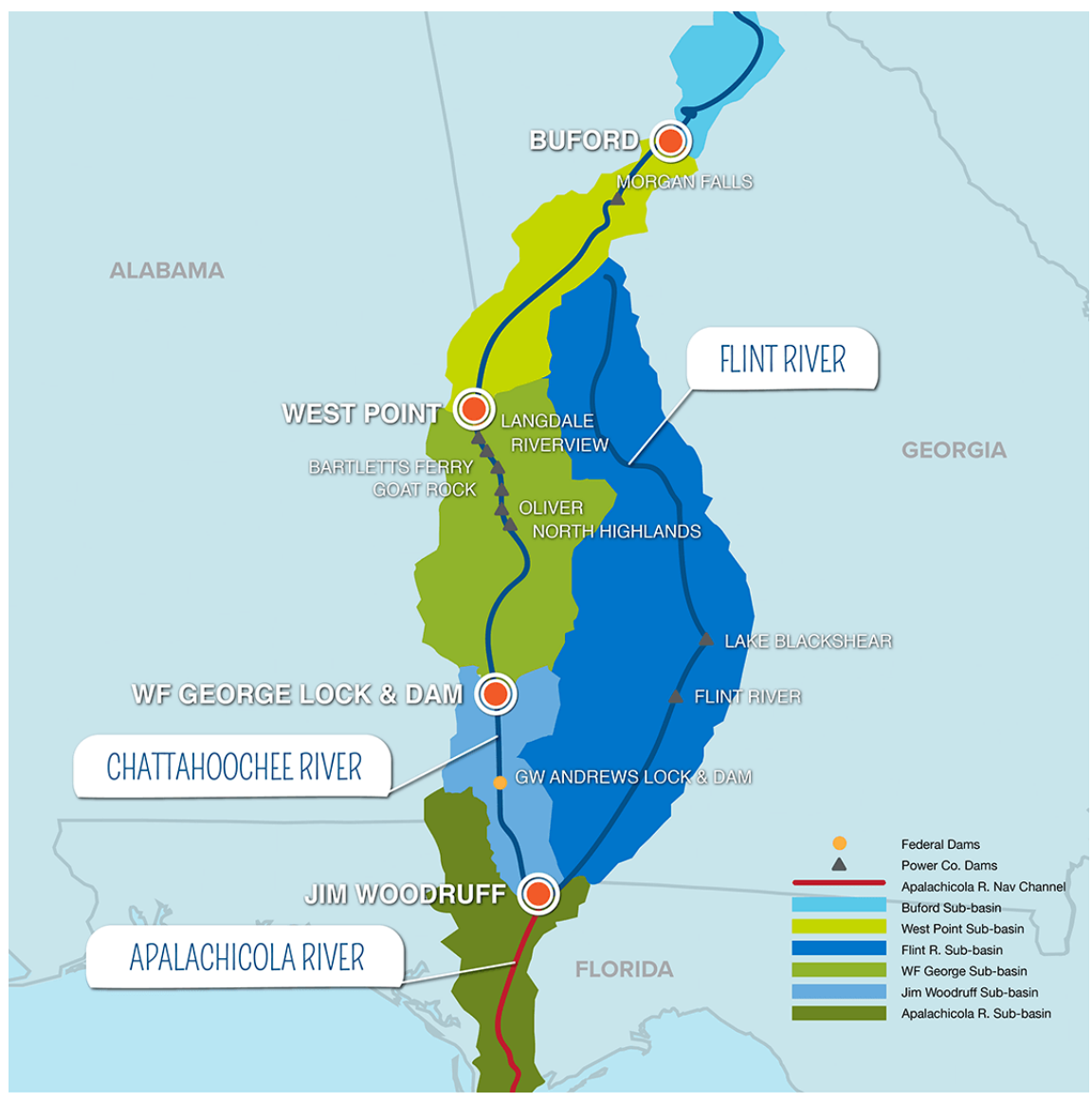
Metropolitan North Georgia Water Planning District, July 2017,
http://northgeorgiawater.org/current-water-stats/acf-river-levels/

That question is broader than it appears at first glance. As will be discussed more

below, an interstate compact is an extraordinarily flexible legal device. An interstate

compact could stipulate an almost infinite number of water allocation formulas. More

important, in this case an interstate compact could institute a river basin commission

exhibiting any number of institutional structures or procedural arrangements. [2] This dissertation does not attempt to evaluate all these options or even to identify the most ideal one. Rather, it investigates whether Adaptive Governance (AG) theory—a model of institutional and procedural reform in environmental policymaking—provides helpful guidance regarding the content of an interstate compact. In particular, this dissertation investigates the merit of AG's guidance for using an interstate compact to institute a transboundary river basin commission. Activists within the region—the Apalachicola-Chattahoochee-Flint Stakeholders (ACFS)—have already published proposals for creating a river basin commission that include AG's main prescriptions. ACFS's work provides a textbook example of AG theory's application to the challenge of interstate water allocation. This dissertation evaluates whether such efforts deserve further analytical attention and political support.

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[2] My use of the word "institution" differs in important ways from that word's usage in Adaptive Governance theory, a body of scholarship with which this dissertation engages extensively. Adaptive Governance's account of institutions is heavily influenced by Elinor Ostrom's Institutional Analysis and Development framework. Within this theory, "institutions are the prescriptions that humans use to organize all forms of repetitive and structured interactions." See John Anderies and Marco Janssen, *Sustaining the Commons (*Tempe, AZ: Center for the Study of Institutional Diversity, ASU, 2013), 13. Marriage is an institution in this sense, as are Senate procedures or national constitutions. My use of "institutions" follows common usage. I use it to refer to organized, formal bodies, such as governments or churches or businesses. The internal structures of institutions in the common sense of the word are largely organized by institutions in Ostrom's sense of the word. So, there is significant overlap between common and technical usages. In referring to Adaptive Governance's "institutional prescriptions," which I will do frequently, what I mean is Adaptive Governance's instructions for how a formalized organization ought to be structured and operate.

This dissertation conjointly addresses interstate water allocation policymaking procedures and policymaking institutions because they are functionally inextricable; the structure of a policymaking institution determines which decision-making procedures it can utilize effectively. For instance, consider the different decision-making processes possible in large legislatures and subcommittees. The institutional structure of a large legislature affords scant procedural opportunity for real dialogue; there are too many voices and too little time for that. Only a little rhetorical sparring is possible before taking a vote. Something procedurally different happens in subcommittees. This institutional structure limits the number of participants, granting them more privacy and time to discuss delicate matters. Thereby, the subcommittee structure enables a more dialogical, more consensus oriented decision-making process. Legislatures are a good way to select among options; committees are a good way to craft viable options. These different functions result from their different structures. In politics as in the natural world, function follows form. Hence, this dissertation probes simultaneously what procedural and what institutional arrangements should be set forth by an interstate water allocation compact for the ACF basin.

My evaluation of the merit of AG instructions for organizing a river basin commission draws upon two normative standards: environmental prudence and democratic legitimacy. By "environmental prudence," I mean the capacity of institutions to support policymaking that is timely, that is informed by relevant data about changing ecological and social conditions, and that intends to promote the environmental conditions necessary to human survival at least and human flourishing at best.[3] By "democratic legitimacy," I mean the capacity of policymaking institutions to win the moral assent of a governed population for a policy's authority (chapters three and four will discuss the concept of democratic legitimacy and its interpretation in various schools of political philosophy).[4] For the purposes of this dissertation, I do not try to defend these procedural goals.[5] Rather, I start with the assumption that both values are important. With those important values in hand, let me specify my research question a bit further: in

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[3] The importance of exercising prudence in environmental policymaking is often remarked upon in scholarly and professional literature, especially with reference to the precautionary principle. See for instance Leslie Paul Thiele, "Limiting Risks: Environmental Ethics as a Policy Primer," *Policy Studies Journal* 28, no. 3 (2000): 540-577. But the concept of environmental prudence is seldom if ever defined. Advocates seem to mean something like "action with an awareness of risk" (Thomas Schwartz, "Hydraulic Fracutring: Risks and Risk Management," *Natural Resources and Environment* 23, no. 2, [2011]: 30-32, 59) or "action informed by environmental conditions" (Karl Hausker, "A Long Winding Road," *Forum for Applied Research and Public Policy* 13, no. 4 [1998]: 42). Chapter Two provides my working definition of environmental prudence. This definition is, I think, compatible with the usage of "prudence" in environmental policymaking literature, although it is not derived from that usage. What my definition contributes, by drawing on Aristotle's account of prudence, is operational clarity about how environmentally prudent decisions can be made.

[4] Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity*, trans. Arthur Goldhammer (Princeton, NJ: Princeton University Press, 2011), 4.

[5] Both procedural goals are often named in environmental policymaking literature. On "environmental prudence," see footnote 3. For examples of the importance of "democratic legitimacy" in environmental policymaking, see for instance Barbara Cosens, Lance Gunderson, Craig Allen, and Melinda Harm Benson, "Identifying Legal, Ecological and Governance Obstacles, and Opportunities for Adapting to Climate Change," *Sustainability* 6, no. 4 (2014): 2338-2356, as well as Timothy Moss and Jens Newig, "Multilevel Water Governance and Problems of Scale: Setting the Stage for a Broader Debate," *Environmental Management* 46, no. 1 (July 2010): 1-6.

principle, could Adaptive Governance's prescriptions for structuring a river basin commission support democratically legitimate and environmentally prudent interstate water allocation policymaking? If they could, AG's institutional prescriptions deserve serious consideration by activists and political leaders in the ACF.

Demonstrating that AG's prescriptions for structuring a river basin commission support *environmentally prudent* policymaking is a relatively straightforward task. Chapter two will make that case. A more complicated task is assessing whether AG prescriptions support *democratically legitimate* policymaking. That assessment will absorb this dissertation's attention for the better part of three chapters.

The legitimacy of AG's political reform agenda requires assessment because it calls for redistribution of political authority. In so far as the US political system's status quo achieves democratic legitimacy (an admittedly open question in the current political climate), any redistribution of political authority requires justification. Adaptive Governance would redistribute political authority in two ways.

First, it would give stakeholders a larger role in policymaking. On its face, this proposition seems quite congenial to democratic legitimacy; it sounds like a celebration of civic engagement in self-rule. However, that interpretation misunderstands what stakeholders are. Stakeholders are not just citizens, but rather include businesses, non-profit organizations, religious groups, or any other corporate or individual actor with a perceived interest in the outcome of a policy.[6] How much and what kinds of power should these self-appointed actors have in policymaking? In particular, how much of the

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[6] Dave Huitema, Erik Mostert, Wouter Egas, Sabine Moellenkamp, Claudia Pahl-Wostl, and Resul Yalcin, "Adaptive water governance: assessing the institutional prescriptions of adaptive (co-)management from a governance perspective and defining a research agenda," *Ecology and Society* 14, no.1 (2009).

policymaking authority that currently belongs to elected officials and/or public agencies should be distributed to stakeholders?[7]

Second, AG calls for redistribution of political authority in ways that would make the federalist structure of the US government more polycentric.[8] United States federalism organizes policymaking authority on three scales: local, state, and federal. These governments form a "nested hierarchy" in which higher scale governments address policy challenges of a broader scope, i.e. the federal government sets national immigration policy, and lower scale governments address policy challenges of a narrower scope, i.e. state governments define property right regimes.[9] Some types of policy, like education and transportation policy, require vertical coordination between state and federal or state and local governments. Horizontal coordination is less common. For instance, states do not need to consult each other on their respective sales tax policies. Within a federalist system, governments at the same scale have discrete, non-overlapping jurisdictions. Regardless of the scale at which they operate, governments exercise "general purpose" authority, which is to say each government handles a wide range of policy challenges that pertain to their jurisdiction—public safety, public health, economic development, etc. By contrast, polycentric governance system often utilize "special purpose" policymaking

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[7] Barbara A. Cosens, "Legitimacy, Adaptation, and Resilience in Ecosystem Management," *Ecology and Society* 18, no. 1 (2013: article 3, and Robin Kundis Craig and J. B. Ruhl, "Designing Administrative Law for Adaptive Management," *Vanderbilt Law Review* 67, no. 1(January 2014): 29-32.

[8] Dave Huitema et al., "Adaptive water governance: assessing the institutional prescriptions of adaptive (co-)management.

[9]Tomas M. Koontz, Divya Gupta, Pranietha Mudliarc, Pranay Ranjan, "Adaptive institutions in social-ecological systems governance: a synthesis framework," *Environmental Science and Policy* (2015): 4-5.

institutions.[10] Hence, rather than concentrating policymaking authority in a clear governmental hierarchy, polycentric governance disperses policymaking authority through multiple ("poly") institutional centers. River basin commissions are a classic example of such dispersal; these institutions handle water allocation and/or water quality policymaking, but they have no authority over, say, child welfare policies. The jurisdictions of these institutions often overlap with the jurisdictions of existing governments at one or more scales.[11] For instance, a river basin commission in the ACF would overlap with the jurisdiction of many local governments, three state governments and the federal government.

Jurisdictional overlap may make coordination among policymaking institutions more difficult in a polycentric governance system than in a strictly federalist system.[12] With more policymaking institutions come more policy agendas, and these may—accidentally or intentionally—lie at cross purposes. For instance, local municipalities might zone for land use patterns that impact river flows (deforestation or significant installation of pavement might affect the rate and amount of water that flows into a river from surrounding land), thereby undermining basin-wide water allocation plans. When the agendas of jurisdictionally overlapping institutions conflict, how are those conflicts to be resolved? In a federalist system, conflict resolution is straightforward: national governments (usually) trump state governments and state governments (usually) trump local governments. The Constitution clarifies and justifies the chain of command within

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[10] Koontz et al., "Adaptive institutions in social-ecological systems governance," 4-5.

[11] Dave Huitema et al., "Adaptive water governance: assessing the institutional prescriptions of adaptive (co-)management."

[12] Ibid.

the federalist system. Coordination and conflict resolution processes among institutions in polycentric governance systems require definition and justification.[13]

Adaptive Governance scholars are aware of these challenges. In a 2014 review of the field essay, "A decade of adaptive governance scholarship: synthesis and future directions," Brian Chaffin and his co-authors located questions regarding democratic legitimacy at the forefront of AG's research agenda. They asked: "What is the relationship between principles of AG and principles…of legitimacy, equity, and justice?"[14] In the short time since that article was published, multiple researchers have begun to answer that question.[15] This dissertation contributes to their emerging discussion. Its unique contribution lies in the depth of its engagement with democratic philosophical literature. Article length treatments of this topic briefly establish their authors' operative definitions of democratic legitimacy and go on to assess AG in those terms. But these articles do not, to my knowledge, offer full length arguments to justify the accounts of legitimacy upon which their arguments rest. This dissertation does that.

An assessment of the relationship between AG and democratic legitimacy is likely to be of interest outside of research circles, too, more locally in the ACF Basin.

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[13] Chris Skelcher, "Jurisdictional Integrity, Polycentrism, and the Design of Democratic Governance," *Governance: An International Journal of Policy, Administration, and Institutions* 18, no. 1 (January 2005): 90.

[14] Brian Chaffin, Hannah Gosnell, and Barbara A. Cosens. "A decade of adaptive governance scholarship: synthesis and future directions" *Ecology and Society* 19, no. 3 (2014): article 56.

[15] Barbara A. Cosens, Robin K. Craig, Shana Lee Hirsch, Craig Anthony (Tony) Arnold, Melinda H. Benson, Daniel A. DeCaro, Ahjond S. Garmestani, Hannah Gosnell, J.B. Ruhl, and Edella Schlager, "The role of law in adaptive governance," *Ecology and Society* 22, no 1 (2017), and Cosens et al., "Identifying Legal, Ecological and Governance Obstacles," 2338-2356, and Robin Kundis Craig, Ahjond S. Garmestani, Craig R. Allen, Craig Anthony (Tony) Arnold, Hannah Birgé, Daniel A. DeCaro, Alexander K. Fremier, Hannah Gosnell, and Edella Schlager, "Balancing stability and flexibility in adaptive governance: an analysis of tools available in U.S. environmental law," *Ecology and Society* 22, no. 2 (2017).

Members of the ACFS have spent many long hours and private funds laying the

groundwork for the establishment of a river basin commission that exhibits AG's

institutional prescriptions. Their work addresses a longstanding water allocation

challenge in their region, mentioned above and known in local media as the "Tri-State

Water Wars."[16]

The "Tri-State Water Dispute" would be a more accurate albeit less catchy

moniker. The conflict is a non-violent political fight among Alabama, Florida, and

Georgia over the waters of the Apalachicola-Chattahoochee-Flint river. Despite the

richness of their water resources, these states have spent nearly thirty years locked in

transboundary water disputes. The states have sued each other (or proxy federal

agencies), negotiated out of court, and made and then broken interstate compacts.[17] The

conflict's latest round is underway in Supreme Court case no. 142, Florida v. Georgia.

Stakeholders across the region have found this pattern of litigation rather tiresome.[18]

Environmentalists worry that riverine ecosystems will suffer, and everyone else worries

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[16]Jessica Saunders, "Water Wars Could Grow Back to Tri-State Dispute," *Atlanta Business Chronicle*, January 23, 2017, https://www.bizjournals.com/atlanta/news/2017/01/23/two-state-water-war-could-become-tri-state-dispute.html.

[17] "Tri-State Water Wars—Background and History," Atlanta Regional Commission website, accessed July 10, 2017, http://atlantaregional.org/tri-state-water-wars-background-and-history/.

[18] Apalachicola-Chattahoochee-Flint River Stakeholders, *Sustainable Water Management Plan,* 2015, http://acfstakeholders.org/wp-content/uploads/2015/05/ACFS-Sustainable-Water-Management-Plan-For-Release.pdf, 1, 101.

about the economic uncertainty attending each new court case.[19] Over a billion dollars

hangs on the next SCOTUS ruling.[20]

So, in 2008, frustrated by the decades-long stalemate, a diverse group of

stakeholders gathered to resolve the conflict themselves.[21] The ACF Stakeholders'

(ACFS) mission was "to achieve equitable and viable [water allocation policy] solutions

among stakeholders that balance economic, ecological, and social values and ensure that

the entire ACF Basin is a sustainable resource for current and future generations."[22] Their

policy proposal named two sets of goals, one long term and one short term. In the short

term, they wanted the US Army Corps of Engineers to adjust when, where, and how

much water would be released from various dams along the Chattahoochee and

Apalachicola Rivers.[23] In the long term, they wanted the Tri-State governors and

legislators to utilize an interstate compact to create a transboundary water management

institution, i.e. a river basin commission, to adjust water allocation policies to the

changing ecological and social conditions of the river basin.[24]

The ACFS knew from the outset that their organization lacked political teeth; they

had no authority to enforce the short term or long term policy proposals they planned to

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[19] "Apalachicola-Chattahoochee-Flint River Basin tops list of America's most endangered rivers," Southern Environmental Law Center website, April 15, 2016, accessed June 10, 2017 https://www.southernenvironment.org/news-and-press/news-feed/apalachicola-chattahoochee-flint-river-basin-tops-list-of-americas-most-end

[20] Dan Chapman, "Water decision to wash over Ga. Economy," in *The Atlanta Journal-*Constitution, December 15, 2016, http://www.myajc.com/business/water-decision-wash-over-economy/P0mIp33weWqXvrkfsphSZO/.

[21] Apalachicola-Chattahoochee-Flint River Stakeholders, *Sustainable Water Management Plan*, 1.

[22] Ibid.

[23] Ibid., 4.

[24] Ibid., 6.

produce. Whatever influence they might achieve would come from offering state governments a plan too good to pass up, a plan too reasonable and popularly appealing across interest groups and boundary lines to be ignored. To garner this support, ACFS needed to build consensus among old enemies: real estate developers and environmentalists, power companies and eco-tourism companies, universities and industry associations, etc. The ACFS therefore invited these groups to become members. It drew representatives from "municipal, industrial, environmental, recreational, navigation and agricultural interests."[25] All these voices were needed to craft and then support short and long term interstate water allocation plans.

The ACFS sought consensus on a short term water allocation policy through a multi-step process. First, ACFS worked to develop the group's understanding of each party's respective interests. The group used this knowledge to develop metrics by which to assess the desirability of various policy outcomes.[26] Second, they worked to develop a shared understanding of the basin's ecological conditions. ACFS members from different states and different sectors had previously operated with piecemeal data about the basin's functioning. Now they worked to overcome these problems by commissioning the Georgia Water Resources Institute (at Georgia Tech) and private consultants Black and Veatch and Atkins, Global to gather all available data on the ACF basins' ecological, hydrological and geological functioning. For these purposes, they relied heavily on extant research from the US Geological Services (USGS) and US Army Corps of Egineers (USACE).[27] Using this hydro-geo-biological data, they built ACF flow models. (They

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[25] Ibid., 9.

[26] Ibid., 12, 40.

also noted gaps in their models, and recommended other studies to be conducted.)[28] The

ACFS then distributed and discussed these models among their members, giving

stakeholders an opportunity to learn and debate the model's underlying data assumptions.

Then, ACFS plugged policy proposals into the flow models, thereby estimating what

each policy's environmental, economic, and social impacts might be, under various

weather conditions. Third, stakeholders evaluated each of these policy outcomes using

the metrics they developed at the beginning of the consensus building process. By

evaluating each policy proposal this way, stakeholders managed to identify a plan with

which all parties could live. Professional mediators played a critical role in facilitating

these discussions.[29]

 ACFS recognized that though their plan was viable in the short term it would not

be viable forever. Social conditions could change just as rapidly as ecological conditions,

and both kinds of shifts would require their water allocation strategy to be adjusted

accordingly. Hence, their policy proposal included both a short-term water allocation

formula and a long-term recommendation to create a transboundary water management

institution to facilitate the ongoing development of water allocation policies in the ACF

river basin.[30] They urged state governments to build a river basin commission capable of

"adaptive management" (a concept I shall discuss in much greater detail in Chapter

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[27] Ibid., 13.

[28] Ibid., 2, 86.

[29] Apalachicola-Chattahoochee-Flint Stakeholders, "Case Statement" June 2012, accessed June 10, 2017, http://acfstakeholders.org/wp-content/uploads/2012/10/ACFS_Case_Statement-updated_June_2012.pdf , 4, and Interview with Bradley Currey, ACF Stakeholders Governing Board member, December 22, 2015.

[30] Apalachicola-Chattahoochee-Flint River Stakeholders, *Sustainable Water Management Plan*, 4.

Two).[31] The ACFS outlined their long and short term proposals in their *Sustainable Water Management Plan* (*SWMP*) in 2015.

One might expect state governors to give the *SWMP* a rather close read. After all, its suggestions reflected the best data available. Certainly, the ACFS used less controversial data than the states themselves used in their last serious attempt to reach a non-litigated agreement.[32] Also, the stakeholders had the support of the US Army Corps of Engineers—the agency tasked with managing dams and water releases throughout the basin.[33] Furthermore, the plan reflected attention to a diverse array of concerns across the region. This is not to say the ACFS was perfectly representative. Membership and voting privileges required a $250-$2500 annual contribution.[34] Participation also required staff time and travel funds to attend meetings (held in different locations across the region or via conference call).[35] Such practical hurdles may have barred the participation of smaller organizations or persons without significant financial means. Nonetheless, ACFS operated far more democratically than the average lobbyist. It represented the needs and concerns of actors across the region rather than one particular interest group. The governors had good reasons to heed the ACFS's *Sustainable Water Management Plan*

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[31] Ibid., 3.

[32] Steven Leitman, "Apalachicola-Chattahoochee-Flint Basin: Tri-State Negotiations of a Water Allocation Formula," *in Adaptive Governance and Water Conflict: New Institutions for Collaborative Planning*, ed. John T. Scholz and Bruce Stiftel (Washington, D.C.: Resources for the Future, 2005), 84.

[33] Apalachicola-Chattahoochee-Flint River Stakeholders, *Sustainable Water Management Plan*, 9.

[34] Apalachicola-Chattahoochee-Flint Stakeholders, "Membership Requirements, ACF Stakeholders." ACF Stakeholders Website, http://acfstakeholders.org/join-us/membership-requirements/.

[35] Apalachicola-Chattahoochee-Flint Stakeholders, "ACFS Events Timeline, ACF Stakeholders," ACF Stakeholders website, http://acfstakeholders.org/events/acfs-events-and-updates/, and Apalachicola-Chattahoochee-Flint Stakeholders, "Calendar, ACF Stakeholders." ACF Stakeholders website, http://acfstakeholders.org/events/calendar/.

because it conveyed the wishes of constituents likely to be deeply impacted by water allocation policies.

Whatever they did in private, in public the Tri-State governors paid the ACFS plan very little attention. They chose instead to proceed with more litigation in the Supreme Court of the United States (except Alabama, which opted to remove itself from this round of disputes), in case no. 142, Florida v. Georgia. They did so although the Supreme Court lacks authority to create fully rational water allocation policies. The Supreme Court's authority is limited to fairly simple and static "equitable apportionment" rulings; it cannot offer water allocation policies that respond in a timely, cost effective way to ongoing changes to the region's population, precipitation, technology, or economy.[36] The SCOTUS can give the states a water allocation formula (limiting the total volume of Georgia's consumption, specifying a minimum flow rate at Florida's border, granting a certain percentage of total volume to each state, etc.), but it cannot give them a strategy for managing a dynamic river basin and social system over time.[37]

This episode hints at something seriously amiss with the procedures and institutions by which transboundary water is allocated in the Southeast. It seems strange that the regions' diverse stakeholders could work through their policy conflicts in an informed fashion when their governments—who are supposed to represent them—could not. Still, that worry needs more definition. Not everyone would agree that these activists' efforts indicate a legitimacy or prudence deficit in our current policymaking system. From one philosophical perspective, things seem fine. The governors were

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[36] Alyssa S. Lothrop, "A Tale of Three States: Equitable Apportionment of the Apalachicola-Chattahoochee-Flint River Basin," *Florida State Law Review* 36, no. 4 (Summer 2009): 879-889.

[37] Ibid., 879-889.

popularly elected. They are pursuing an interstate water allocation policy using the fully

legal means of SCOTUS litigation. Nothing in the law obliges them to uphold the

proposals of a self-selected group of stakeholders, even though this group had

collaborated with local municipalities and federal environmental regulatory agencies.

Really, no democratic legitimacy problem exists from this standpoint. On the other hand,

political philosophy often distinguishes between real and ideal conditions. Something

feels less than ideal about the fact that our political system allows governors to disregard

stakeholders' concerns so easily. Similarly, it seems odd that governors could choose to

employ a conflict-resolution mechanism (SCOTUS litigation) that hinders

environmentally prudent decision making. Democracy, after all, is supposed to ensure

rulers exercise power in more rational, less arbitrary ways than monarchical or

oligarchical forms of government.[38] From this perspective, a legitimacy problem arises

not from the governors' decisions per se, but rather from the fact that our system for

crafting interstate water allocation policies seems under-responsive *both* to the

democratically formed will of (at least an important subgroup of) the people and to

ecological realities. That, at least, would seem to be the sentiment of the stakeholders

who put so much time and money into crafting the *Sustainable Water Management Plan.*

*"*It was a profound, shared dissatisfaction with 20-plus years of fruitless negotiation,

mediation and litigation that motivated us to join in the ACF Stakeholders." [39]

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[38] John S. Dryzek and Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance*, (New York: Oxford University Press, 2012), 45-46.

[39] Apalachicola-Chattahoochee-Flint River Stakeholders, *Sustainable Water Management Plan*, 101.

Which is to say that a profound dissatisfaction with status quo political arrangements motivated their efforts to craft proposals for new political arrangements. ACFS utilized AG's institutional prescriptions to design those new arrangements, i.e. a river basin commission. Hence, an assessment of AG's value in terms of democratic legitimacy is likely to be of interest to ACFS members. An assessment of AG's contributions to or detractions from democratically legitimate policymaking could inform their future institutional reform efforts, offering guidance for further political activism.

An assessment of the democratic legitimacy of AG's institutional prescriptions may be of interest even beyond the ACFS. Americans across the political spectrum seem to share the ACFS's concern that they have too little access to the institutions that make the laws that govern them.[40] This worry extends far beyond interstate water allocation policy, but it certainly applies in these cases. Furthermore, the difficulty surrounding water allocation policymaking will likely rise in the coming years. Water conflicts will likely multiply and intensify with hikes in global temperatures and populations.[41] If these conflicts are to be resolved through politics rather than violence, we need policymaking institutions that governed populations recognize as legitimate. If AG can help us build such institutions, AG certainly deserves more attention. This dissertation evaluates whether or not that is the case.

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[40] The Associated Press-NORC Center for Public Affairs Research, "The Frustrated Public: Views of the 2016 Campaign, the Parties, and the Electoral Process," accessed June 10, 2017, http://www.apnorc.org/projects/Pages/HTML%20Reports/the-frustrated-public-americans-views-of-the-election-issue-brief.aspx.

[41] Jaroslav Tir and Douglas M Stinnett, "Weathering Climate Change: Can Institutions Mitigate International Water Conflict?," *Journal of Peace Research* 49, no. 1 (January 1, 2012): 211.

Subsequent chapters undertake that evaluation in several steps. In brief: Chapter One names and justifies my research question; Chapters Two to Four define terms within my research question; Chapter Five answers my research question.

In more detail: Chapter Two explains what kinds of institutional and procedural reforms Adaptive Governance theory calls for and argues that these reforms hold great potential to enhance the environmental prudence of interstate water allocation policymaking. That is not to say that AG theory was designed to enhance the prudence of environmental policymaking. As shall be discussed it Chapter Two, AG was designed for a more neutral purpose, namely to help policymakers respond to ecological uncertainty.[42] Nonetheless, this chapter argues that, should society desire a more environmentally prudent policymaking system, AG's guidance for the design of policymaking institutions can serve that purpose. To make this point, Chapter Two also defines in more depth what I mean by the term "environmental prudence" and explains AG theory's relationship to two other natural resource management theories, Adaptive Management (AM) and Resilience. This chapter draws on ACFS's example to show how AM and AG can work in practice. It ends with an affirmation of the potential that AG prescriptions hold for improving the environmental prudence of policymaking institutions.

Chapters Three and Four identify an account of democratic legitimacy that can be used as an evaluative standard of AG's institutional prescriptions. Chapter Three assesses two prominent political philosophies' accounts of democratic legitimacy: Political Liberalism and Communitarianism. These accounts of democratic legitimacy deserve attention because they have had profound influence on North American political

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[42] Carl Walters, *Adaptive Management of Renewable Resources* (New York: Macmillan Publishing Company, 1986), vii.

culture.[43] Four authors in particular inform (or have informed) political discourse beyond academic circles: John Rawls and Martha Nussbaum for Liberalism; Michael Walzer and Charles Taylor. Though all are successful academics, they deserve attention for their public engagement. John Rawls' work has been translated into 28 languages and is read by students of political science, law, and economics as well as philosophy.[44] Martha Nussbaum, herself a student of Rawls, worked as a research advisor at the World Institute for Development Economics Research, a United Nations think tank that is part of the United Nations University.[45] Michael Walzer has served as contributing editor at *The New Republic* and regularly authored pieces for *Dissent,* two prominent, progressive, public-facing journals. He is also Professor Emeritus at the Institute for Advanced Study.[46] Last but not least, Charles Taylor helped found Canada's New Democratic Party in the 1960's.[47] In the last decade or so, he has won the Kluge Prize, the Templeton Prize, the Kyota Prize, and the Berggruen Prize.[48]

Each of these scholars and the schools of thought they represent has had significant influence over North American publics' understanding of legitimate governance. Their theories of democracy must be addressed. Unfortunately, their

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[44] Thomas Pogge, *John Rawls: His Life and Theory of Justice* (Oxford: Oxford University Press, 2007), 3.

[45] "Marth Nussbaum," The Gifford Lectures Website, accessed July 10, 2017, http://www.giffordlectures.org/lecturers/martha-nussbaum.

[46] Jeffrey Williams, "Michael Walzer's Politics, in Theory and Practice," *The Chronicle of Higher Education*, June 3, 2012.

[47] Joshua Rothman, "How to Restore Your Faith In Democracy," *The New Yorker*, November 11, 2016, https://www.newyorker.com/culture/persons-of-interest/how-to-restore-your-faith-in-democracy.

[48] Jennifer Schussler, "Canadian Philosophy Wins $1 Million Prize," *The New York Times,* October 4, 2016, https://www.nytimes.com/2016/10/05/books/canadian-philosopher-wins-1-million-prize.html

accounts of democratic legitimacy do not give sufficient guidance for navigating, in democratically principled ways, the pragmatic challenges that arise in interstate water allocation policymaking. Hence, whatever value these accounts of democratic legitimacy may have in general, and however compelling their visions of political justice, these philosophies are not of much help in evaluating the merit of AG. They cannot tell us whether AG's solutions to pragmatic problems improve or undermine the democratic legitimacy of interstate water allocation policymaking. Chapter Three thus argues that some other account of democratic legitimacy is needed.

Chapter Four argues that the account of democratic legitimacy given by Deliberative Democracy, especially as Jürgen Habermas, Seyla Benhabib, John Dryzek, and John Parkinson articulate it, offers a more appropriate evaluative standard. This version of Deliberative Democracy enables a normative evaluation of AG's prescribed responses to the practical problems that arise in interstate water allocation. Deliberative Democracy also articulates a vision of democratic legitimacy that is morally compelling in its own right in that it offers a means to address democratic exclusions, perceived tensions between individual rights and popular sovereignty, and political problems of a transboundary nature (environmental or otherwise). Hence, Deliberative Democracy provides an appropriate standard for evaluating the democratic legitimacy of AG institutional prescriptions, especially as they would apply to a river basin commission in the ACF.

Chapter Five is my considered answer to this dissertation's question: Does Adaptive Governance theory provide appropriate guidance for addressing interstate water allocation conflicts? Which is to say: Could utilizing AG institutional prescriptions in the

design of a river basin commission give us more democratically legitimate and environmentally prudent interstate water allocation policies? My resounding answer to that question is yes.

But we should not dive into the dissertation's constructive argument just yet. First, one of its premises requires justification. This dissertation's research question assumes that the Tri-States need an interstate compact to transform their "Water Wars" into more productive forms of conflict and cooperation. The rest of this chapter explains that assumption, in two broad moves. First, it discusses the conflicts that are the subject matter of interstate water allocation policy-making. Second, it discusses the policy-making mechanisms—Congressional allocation, SCOTUS litigation, and interstate compacts—currently available in the USA for working through these conflicts. Along the way, it traces how state and federal governments have recently chosen to employ these procedures in the ACF case. This discussion demonstrates why political leaders at several levels—in addition to ACFS activists—agree that the Tri-States need an interstate compact.

Conflicts Attending Interstate Water Allocation Policymaking

Democratic policymaking usually involves conflict, and interstate water allocation policymaking is no exception. Quite the opposite. As Mark Twain allegedly quipped, "Whiskey is for drinking. Water is for fighting over." This section demonstrates why interstate water allocation is such a contentious policy subject by outlining its various conflict triggers.

These triggers fall into two broad categories. First, there are *drivers of water allocation conflict in general*. This section discusses social, physical, biological, and

moral dynamics at stake in water allocation. On the basis of these dynamics, this section

argues that vulnerability combined with material and moral uncertainty besets all water

policy decisions. Thus, conflict almost inevitably attends water allocation policymaking.

Second, there are *drivers of transboundary water conflicts.* When rivers cross or

constitute political boundaries, water allocation policies become even more contentious.

This section discusses three common causes of interstate water allocation conflict:

sovereignty concerns, power asymmetries, and capacity asymmetries.

Drivers of Water Allocation Conflicts in General

Water allocation policy—transboundary or not—tends to raise people's hackles.[49]

Material uncertainty and moral pluralism both amplify the primary driver of water-policy

conflict: the fact that society and nature need water for a wide array of respectable uses,

and those respectable uses often compete. To name but a few: farmers need water to

irrigate; hydroelectric power plants need water to turn their turbines; municipalities need

water to drink; Baptists need water for religious rituals; and fish, wildlife, forests, and

wetlands need water to sustain their habitats. Because users all depend on the same

natural resource, they are all vulnerable to each other's choices.

To explain this vulnerability, natural resource scholars often employ Nobel

Laureate political scientist Elinor Ostrom's theory of common pool resources (CPRs).

Ostrom defines CPRs as goods or services that are both "subtractable" and "non-

excludable."[50] Natural resources are "subtractable" if one use reduces the resource's

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[49] Apalachicola-Chattahoochee-Flint River Stakeholders, *Sustainable Water Management Plan*, 91.

[50] Elinor Ostrom, "Beyond Market and States: Polycentric Governance in Complex Economic Systems," (prize lecture, Nobel Prize in Economic Sciences, Aula Magna, Stockholm University, December 8, 2009) 412-413, http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2009/ostrom_lecture.pdf.

availability for all other users. For example, every gallon of water drawn from a river to irrigate crops reduces the volume of water available for use by fish, municipalities, shipping companies, other irrigators, etc. (Not all uses permanently subtract water from a river, but many do. See discussion below.) Resources are "non-excludable" if controlling users' access is difficult. River water has grown easier and easier to access, and therefore less and less excludable, as water-pumping technology has advanced and water-pumping costs have dropped. Centuries ago, farmers had to use canals, which require significant labor to build and maintain, to move water from the river to their fields. These labor costs prevented many farmers from accessing the water in the first place or accessing as much of it. Combined, extractability and non-excludability render CPRs vulnerable to overuse.

"Tragedies of the commons" showcase extreme, but unfortunately frequent, outcomes of overuse.[51] Tragedies of the commons occur when resource-users fail to limit and coordinate their consumption patterns. Unfettered use overtaxes the ecosystem that generates the natural resource. Stressed to the point that it cannot regenerate itself, the ecosystem collapses, depriving all users of any benefits. In forests, a tragedy of the commons may occur when so many trees are harvested that soil erodes, leaving seedlings and saplings without the nutrients required to survive and reproduce the next generation of timber. In lakes, a tragedy of the commons may occur when users pump out too much water to irrigate surrounding fields. Water levels drop and water temperatures rise. Meanwhile, the lake also receives phosphorus and nitrogen run-off from surrounding fields irrigated by its water. Less water, warmth, and higher phosphorous concentrations

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[51] John M. Anderies and Marco A. Janssen, *Sustaining the Commons,* (Tempe, AZ: Center for the Study of Institutional Diversity, University of Arizona: 2013), v.

combine to increase algal blooms on the lake's surface, rendering water unsafe for all

users' drinking or irrigation.[52]

In rivers, the danger of overuse and resource collapse depends on *how* the water is

used, not just *how much* water is used. An important distinction lies between those uses

that withdraw water from the river (e.g. household use) and those uses that do not

withdraw (e.g. fishing). This distinction is relatively easy to grasp. A more confusing

distinction lies between water uses that consume and do not consume. Consumptive uses

withdraw water *and* remove it from fresh water supply.[53] Irrigation consumes a

tremendous amount of water via evaporation and evapotranspiration (water lost through

plants' pores).[54] The water does not cease to exist, but it moves through the atmosphere

to somewhere else. This water is functionally lost to the local ecosystem. By contrast,

while hydroelectric power plants withdraw an enormous amount of water, they consume

relatively little.[55] Hydroelectric plants return most of the water to the river after it flows

past their turbines. So long as returned water is not chemically contaminated, oxygen

depleted, or too hot, this use counts as non-consumptive; the water remains useful to the

ecosystem and the society surrounding it. [56] Non-consumptive uses still compete with

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[52] "Irrigating with Blue Green Algae Affected Water," Department of Primary Industries, New South Wales Government, May 2017, July 10, 2017, http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0017/451106/Irrigating-with-blue-green-algae-affected-water.pdf, 1-4.

[53] Cambridge Energy Research Associates, *Thirsty Energy: Water and Energy in the 21st Century,* (Geneva, Switzerland: World Economic Forum, 2009), 13.

[54] "Irrigation & Water Use," United States Department of Agriculture, Economic Research Service, April 28, 2017, accessed July 17, 2017, https://www.ers.usda.gov/topics/farm-practices-management/irrigation-water-use.aspx.

[55] Cambridge Energy Research Associates, *Thirsty Energy: Water and Energy in the 21st Century*, 13.

other uses, however, especially ecological uses. To stick with the hydroelectric example, dams inhibit some fish species from reproducing. Dams block fishes' upstream journey to their home spawning beds. Dams also kill a lot of the eggs that fish manage to lay by sucking the eggs through machinery or washing them downstream away from slow-flowing waters where the eggs can gestate.[57] Hence "overuse" of the river for one purpose can cause a tragedy of the commons for another purpose. "Overuse" of a river is a more complicated matter than overuse of grazing field or timber forest, since multiple goods are at stake, but a similar logic applies: unfettered use of a system reduces or destroys a system's capacity to restore itself and provide useful services (broadly defined) to humans.

Crafting water policies that balance various needs and prevent overuse is difficult in part because water supply is itself uncertain. The quantity of available groundwater (amount of water in soil and in aquifers) is difficult to measure, and rainfall and snowmelt vary from year to year. Furthermore, the International Panel on Climate Change expects that shifts in the water cycle will accompany a rise in global temperatures. Some places will receive more precipitation, others will receive less. Glaciers will store less water. Rising sea levels may cause saltwater encroachment in

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[56] For more information on consumptive v. non-consumptive water uses, see Paul Reig, "What's the Difference Between Water Use and Water Consumption?," Water Resources Institute, March 12, 2013, http://www.wri.org/blog/2013/03/what%E2%80%99s-difference-between-water-use-and-water-consumption

[57] National Marine Fisheries Service, "Multitasking the Nation's Rivers," *National Oceanic and Atmospheric Association*, accessed July 10, 2017, http://www.habitat.noaa.gov/protection/hydro/bakerlakess.html.

fresh water aquifers. The nature and intensity of these changes in water supply will vary from place to place, increasing policymakers' uncertainty.[58]

Hydrological uncertainty contributes to biological uncertainty (which further heightens the challenge of balancing water use needs in policy decisions). Living systems develop around water. Changes in water supply—geologically or anthropogenically driven—impact living systems' behaviors and relationship patterns, but not in entirely predictable ways. Unlike machines which are "complicated"—consisting of many parts which interact in consistent, determinative ways—natural systems are "complex"—consisting of many parts which exhibit a degree of spontaneity, influencing each other in familiar and surprising ways.[59] Humans do not even know what all of nature's parts and pieces are. We surely cannot predict with complete certainty how a natural system's parts and pieces *plus* their patterns of interaction will change in response to hydrological shifts. Humans cannot entirely foresee the ecological outcomes of their water policies; we can only make better or less informed guesses.[60]

All this uncertainty can cause acrimony between environmental advocates and economic development interests. Environmental advocates tend to stress the importance of precautionary principle. [61] They argue that since human users cannot determine exactly

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[58] "Climate Change and Water," IPCC Technical Paper VI (Geneva, Switzerland: International Panel on Climate Change, 2008), 3, 43.

[59] Brian Walker and David Salt, *Resilience Practice: Building Capacity to Absorb Disturbance and Maintain Function* (Washington: Island Press, 2012), 5.

[60] Walker and Salt, *Resilience Practice,* 4-18.

[61] For further discussion on the precautionary principle, see Sandra Postel, "The Missing Piece: A Water Ethic," *Water Ethics: Foundational Readings for Students and Professionals,* ed. Peter G. Brown and Jeremy J. Schmidt (Washington: Island Press, 2010), 224.

how much water stress an ecosystem can bear without serious harm, policymakers ought to minimize ecosystem disturbance. Dams, reservoirs, and other water infrastructure projects should be undertaken with great caution or not at all. Groups oriented toward economic development may see this approach as paranoid. In their view, the known good of economic development outweighs the unknown and often unknowable risk of environmental damage.

The example of environmentalists' and economic developers' disagreement over the precautionary principle flags a common problem in water policymaking—that moral pluralism attends material uncertainty. The following paragraphs discuss three common ways people value water: as an economic good, as a human right, and as "Life's Common Wealth."[62] This list is by no means comprehensive, but it does name important centers of moral gravity in water policy debates.

Many people value water instrumentally, as a means to profit. This valuation makes a great deal of sense since water sustains many businesses, from beverage bottlers to paper manufacturers to golf courses. Even if these businesses do not purchase the water upon which their operations rely, they still understand water's dollar value. For instance, lakeside restaurants and hotels know that tourists do not like muddy lakes.[63] A municipality's or a regulatory agency's decision to drain water from the lake may cost a restaurant owner thousands or tens of thousands of dollars annually, even if her water bill

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[62] The phrase "Life's Common Wealth" comes from the title of Part 5 of *Water Ethics: Foundational Readings for Students and Professionals,* ed. Peter G. Brown and Jeremy J. Schmidt (Washington: Island Press, 2010), 197. Brown goes on to define what he means by that term in his chapter of that section, "Are There Any Natural Resources?," 203-220.

[63] Bleakley Advisory Group, Inc., Bruce Seaman, and PBS&J, Inc., "Lake Sidney Lanier Economic Impact Analysis," (1071 Coalition, December 2010), 67-79.

does not increase at all.[64] Therefore, when nature's rhythms do not supply the steady

flows businesses rely upon, many business owners are willing to pay top dollar for water,

just as other businesses (trucking companies for instance) pay high prices for petroleum

when political conditions inflate its cost. Water markets exist to meet this demand.[65] And

businesses are not the only buyers. Many western cities rely on water markets. San Diego

purchases and imports about 80 percent of its municipal supply.[66] Even for those who

wish to affirm that water's value exceeds its economic utility, it is hard to disagree that

water does and often must function as a commodity with economic value.

On the other hand, the moral valuation of water as a human right gained

significant support in recent years. In 2010, the UN General Assembly recognized "the

right to safe and clean drinking water and sanitation as a human right that is essential for

the full enjoyment of life and all human rights."[67] This resolution was signed a decade

after UN agencies and signatory nations undertook Millennium Development Goals

(MDG) Target 10, to halve the global population without access to clean water.[68]

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[64] ACF Stakeholders, *Sustainable Water Management Plan,* 41.

[65] A water market is a general term for a collection of trade mechanisms used to redistribute water rights. Such mechanisms include selling one's water rights permanently, wholesale, the way one might sell a piece of land, leasing water rights for a particular amount of time, charging fees to store water in an aquifer or reservoir, etc. Private and public entities use these mechanisms to acquire water rights, either for profit or for the public's benefit.

[66] FAQ and Key Facts, San Diego County Water Authority, 2016, http://www.sdcwa.org/frequently-asked-questions-and-key-facts#t7n116. Last accessed June 12, 2017.

[67] United Nations General Assembly, Resolution 64/292, "The human right to water and sanitation," 2010, http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E, 3.

[68] United Nations Office to support the International Decade for Action 'Water for life' (2005-2015), *A 10 Year Story: The Water for Life Decade 2005-2015 and Beyond*, 2015, accessed February 15, 2016, http://www.unwaterbestpractices.org/WaterforLifeENG.pdf, 4.

By the Millennium Development Goals' twilight in 2015, enactors of Target 10—

UNICEF, WHO, partner nations and other NGO's—had come to recognize an integral

relationship between ecosystem health and human water security. The UN Report, "A 10

Year Story—The Water for Life Decade 2005-2015 and Beyond" observed that

> Ecosystems also play a key role in regulating the availability of water and its
> quality. We have now improved awareness of how ecosystem management can
> contribute to sustainable water….We now know how in many places, changes in
> the global water cycle, caused largely by human pressures, are seriously affecting
> ecosystem health and human well-being. The increasing prominence of water in
> the global dialogue has meant an increased awareness of how healthy ecosystems
> can bring concrete benefits to the people. In the discussions on the post 2015
> agenda the water community is providing evidence on how crucial is the
> transition to an economy that not only improves human well-being and lessens
> inequality but also reduces environmental risks, ecological scarcities and brings
> ecosystems in as solutions for water security.[69]

The Sustainable Development Goals, the successors of the MDGs, also reflect this

ecosystemic awareness. However, ecosystemic awareness does not fundamentally change

the UN General Assembly's moral claim; water is still a *human* right. Clean water supply

depends on a healthy ecosystem, but non-human creatures and systems are not thereby

granted moral standing.

Less anthropocentric valuations of water abound, too. Environmental economist

Peter G. Brown's valuation of water as "life's common wealth" demonstrates a moral

logic common to more eco-centric thinking.[70] According to his view, all life deserves

reverence, all life depends upon water, and therefore all life has a moral claim to water.

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[69] UN Office to support the International Decade for Action 'Water for Life,' "A 10 Year Story," 36.

[70] Brown, "Are There Any Natural Resources?," 203-220.

Humans ought to treat water and watersheds carefully not just because human health

depends on them but because other life forms depend on them, too.

People who hold such eco-centric positions justify respect for non-human life in

various ways. On the secular end of the spectrum, Brown's reverence derives from

wonder at the evolutionary process. Through evolution, biodiverse systems overcome the

law of entropy, creating complex order despite matter's tendency towards chaos.[71] This

mundane miracle provokes wonder enough in Brown to justify the protection of

biodiverse organisms' water supplies. On the religious end of the spectrum, Pope Francis

preaches reverence for all life because it expresses God's nature: "[E]ach creature has its

own purpose. None is superfluous… The Canadian bishops rightly pointed out that no

creature is excluded from this manifestation of God: 'From panoramic vistas to the tiniest

living form, nature is a constant source of wonder and awe. It is also a continuing

revelation of the divine.'"[72]

In practice, these three styles of moral valuation sometimes complement and

sometimes compete with one another. For instance, conservation pricing satisfies

advocates of water as an economic resource and advocates of water as "life's common

wealth." Conservation pricing uses higher water utility rates to decrease water use; it

assumes people take shorter showers when water is expensive. This strategy works

beautifully, padding municipalities' budgets and protecting instream flows in one fell

swoop.[73] On the other hand, advocates of water as a human right may be significantly

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[71] Ibid., 217.

[72] Pope Francis, "*Laudato Si*," Encyclical On Care for Our Common Home, Vatican Website, May 24, 2015, http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents /hf_ben-xvi_enc_20090629_caritas-in- veritate_en.html, Sec. 84-85.

less impressed by conservation pricing. This conservation strategy raises the price of water for everyone, but it disproportionately impacts the poor for whom the water bill represents a much higher percentage of their income.

Thus, moral disagreement regarding water's value accompany techno-, hydro-, and ecological uncertainty regarding water policy. Both dynamics compound the fundamental reason for water allocation conflicts—that human and non-human users need water for diverse, often competing purposes. Such uncertainty and vulnerability make conflict over water allocation policies nearly inevitable.

Drivers of Transboundary Water Allocation Conflicts

The contentiousness of water allocation goes from bad to worse as water crosses political boundaries. Reasons for tension abound. Key reasons include: states' concern over the erosion of their sovereignty; power asymmetries; and capacity asymmetries.

States' concerns over sovereignty often drive the moral claims states make about water rights, though not always in obvious ways. Two seemingly opposite water rights claims both demonstrate this point: "the doctrine of absolute sovereignty" and "the doctrine of absolute river integrity." [74] The doctrine of absolute sovereignty argues that a state has total authority to use the water within its territory however it sees fit. This doctrine implies, for example, that if an upstream state wished to pump a river dry to support agriculture, it would have every right to do so, as long as it did not place pumps

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[73] Kristina Donnellly and Juliet Christian-Smith, "An Overview of the 'New Normal' and Water Rate Basics," The Pacific Institute, June 6, 2013, accessed April 15, 2016, http://pacinst.org/publication/water-rates-series/, 11-12.

[74] Aaron T. Wolf, "International Water Agreements: Implications for the ACT and the ACF," *Interstate Water Allocation in Alabama, Florida and Georgia: New Issues, New Methods, New Models*, ed. Jeffrey L. Jordan, Aaron T. Wolf (Gainesville: University of Florida Press:, 2006), 131.

outside its own territory. This right would hold even if the downstream state relied on traditional forms of irrigation for agriculture or on ecotourism surrounding the river. Upstream states, of course, are more likely to invoke this doctrine than downstream states. In the ACF dispute, Georgia previously invoked the "Harmon Doctrine" (a version of the absolute sovereignty doctrine), claiming that the state on which rain falls owns that water (i.e. mostly Georgia).[75] The doctrine of absolute river integrity follows a quite different logic; it treats water not as a property, which states may dispose of as they wish, but as a vital component of a hydro- and biological system. It argues that a river's ecological functions and character must be maintained even if that effort creates economic burdens. Downstream states are more likely to invoke some version of this doctrine, though they usually also want their own economic needs considered.[76] Florida's arguments in the ACF case exhibit this logic. In their latest round of failed compact negotiations, Florida wanted Georgia to reduce and cap its use, leaving the rest of the water available for ecosystem services (but also for Florida's agricultural use).[77] On the surface, Georgia' and Florida's claims seem to rest on contradictory justifications. However, the driving motivation of both kinds of claims is exactly the same: the maintenance of state sovereignty. Both Georgia and Florida seem to be telling each other 'figure out how much you need, and we'll make sure you get it. Leave the rest to us (and Alabama). We'll figure out how to manage our water *without consulting any other*

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[75] Aaron T. Wolf, "International Water Agreements," 149.

[76] Ibid.

[77] "A Complaint for Equitable Apportionment and Injunctive Relief, Florida v. Georgia, No. 142, Supreme Court of the United States" Special Master's Website, November 3, 2014, accessed July 10, 2017, http://www.pierceatwood.com/florida-v-georgia-no-142-original, 21.

states.'[78] States seem bound and determined to maintain their policymaking authority within their own territory, with as little interference from other actors as possible.

A state's ability to maintain its sovereignty, i.e. to avoid cooperation, often depends on power asymmetries. Power asymmetries come in a number of forms. Geography provides upstream states a natural, strategic advantage; the water comes to them first. Geographic power asymmetries may be exacerbated or ameliorated by each state's economic power asymmetries. Plentiful funds enable states to build more effective water infrastructure. This infrastructure, in turn, enables upstream states to withdraw and store more water, via powerful pump systems and large reservoirs. Yet, wealth and infrastructure can also supply downstream states with bargaining chips. If, for instance, a wealthy downstream state can afford a hydroelectric dam and a poorer upstream state cannot, the downstream state can swap power for water with its upstream neighbor.[79]

Even if states wish to cooperate across boundaries, capacity asymmetries create roadblocks. Capacities of particular importance are state natural resource management agencies' technical and administrative capacities. Technical capacities include any quantitative/qualitative research and analysis skills required to assess the hydrological, ecological, and technological functioning of a watershed or technological skills necessary to implement policies. Administrative capacities include management, communication, legal interpretation and any other task necessary to organize human labor. The primary difference between political asymmetries and capacity asymmetries is that the former

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[78] Jeffrey L. Jordan, "Conflict Comes to the Humid East: The Tri-state Water Wars," *Interstate Water Allocation in Alabama, Florida and Georgia: New Issues, New Methods, New Models,* ed. Jeffrey L. Jordan and Aaron T. Wolf (Gainesville: University of Florida Press, 2006), 27.

[79] Aaron T. Wolf, "International Water Agreements: Implications for the ACT and ACF," 141.

refs to one state's ability to foist its agenda onto another state while the latter refers to a state's ability (or inability) to enact its own agenda, by its own agencies. The former has to do with influence; the latter has to do with competence.[80]

In the context of water allocation policymaking, a capacity asymmetry occurs when one state's water management agencies demonstrate significantly more administrative and/or technical competence than the other state's water management agencies. A comparison between Georgia's Environmental Protection Division (EPD) and Alabama's Office of Water Resources (OWR) exemplifies this dynamic. Both organizations are tasked with overseeing water withdrawals within their states, but Georgia's EPD exercises far greater competence than Alabama's OWR.

Georgia's EPD regulates water withdrawals through a permit system. Farms, industries, and municipalities each apply for their respective permits, specifying whether they wish to withdraw surface waters (streams and rivers) or ground water (aquifers), from which location, and how much.[81] The EPD reviews applications and issues or denies permits based on whether the proposed withdrawal falls within the allocation limits prescribed in both Georgia's "Comprehensive State-wide Water Management Plan" and that local basin's regional water management plan. Regional plans identify

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[80] My explanation of a "capacity asymmetry" is derived from two sources: first, from Mark Zeitoun's and Anders Jagerskog's explanation of "power asymmetry" from their essay "Confronting Power: Strategies to Support Less Powerful States" in *Getting Transboundary Water Right: Theory and Practice for Effective Cooperation* (Stockholm, Sweden: Stockholm International Water Institute, 2009) 12; and second, from the essay "Effective Cooperation on Transboundary Waters: A Practical Perspective" in the same report, especially pp. 16-19, by David Grey, Claudia Sadoff, and Genevieve Connors.

[81] State of Georgia, Environmental Protection Division, Agriculture Water Permitting Program, "Application for a Letter of Concurrence to Install an Agricultural Water Withdrawal System," 2008, https://epd.georgia.gov/sites/epd.georgia.gov/files/related_files/site_page/AG_Water_Withdrawal_Application_2008.pdf.

roughly how much water the region has and how the region will distribute it. Withdrawal limits specified in the plans reflect, on the one hand, Georgia EPD's environmental assessments of the water source's historic route and volume under wet and dry year conditions and the water source's assimilative capacity (its ability to dilute pollutants to a safe level). On the other hand, these limits reflect the economic development goals, social values and chosen water management strategies of each intra-state regional water planning council.[82]

In issuing permits, Georgia's EPD exercises significant technical and administrative capacity. This process involves collecting data and creating hydrological models to assess current conditions of the state's water resources and estimate how new withdrawals will affect these conditions, both in terms of water quantity and water quality (technical capacity). The EPD uses these data and its own legal expertise to interpret and implement statewide and regional law (administrative capacity).

By stark contrast, Alabama's Office of Water Resources hardly regulates water withdrawal at all. It implements the Water Use Reporting Program, which requires users to report but not to limit their water withdrawals.[83] The reporting program requires very little of water users. It asks them to fill out a form stating quantity and location of withdrawals and to "briefly explain how the water withdrawal…does not interfere with any presently known existing legal use of the water."[84] Explanations can be brief because

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[82] Georgia Water Council, "Georgia Comprehensive State-Wide Management Plan" June 2, 2008, http://www.georgiawatercouncil.org/Files_PDF/water_plan_20080109.pdf, 13-14, 35-38.

[83] "Water Development," Alabama Department of Economic and Community Affairs Website, http://adeca.alabama.gov/Divisions/owr/Pages/WaterManagement.aspx#Program,

[84] Alabama Department of Economic and Community Affairs, Office of Water Resources, "Declaration of Beneficial Use," May 1, 2002, accessed June 14, 2017, http://adeca.alabama.gov/Divisions/owr/Documents/Water%20MGMT/Supplemental/dbu-sw.pdf.

it would be difficult for one water user to assess whether her withdrawal hinders someone

else's. Even OWR has insufficient data on historic river volumes to show whose

withdrawals impact downstream users and how they do so.[85] For their small trouble,

applicants receive a more-or-less meaningless "Certificate of Use." According to the

Alabama Water Agencies Working Group's report to then Governor Bentley, this

document holds little authority: "The [Certificate of Use] neither modifies nor confers

any…legal rights to the…water."[86] This includes users' right to access the water under

drought conditions.[87]

The Office of Water Resources lacks administrative capacity to do anything other

than compile water withdrawal data. It also lacks technical capacity to study watersheds

and assess environmental stresses. This capacity asymmetry between the two departments

would make interstate water management difficult, even if Georgia did not wish to

protect its sovereignty and exploit its geographic and economic advantages.

In sum, numerous drivers of conflict beset water allocation policymaking. General

drivers of these conflicts include: multiple, competing water uses; biological, geological,

hydrological, and technological uncertainty; and moral diversity. Transboundary drivers

of conflicts include: states' desire to protect their own sovereignty; power asymmetries;

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[85]Alabama Water Agencies Working Group, "Water Management Issues in Alabama, A Report to the Honorable Robert Bentley, Governor of Alabama" 2012, accessed June 14, 2017, www.adem.state.al.us/programs/water/waterforms/WaterIssueReport.pdf., 13.

[86] Alabama Water Agencies Working Group, "Water Management Issues in Alabama," 16.

[87] Ibid., 10-11. For information on Alabama's ongoing efforts to correct these challenges, see Alabama Water Agencies Working Group, "Mapping the Future of Alabama Water Resources Management: Policy Options and Recommendations, A Report to the Honorable Robert Bentley, Governor of Alabama," December 1, 2013, http://adeca.alabama.gov/Divisions/owr/awawg/pages/default.aspx.
See also Katherine Baer and April Ingle, "Protecting and Restoring Flows in Our Southeastern Rivers: A Synthesis of State Policies for Water Security and Sustainability" River Network, 2016, http://www.rivernetwork.org/wp-content/uploads/2017/01/River-Network-Protecting-Restoring-Flows-in-SE-Rivers.pdf.

and capacity asymmetries. Hence, water allocation policymaking will always be contentious work. The next section explores the options US law provides for working through interstate water allocation policy conflicts.

Legal Mechanisms for Developing Interstate Water Allocation Policies

US states and the federal government have three options for working through conflicts and developing interstate water allocation policies: congressional allocation, interstate compacts, and judicial allocation. Each of these options operates through four constitutive parts: 1) a law or group of laws, such as the Articles of the Constitution and others statutes or Supreme Court precedents; 2) which instruct particular political institutions, such as Congress, the Supreme Court, or state governors; 3) to undertake certain decision-making procedures, such as voting on bills, hearing cases, or holding negotiations; 4) in order to address a specific kind of problem, in this case, water allocation conflict. This section will discuss how each of these procedures has been employed (or, intentionally not employed) in the ACF case.

The first, and rarest, of interstate water allocation procedures is congressional allocation; it has only been used in two cases.[88] A congressional allocation occurs when Congress passes a federal statute defining how water will be divided among two or more states. These statutes generally use allocation formulas to define how much water belongs to which government (state, federal, or tribal). In addition, Congress may grant federal agents authority to allocate water among states in particularly dry years, when it is not

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[88] Robert Haskell Abrams, "Interstate Water Allocation: A Contemporary Primer for Eastern States," *University of Arkansas, Little Rock Law Review* 25, no. 1 (2002): 158.

possible to grant all parties their normal water allotment.[89] Technically, Congress could pass such a statue without states' approval, but this possibility has never been tested historically. [90] In fact, Congress has invoked this allocation privilege only at the end of lengthy water negotiations among states and tribes. Furthermore, it has done so only in cases involving either the federal government's own water rights or tribal rights (which the federal government is responsible to protect). [91]

Congress's authority to allocate interstate waters derives from the Constitution's Commerce Clause, which empowers Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"[92] The Commerce Clause pertains to water allocation policies because water supply not only affects states' ability to ship goods, it also affects states' ability to grow and/or manufacture goods in the first place.[93]

Congress almost never exercises its authority to allocate interstate waters.[94] It explicitly demurred from doing so in the ACF case in the Water Resources Development Act of 2014.

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[89] Joseph Dellapenna, "The Law, Interstate Compacts, and the Southeastern Water Conflict," in *Interstate Water Allocation in Alabama, Florida and Georgia: New Issues, New Methods, New Models* (Gainesville: University of Florida Press, 2006), 54.

[90] Robert Haskell Abrams, "Interstate Water Allocation: A Contemporary Primer for Eastern States," 158

[91] "Arizona v. California," United States Department of Justice, Environment and Natural Resources Division website, May 15, 2015, last accessed July 10, 2017, https://www.justice.gov/enrd/arizona-v-california.

[87] U.S. Constitution Article I, Section 8, Clause 2.

[88] Robert B. Percival, Christopher H. Schroeder, Alan S. Miller, and James P. Leape, *Environmental Regulation, Sixth Edition* (Chicago: Aspen Publishers, 2009), 607-609.

[94] Dan Seligman, *"Laws of the Rivers": The Legal Regimes of Major Interstate River Systems in the United States* (Las Vegas: Colorado River Commission of Nevada, October 2006), 27. As of 2006, Congress had only exercised this authority twice. Or once, depending on whether or not one agrees with the

>The Committees of jurisdiction are very concerned about…the Apalachicola-Chattahoochee-Flint River System….[T]his ongoing water resources dispute raises serious concerns…[Nevertheless,] water disputes of this nature are more properly addressed through interstate water agreements that take into consideration the concerns of all affected States including impacts to other authorized uses of the projects, water supply for communities and major cities in the region, water quality, freshwater flows to communities, rivers, lakes, estuaries, and bays located downstream of projects, agricultural uses, economic development, and other appropriate concerns. To that end, the Committees of jurisdiction strongly urge the Governors of the affected States to reach agreement on an interstate water compact as soon as possible, and we pledge our commitment to work with the affected States to ensure prompt consideration and approval of any such agreement. Absent such action, the Committees of jurisdiction should consider appropriate legislation to address these matters.[95]

In sum, Congress recognizes the complexities besetting water allocation controversies; it knows all cases exhibit locally unique features. State officials perceive these details more clearly than federal legislators. Hence, Congress will only intervene if conflicts cannot be resolved otherwise. Congress strongly prefers to leave such matters up to the states themselves, via the second procedural option of interstate compacts.[96]

Congress is wise to avoid entanglement in interstate water allocation if at all possible. For not only does water allocation policymaking respond to complex local conditions, local conditions can change rapidly and unexpectedly. Congress moves too slowly to respond to those changes. Bills must be sent back and forth between various committees, subcommittees, the floors of the House and Senate, and finally to the

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Supreme Court's judgment in Arizona v. California 373 U.S. 546 (1963) that Congress intended to create a comprehensive water allocation plan via the Boulder Canyon Project Act of 1928.

[95] Water Resources Reform and Development Act of 2014, Public Law No:113-121, accessed April 15, 2016, https://www.gpo.gov/fdsys/pkg/BILLS-113hr3080enr/pdf/BILLS-113hr3080enr.pdf, 67.

[96] Joseph Dellapenna, "The Law, Interstate Compacts, and the Southeastern Water Compact," 71.

President.[97] This is why Congress cannot, and knows it cannot, craft interstate water allocation policies quickly enough to respond to changing conditions.

The second procedural option for interstate water allocation policymaking is the interstate compact. The US Constitution's Compact Clause authorizes states to enter into a binding "Agreement or Compact" with each other, provided Congress ratifies it.[98] The process of crafting a compact closely resembles that of crafting a contract. Each party can negotiate for whatever terms it prefers, so long as those terms do not violate some other law. The contract itself becomes a federal statute after both states' legislatures and Congress have approved it.[99] Congress seems quite willing to give its blessing to an ACF compact: "we pledge our commitment to work with the affected States to ensure prompt consideration and approval of any such agreement."[100]

Because compacts reflect the interests and administrative styles of their member states, they differ markedly from each other. In Western States, water compacts often rely on a mathematical allocation formula. These formulas employ various criteria: minimum flow rates at check points, percentages of total reservoir volume, reservoir storage limits, etc.[101] This method of allocation requires very little ongoing cooperation among signatory

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[97] As Barbara Sinclair points out in *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress, Fifth Ed.* (Washington, D.C.: CQ Press, 2016), this process has only grown more complicated over the last twenty years.

[98] George A. Gould and Douglas L. Grant, *Cases and Materials on Water Law,* 464.

[99] Dellapenna, "The Law, Interstate Compacts and the Southeastern Water Conflict," 54-55.

[100] Water Resources Reform and Development Act of 2014, 67.

[101] Shannon T. Peterson and Rose Wallick, "Water Allocation during Scarcity: Reservoir Modeling and Drought Protection in the ACT Basin," in *Interstate Water Allocation in Alabama, Florida and Georgia: New Issues, New Methods, New Models* (University Press of Florida: FL, 2006), 203-204.

states so long as both states observe the requirements of the compact.[102] The states enjoy

discretion within their own boundaries to permit water withdrawals in accordance with

local laws. Eastern state compacts take a quite different approach.[103] Their compacts tend

to address ongoing river basin management issues—planning for droughts, population

growth, hydrological infrastructure, and environmental concerns—rather than simply

dividing volumes of water.[104] To accomplish these tasks, eastern compacts sometimes

create interstate river basin commissions. These commissions vary in terms of power.

Some exercise only "soft" powers like information sharing and policy advice. Other

compacts authorize river basin commissions to make and enforce binding laws regarding

water allocation, dam building, etc.[105] River basin commissions also vary with regard to

the parties involved. Most include only the states sharing a river, but others hold a seat

for the federal government, either as an advisory member or voting member.[106] Some

commissions also includes non-governmental actors.[107] A variety of membership

arrangements are possible. Lastly, river basin commissions' internal conflict resolution

methods vary; they may employ mediation, arbitration, or ad hoc approaches.[108] Interstate

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[102] Dellapenna, "The Law Interstate Compacts and the Southeastern Water Compact," 58.

[103] Ibid., 61.

[104] Robin Craig, Robert Adler, Noah Hall, *Water Law* (St. Paul, MN: Foundation Press 2017), 182-3.

[105] Dan Seligman,*"Laws of the Rivers,"* 20, 208.

[106] Dellapenna, "The Law Interstate Compacts and the Southeastern Water Compact," 61.

[107] Laurie Fowler, Katie Sheehan, and Shannon Bonnie, "Options for Transboundary Governance to Promote Sustainable and Adaptive Water Management in the Apalachicola-Chattahoochee-Flint Basin" (The ACFS University Collaborative), accessed July 10, 2017, http://acfstakeholders.org/wp-content/uploads/2015/07/Phase_4_TUC_Institutional_Options_2015.pdf., 16.

[108] Zimmerman, *Interstate Water Compacts,* 109.

compacts thus provide states a great deal of leeway—substantively and procedurally—for addressing their water allocation conflicts.

In sum, interstate compacts enable states to address the changing conditions and dynamic conflicts that beset water allocation by empowering states to create new policymaking institutions, i.e. interstate basin commissions. Rather than setting a static formula, these commissions can adjust policies as basin conditions change. The AG prescriptions suggest how river basin commissions could be organized so as to accomplish this goal more effectively; one could say that the AG exists to enhance policymaking institution's adaptive capacity. Chapter Two explores this subject in more depth. For now, suffice it to say that AG's institutional prescriptions align well with congressional and, as we shall see, judicial judgments that interstate compacts are the best mechanism to address interstate water allocation conflicts.

Unfortunately, states are not always willing or able to utilize interstate compacts to address their water allocation conflicts. States with congressional allocations may butt heads over how their statute should be interpreted. States in an interstate compact may find fault with its partner state's fulfillment of mutually recognized contractual obligations. Or states may struggle without a congressional allocation and without an acceptable compact. For these situations, the Supreme Court provides states a third policymaking option.

The ACF case illustrates this last possibility. Congress has passed no allocation statutes over the conflict's history. For a brief period, it seemed the states had worked through their disagreements themselves. In 1997, all three state legislatures approved an interstate compact, establishing an interstate river basin commission and tasking that

commission with the creation and regular amendment of a water allocation formula (a

hybrid model of eastern and western approaches to water compacts). The compact

stipulated that it would automatically dissolve if the basin commission did not produce a

water formula within thirteen months of the compact's start date.[109] Unfortunately, the

commission failed to name a water allocation formula in the allotted time. After years of

deadline extensions, ad hoc meetings, and mediation sessions, the compact was dissolved

in 2003.[110] The causes of the ACF conflict (tensions among metropolitan Atlanta's

municipal water use, Georgia and Florida's agricultural consumption, and Floridian

oyster farmers' instream flow needs, to name but a few) remained.

When such conflicts flare up, states may employ the third procedure for resolving

their disputes: litigation in the Supreme Court of the United States. The authority of

SCOTUS to hear interstate suits rests on US Constitution Article III, Section 2, Clause 1:

"[SCOTUS's] judicial Power shall extend to all…Controversies between two or more

states."[111]This clause gives SCOTUS "original jurisdiction" over interstate disputes.[112]

Which is to say, this clause establishes SCOTUS as the first and last court to hear

interstate suits, rather than allowing SCOTUS to serve its usual function as the final court

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[109] *Apalachicola-Chattahoochee-Flint River Basin Compact*, Public Law No. 105-104, 111 Stat. (1997): 2224.

[110] "Apalachicola-Chattahoochee-Flint River System (ACF) Timeline of Action, as of July 27, 2009" Florida Department of Environmental Protection Website, accessed June 13, 2017, http://www.dep.state.fl.us/mainpage/acf/timeline.htm.

[111] U.S. Constitution, Article III, Section 2, Clause 1.

[112] Lynn A. Mandarano, Jeffrey P. Featherstone, and Kurt Paulsen, "Institutions for Interstate Water Resources Management," *Journal of the American Water Resources Association* 44, no. 1 (February 2008): 137.

of appeals. The Judiciary Act of 1789 strengthened SCOTUS's authority to resolve

interstate disputes; it granted SCOTUS both original *and* exclusive jurisdiction.[113]

To exercise its jurisdiction, SCOTUS relies heavily on the expertise of a "special

master."[114] Unlike the Justices themselves, the special master usually specializes in water

law.[115] She is therefore better equipped to gather evidence from expert witnesses

(hydrologists, ecologists, economic developers, advocacy groups, etc.) and to highlight

pertinent statutes and case law precedents. After gathering and analyzing these data, the

special master provides a report to the parties of the lawsuit and the court. The report

often recommends that parties re-open negotiations with each other. Sometimes they do

so. Other times, states again plead for SCOTUS to hear and judge their case. If SCOTUS

accepts these pleas, it hears fresh arguments from both party states, but it also relies

heavily on the Special Master's report.[116]

Despite having jurisdiction over these cases, SCOTUS hesitates to add interstate

water disputes to its docket. The Court's judgment of *Colorado v. Kansas (1943)*

explains this reluctance:

> The reason for judicial caution in adjudicating the relative rights of states in
> [water allocation] cases is that, while we have jurisdiction of such disputes, they
> involve the interests of *quasi-sovereigns*, present complicated and delicate
> questions, and, due to the possibility of future change of conditions, necessitate

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[113] *The Judiciary Act*, Yale Law School Lillian Goldman Law Library, The Avalon Project, accessed June 13, 2017, http://avalon.law.yale.edu/18th_century/judiciary_act.asp, Section 13.

[114] Joseph F. Zimmerman, *Interstate Water Compacts: Intergovernmental Efforts to Manage America's Water Resources* (Albany: SUNY Press, 2012), 113.

[115] Matthew A. Draper, "Resolving Water Disputes: Compacts and the Supreme Court," Water Committee Webinar for the American Bar Association's Section of Environment and Energy Resources-Alternative Dispute Resolution, accessed April 1, 2016. http://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/committees_dch/draper_aba_seer_adr_6-15.authcheckdam.pdf, 20.

[116] Zimmerman, *Interstate Water Compacts*, 113-14.

expert administration, rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.[117]

The Court gives two reasons for its reluctance. First, rivers constantly change and therefore require ongoing management. The Court is practically ill-equipped to serve as interstate river manager. Second, it is democratically problematic for the Court to manage interstate rivers because such action undermines state sovereignty. Obligations to exercise this kind of administrative discretion rest on the shoulders of state governments, which are more accountable to voters than judges ought to be. For these reasons, SCOTUS takes the position that states should seek its judgments only as a last resort.

Special masters generally agree that states should try to resolve water allocation disputes among themselves, without involving SCOTUS.[118] During 2015 preliminary hearings of the Florida v. Georgia case, Ralph Lancaster demonstrated a special master's typical stance: "Again and again and again I'm going to urge [the states] to discuss a settlement seriously… Whatever the result is … we are talking a lot of money and a result you may not like." [119] A lot of money indeed. Florida alone will likely spend more than $41 million on the case.[120]

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[117] *Colorado v. Kansas* 320 U.S. 392 (1943).

[118] Draper, "Resolving Water Disputes: Compacts and the Supreme Court," 24.

[119] Bruce Ritchie, "Georgia water lawsuit cost Florida $41M in past year," *Politico*, published January 18, 2017, http://www.politico.com/states/florida/story/2017/01/water-lawsuit-vs-georgia-cost-florida-41-million-in-past-year-108847, accessed June 13, 2017.

[120] "Florida v. Georgia," SCOTUSBlog.com, accessed July 10, 2017, http://www.scotusblog.com/case-files/cases/florida-v-georgia-2/.

The sheer cost of SCOTUS litigation makes it untenable as a regular procedure. Furthermore, SCOTUS cannot adjust its decisions quickly enough to address changing environmental conditions. Although litigation does have the capacity to bring many relevant facts to light, and to have those facts interpreted by a technically competent special master, it is a slow process. Florida v. Georgia has taken nearly four years. It began in September 2013, and SCOTUS is expected to rule by the end of 2017.[121] More important than even its slowness, SCOTUS has very limited policy problem-solving capacities. It can only react to harm already done by parties explicitly named in a suit. Even then, SCOTUS's options are limited.

Florida v. Georgia provides an unfortunately apt example. The special master's report on the case notes that Georgia's water permitting practices on the Flint River have almost certainly harmed Florida. However, SCOTUS cannot order Georgia to cap its water use. In order to make such an order, the Court would need to ensure that a water-use cap would remedy harms done to Florida, rather than simply burdening Georgia. In order for a water-use cap to ensure Florida received sufficient flows, Georgia would need to coordinate its water allocation decisions on the Flint River with the USACE's water allocation decisions on the Chattahoochee River. But USACE was not party to the lawsuit. Therefore, the Court cannot order USACE to do anything. No order the Court could give Georgia alone would guarantee relief for Florida, and so no order can be given at all.[122] Which is to say, the Court simply does not have the necessary flexibility to

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[121] Ibid.

[122] Ralph Lancaster, "Report of the Special Master" regarding Florida v. Georgia, no. 142, SCOTUS, February 14, 2017, 27, 69-70.

resolve interstate water allocation conflicts in ways that respond to changing social and ecological conditions and conflicts.

Congress, SCOTUS, and the ACFS agree on this point: the best mechanism to utilize in interstate water allocation policymaking is the interstate compact. This procedure gives states freedom to craft an agreement that fits their particular legal, ecological, sociological, technological, and economic situations. This freedom includes the opportunity to build new policymaking institutions that respond to changing interstate water allocation challenges in an ongoing way. So, what should states do with that freedom? What kind of institutions might they build to enhance the environmental prudence and democratic legitimacy of policy outcomes? The next chapter offers Adaptive Governance's answer to that question.

Chapter Two

Introduction

Chapter one discussed why interstate compacts are widely considered the best policymaking procedure for interstate water allocation. States may use a compact not only to craft a water allocation policy, but also to build a water allocation policymaking institution, i.e. a river basin commission. States enjoy great latitude in how they design their commissions. Adaptive Governance (AG) scholarship offers guidance on how policymakers should utilize that latitude. [123]

This chapter argues that AG institutional design prescriptions could support environmentally prudent policymaking. As a concrete example of AG, this chapter utilizes the ACFS's long term proposal for the creation of an interstate water management institution, i.e. a river basin commission. This chapter makes its argument in five moves. First, it defines "environmental prudence" in greater depth. Second, it traces Adaptive Management's (AM) and AG's origins in Resilience Theory, a model of how ecosystems function and change over time. Third, it introduces AM procedures and shows how they can encourage, though not guarantee, environmentally prudent policymaking. This section uses the ACFS's process for developing its short term policy proposal as an example of how AM works. Fourth, this chapter provides an overview of AG institutional design prescriptions, and it shows how these enable AM procedures. It

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[123] The following discussion focuses on Adaptive Governance scholarship's import for building a formal governmental institution, namely a river basin commission. However, AG scholarship also speaks to the development of informal governance institutions, and to the relationship between government bodies and other actors (businesses, non-profits, international government-like institutions such as the UN, etc.). For an example of informal governance bodies, see Meek et al.'s discussion of informal regional initiatives to manage seal harvesting (Chanda L. Meek, Amy Lauren Lovecraft, Riku Varjopuro, Martha Dowsley, Aaron T. Dale, "Adaptive governance and the human dimensions of marine mammal management: Implications for policy in a changing North," *Marine Policy* 35 (2001): 468, 473-474.)

concludes with an argument that while relying on AG instructions for designing

policymaking institutions does not guarantee environmentally prudent policymaking, it

certainly supports and encourages it.

Prudence and Environmental Prudence

The word that moral philosophy traditionally uses to describe attentive and

effective navigation of changing situations is prudence. Prudence is a very old idea in

moral and political philosophy. The English word comes from *prudentia,* the Latin

approximation of Aristotle's Greek *phronesis.*[124] Aristotle thought prudence was an

important capacity for private persons to exercise in their home lives, but he was

especially concerned that judges, legislators, and citizens exercise prudence in their

shared political life as they crafted, interpreted, and implemented laws.[125] Aristotelian

prudence, at its most basic, is the capacity to make good choices and act upon them. For

Aristotle, a good choice is one that is made in the right way and aims at worthy goals.[126]

The "right way" to make a decision is to deliberate. Aristotelian deliberation

involves four overlapping and not entirely sequential steps: 1) investigating the particular

details of the situation at hand, both in terms of the situation's moral stakes and material

conditions; 2) identifying what options for action exist and/or imagining what options for

action could be created in a given situation; 3) discerning which of these options is most

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[124] See for example Thomas Gilby's translation of Thomas Aquinas, *Summa Theologia, Latin text and English translation, Introduction, Notes, Appendices and Glossaries,* "Prudence," Volume 36, Question 47, Article I (Cambridge, UK: Cambridge University Press: 2006), 5.

[125] Aristotle, *Nichomachean Ethics*, 1141b20-1142a, in Aristotle, *Nichomachean Ethics*, translation, introduction and notes by Martin Ostwald (New York: MacMillan Publishing Company, 1962).

[126] Ibid. 1140a20-1140b30.

conducive to human flourishing (or at least, which option is least harmful to human

flourishing); and 4) acting upon that option in a timely manner.[127]

The outcomes of decisions made through deliberation are impossible to predict;

outcomes of good decisions will not necessarily conform to extant rules.[128] This

unpredictability has three causes. An example adapted from Martha Nussbaum, a

prominent commentator on Aristotle, demonstrates these three causes of unpredictability:

a person must decide whether she will spend her afternoon practicing piano or helping a

friend.[129] The first reason a good choice in this decision cannot be predicted ahead of

time is that it involves selection between two incommensurable values. Both musical skill

and friendship contribute to human flourishing, but in different ways. It is impossible to

compare these values objectively because they are not quantifiable. It makes little sense,

for instance, to claim that friendship is worth nine value points and musical skill only six.

So, the person deciding how to spend her afternoon must make some subjective judgment

about how she will rank these values on this occasion.[130] Second, the outcomes of good

decisions are unpredictable because deliberators take contextual circumstances into

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[127] Ibid.,1142a30-1143a. It is important to note that most of the modern moral philosophies that use Aristotle's model of good decision-making hesitate to embrace Aristotle's actual account of flourishing, which is thoroughly inegalitarian and utterly inaccessible to women and slaves (slavery being a social institution Aristotle treated as more or less inevitable). Hence, modern Aristotelian philosophers must define what precisely they mean by human flourishing and how they justify that definition. My account only partially fulfills that task. I do not fully flesh out what human flourishing entails, but I do highlight an aspect of human flourishing which is often neglected in moral philosophy, i.e. human need for ecosystem services to survive at least and flourish at best. In short, I offer a bare bones account of human flourishing, but one that enables and invites further definition.

[128] Ibid., 1142b10-16 and 1104a1-10.

[129] Martha Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (New York: Oxford University Press, 1990), 59.

[130] Ibid., 59-63.

account when making their decisions, and these circumstances can be rather fluid.[131] To

continue the example above, the decision maker might consider the circumstance that her

friend is moving to a different part of the country tomorrow, and so today is her last

opportunity to express her affection in person. She might also weigh that detail against

the fact that she has an audition at Juilliard coming up in a week. Switch the timeline, and

the calculus of the decision changes. Aristotle would say these changing conditions are

morally relevant; one cannot make a good decision by ignoring them and simply deciding

whether friendship or musical skill or career advancement is fundamentally most

important.[132] The third reason that outcomes of deliberation cannot be known ahead of

time is that humans' understanding of their options, and of the probable outcomes of their

options, and of the value at stake in their options, is heavily conditioned by the decision

maker's past experiences.[133] Young people have less experience, and hence are more

likely to fail to grasp what Nussbaum calls "salient features" of the decision at hand.[134]

Hence, Aristotle urges young people to rely upon "men of understanding," to guide their

deliberations.[135] Such "friends enhance our ability to think and to act."[136] Rules can also

help inexperienced deliberators pick out the important features of a situation. Rules

support prudent decision-making so long as deliberators treat them as rules of thumb, as

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[131] Ibid., 70-73.

[132] Aristotle, *Nichomachean Ethics,* 1103b34-1104a10.

[133] Ibid., 1142a10-20.

[134] Nussbaum, *Love's Knowledge*, 55.

[135] Aristotle, *Nichomachean Ethics,*1143a1, 1143b5-15.

[136] Ibid., 1155a15-6.

condensed sets of observations, rather than absolute standards to which their choices must conform.[137] Guidance either from persons or rules may help deliberators see their decision in entirely different ways, depending on the source. Hence, even under the guidance of experience, deliberation yields unpredictable outcomes.

Discussion of the 'right way' to make a decision hints at what counts as a 'worthy goal' for the decision. Valuable ends (friendship, musical skill) obviously constitute worthy goals. But what makes something valuable in the first place? Aristotle defines as worthy those goals that contribute to human flourishing, to "the good for man."[138] Aristotle roots his account of human flourishing in biology. Humans flourish as members of a particular species, which has its own particular set of biologically intrinsic needs and capacities. This point holds for other species, too.[139] Bats flourish by flying, eating insects, and sleeping during the day. Plants flourish by receiving sunlight and water. Humans obviously differ from other living things in the types of natural capacities they need to develop. Far more important, humans differ from other animals in *how* their natural capacities develop.[140] Human capacities and characteristics do not develop spontaneously as an individual matures biologically. Rather, human flourishing results from a human's ongoing efforts to develop her naturally endowed capacities, to hone her skills and shape her character.[141]

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[137] Nussbaum, *Love's Knowledge*, 68.

[138] Aristotle, *Nichomachean Ethics,* 1098a15-16.

[139] Ibid., 1176a1-10.

[140] Ibid.*,* 1098a15-16.

[141] Ibid., 1103a25-1103b2.

The effort to develop one's capacities is hard work, but it contributes to a person's happiness over the whole course of her life.[142] For instance, for a human to develop her natural aptitude for music, she must watch other performers, she must learn something of musical theory, and above all she must commit herself to a great deal of practice. This effort requires discipline. The learner must withstand the pain of embarrassment at failed performances and displeasure at sour notes. Also, she must withstand the temptation of pleasant distractions—snacks, flirtations and affairs, an easier and more lucrative profession, etc. But if the student perseveres in developing her musical capacities, she will find joy and satisfaction inherent in that activity. Having savored the exercise of this capacity, she will desire to exercise it more and more, even though or perhaps especially because that capacity was hard won.[143]

The most important capacities for humans to achieve belong on a list of what Aristotle calls the "moral virtues."[144] Aristotle ranks courage, self-control, and generosity high on his list.[145] These capacities are so essential to the good life that they must be practiced constantly, so much so that they become characteristics of the personality of the human who exercises them, rather than functioning simply as skills a person may choose to employ or not (as a trained violinist might choose to perform a concerto or not at any given moment).[146] The virtues are central to human flourishing in two key aspects. First, the virtues constitute their bearers' self-respect and immediate satisfaction with their own

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[142] Ibid., 1099b8-32.

[143] Ibid., 1105a10.

[144] Ibid., 1103a15-20.

[145] Ibid., 1106a27-1107b15.

[146] Ibid., 1105a30-1105b9.

behavior.[147] Second, the virtues enable humans to build long-term cooperative

relationships, to form groups bound by common interest, affection, and trust. Through

these relationships, humans achieve meaning, wealth, affection, security, in sum a quality

and quantity of happiness together that they could not find alone.[148]

The community-building function of the virtues is evident in Aristotle's

description of justice. Justice is the chief virtue for Aristotle. It is the capacity and

characteristic habit of giving to each person what is due them materially and emotionally.

As stated in Book VI of *Nichomachean Ethics*:

> 'In justice every virtue is summed up.' It is complete virtue and excellence
> in the truest sense, because it is the practice of complete virtue. It is
> complete because he who possesses it can make use of his virtue not only
> by himself but also in his relations to his fellow men; for there are many
> people who can make use of their virtue in their own affairs, but who are
> incapable of using it in their relations with others….[J]ustice alone of all
> the virtues is thought to be the good of another, because it is a relation to
> our fellow men in that it does what is of advantage to others."[149]

The reason Aristotle sees justice as the pinnacle of the virtues is that it draws the practice

of the virtues beyond private affairs and into public life. In so doing, justice "produce[s]

and preserve[s] happiness for the social and political community."[150] Such communal

flourishing is supported by various behaviors—bravery in battle, self-control with regard

to other men's wives, gentleness that avoids physical assault or character assassination,

etc.[151] What these and many other seemingly random activities have in common that they

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[147] Ibid., 1099a7-21.

[148] Ibid., 1159b25-1160a30.

[149] Ibid., 1129b30-1130a4.

[150] Ibid., 1129b17-18.

[151] Ibid., 1129b20-25.

give to each person what is due them, thereby maintaining social order. The truly just person, in Aristotle's account, desires this vibrant network of community relationships above all else; he sees personal satisfaction and life's meaning therein.[152]

It is hard to argue against Aristotle's point that humans are social animals. We cannot flourish in isolation. We need flourishing communities to flourish individually. The virtues sustain the ties that bind individuals and communities, but the virtues do not do this work alone, as even Aristotle recognized. We are "political animals" as well as social animals. If we are to live together, we need laws to organize our collective behavior, and we need institutions for making, enforcing, and revising laws. Flourishing thus requires a healthy political system, one where virtuous legislators can make wise judgments.[153]

To sum up Aristotle's account of flourishing, persons need the ability 1) to develop their capacities, especially the virtues; 2) a network of social relationships sustained by virtuous people; and 3) an effective political system, also sustained by virtuous people. To Aristotle's account of human flourishing, modern thinkers need to add a scale of consideration. Just as human individuals need human communities to flourish, both human individuals and human communities need ecosystem services to survive and hence to flourish. More will be said about the nature of human dependence on ecosystem services below, but first a definition is in order.

Ecosystem services are generally organized into four categories: "provisioning," "supporting," "regulating," and "cultural services."[154] Provisioning services are the most

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[152] Ibid., 1169b-1170a12.

[153] Ibid., 1142a8-10.

straightforward. They are the ecological materials and design principles humans can use to meet their needs: food, fiber, medicinal ingredients, genetic codes that can be used to design new medical treatments, biological models that can inspire technological development, etc. The least obvious but perhaps the most important type of ecosystem service is supporting services. Supporting services produce the basic conditions necessary to sustain all life. These include soil formation, the hydrological cycle, and creation of organic matter from sunlight by photosynthetic organisms, etc. These services allow for the sustenance and evolution of many other species on earth (including all animals). This diversity of organisms creates symbiotic and competitive relationships, which taken together maintain Earth's regulating services. Regulating services maintain equilibria of various kinds. These include flood regulation (wetlands provide buffers in the event of flash floods), climate regulation (trees reduce carbon in the atmosphere), waste and disease regulation (buzzards eat dead carcasses, preventing the spread of disease), etc. Last but not least, ecosystems provide humans various kinds of cultural services— recreation, aesthetic or spiritual appreciation, scientific inquiry, etc.[155]

Human flourishing depends on ecosystem services in various ways. Most basically, human survival depends on ecosystem services. Plants provide the oxygen humans breathe; microbes create the soil in which humans grow food. Survival is the precondition to individual flourishing (at least, from a secular perspective). Persons need sufficient oxygen and food supply even to begin to develop their capacities; they need air and food before they can aspire to excellence in music, politics, or sports. Ecosystem

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[154] "Millenium Ecosystem Assessment, *Ecosystems and Human Well-Being: Synthesis* (Washington, D.C: Island Press, 2005), v-vii.
[155] Ibid.

services are also the precondition to societal flourishing. Human society can tolerate the occasional natural disaster, but too many floods, droughts, disease infestations, and so forth stress entire populations. Society's flourishing depends upon ecosystems maintaining equilibrium ranges with regard to temperature, water supply, insect populations, air quality, etc. Furthermore, many humans link their flourishing directly to certain ecosystem services which are not absolutely necessary for survival. Many people would say they enjoy living on a tree-lined boulevard rather than a street of bare concrete, that they relish the occasional hike in the woods, that they feel overcome by wonder by the ocean. Still other human individuals and communities feel their flourishing depends on ecosystems in far more profound ways, that to live well entails exercising reverence and care for the natural world. For these people, even the term "ecosystem services" is likely to seem too utilitarian and anthropocentric. In sum, all humans depend on ecosystem services not just to survive but to flourish, though not all individuals or communities depend on ecosystem services in quite the same ways or to the same extent.

Furthermore, not all humans recognize the full extent of humanity's dependence on ecosystem services to survive and thrive. This lack of recognition is a serious problem, since technology gives humanity the power to transform the natural world in ways Aristotle could not have imagined. His political community did not need to decide whether or where to place a nuclear power plant, when to use river flows to generate hydroelectricity, whether to allow miles of creeks to meander or to channel them in concrete troughs, etc. Modern societies have the power to make these and many other choices. As a result, we have the capacity to make political decisions that can undermine the natural conditions necessary to human survival, and even more readily undermine the

conditions necessary to human flourishing. Hence, prudent modern political decisions by definition must aim at ecosystem conditions that sustain at least human survival and at most human flourishing (even if that condition is difficult to define); prudence must become environmentally attuned.[156]

An important caveat: environmental prudence does not require decision makers to prioritize environmental concerns over all other values, all the time. Quite the opposite, just as the violinist in the example above must choose between visiting her friend or practicing her craft, policymakers must sometimes choose between addressing environmental concerns or addressing economic or social concerns. Value pluralism—an ontological premise on which Aristotelian prudence is built—implies that such tragic situations are inevitable. Environmental prudence does not help us avoid moral tragedy any more than regular prudence does. Yet it does help us make less tragic choices, to select the lesser of two evils when no good option is available.[157] Now, it should be noted that the rapidly escalating problem of climate change and a myriad of other environmental challenges suggests policymakers have often taken environmental concerns less seriously than they ought. Environmental prudence entails a fuller recognition of how much human flourishing depends upon environmental health than otherwise prudent people have often acknowledged. But it does not mean turning a blind

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[156] From the standpoint of environmental ethics, this position sets a rather low moral bar. It does not require decision makers to honor the intrinsic value of nature as such (although some might, and might express that valuation in deliberations). Nor does it require humans to acknowledge some responsibility to other non-human creatures or to their Creator. It only requires a person to recognize natural systems' contributions to human flourishing. I start from this position not because I think a morally minimalist position is the only defensible one, but because it provides a relatively non-controversial point of departure.

[157] Nussbaum, *Love's Knowledge*, 64.

eye to other conditions necessary to human flourishing. To weigh these values and act well in particular situations, decision makers must undertake deliberation.

Hence, environmental prudence involves a two-part expansion on Aristotle's account of prudence. The first expansion has already been named: the goals of our decision-making must include ecosystem service provision as a fundamental requirement of human survival and flourishing (variously defined), in addition to traditionally recognized requirements like wealth, health, community belonging, etc. The second expansion involves the 'right way' to make a choice; we need an environmentally oriented model of deliberation. Happily, we can produce such a model without too radical a departure from the existing one. A couple of adjustments to the four steps of deliberation will suffice. In the first step, we need merely to add investigating environmental details to our investigations of the social, economic, and political details of a particular decision. In step two, we identify what options for action exist and/or imagine what options for action could be created in a given situation. In particular, we should consider what technology can and cannot do for us and what (known and unknown) environmental risks attend whatever decision we make. In step three, we must decide which of our options is most conducive to human survival and flourishing as it depends upon ecosystem service provision (or at least, which option is least harmful to human flourishing). Step four on its face remains mostly unchanged: we must act in a timely fashion upon the option we have selected. However, taking environmental conditions into account helps deliberators understand timeliness in a new way, with reference to the timelines of ecosystem change.

The next section discusses environmental change in depth. It provides an overview of Resilience Theory, a branch of ecological science that explains why and how ecosystems change. AM procedures were designed to help policymakers recognize and respond to those changes in a timely manner, in order to protect important environmental services. The following paragraphs outline Resilience Theory's account of ecosystem change in order to lay the foundation for a discussion of AM.

<center>Resilience Theory</center>

Resilience Theory helps explain a series of natural resource management crises observed across the US in recent decades.[158] Forests where fires had been suppressed for many years sparked and burned hotter, faster, and over larger areas than ever before. Farms that grew monoculture crops experienced massive topsoil erosion. Rivers that had been channeled and dammed to maintain a consistent speed of water were overrun by exotic fish species.[159]

Investigating these crises, natural resource management scholars concluded that many of them shared a common cause.[160] In these cases, the driving management goal had been to hold one condition of the ecosystem constant over time, often at a maximal or minimal level. So, foresters tried to eliminate forest fire entirely; farmers tried to produce the same maximum amount of one crop year after year; and engineers tried to produce a steady flow of water. C.S. Holling and Gary K. Meffe call this pattern "the

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[158] Carl Folke, "Resilience: The emergency of perspective for social-ecological systems analysis," *Global Environmental Change* 16, no.11 (2006): 255-256.

[159] Ibid., 255-256.

[160] C.S. Holling and Gary K. Meffe, "Command and Control and the Pathology of Natural Resource Management," *Conservation Biology* 10, no. 2 (April 1996): 330-331.
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pathology of natural resource management."[161] This pathology was and is driven by two

incorrect assumptions about how natural systems worked, namely that ecosystems are

relatively stable over time and that the initial, beneficial consequences of a management

practice (higher crop yields, no forest fire damage, steady stream flows) will continue

without unintended impacts cropping up in the ecosystem, especially over a long period

of time.[162]

To demonstrate how these assumptions err, natural resource management scholars

produced a new explanatory model of how ecosystems work: Resilience Theory.

Resilience Theory shows how an ecosystem's internal relationships are structured and

how these relationships change over time. A key feature of this account is the concept of

a system's adaptive cycle.

Figure 2-1
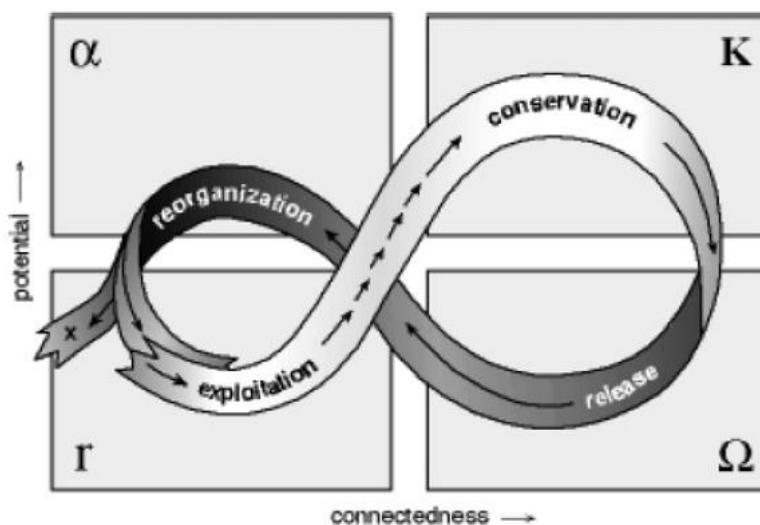
From *Panarchy* edited by Lance H. Gunderson and C.S. Holling. Copyright 2002 Island
Press. Reproduced by permission of Island Press, Washington, DC.

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[161] Ibid., 330.

[162] Ibid., 330.

The adaptive cycle depicts an ecosystem's characteristic condition not as one steady "normal" state, but as a cycle that moves through four phases. The cycle is driven by three factors: 1) occasional, unpredictable, but repeated physical or biological disturbances that typically beset a location, such as hurricanes, droughts, or volcanic eruptions; 2) the regular physical conditions of that location such as temperature and temperature variation, wind speed, elevation, sunlight, mineral deposits, rainfall, etc.; and 3) the biota that survive in that place, characterized by these standard conditions and standard disturbances.[163]

The cycle, by definition, has no clear beginning and end, but for explanatory purposes it is easiest to begin with a crisis. A crisis like a fire, drought, or earthquake triggers the most chaotic phase of the adaptive cycle, the "Release Phase."[164] During this phase, many of large biota die off: tall trees topple, lumbering mammals perish. Living creatures survive by capturing scarce resources like sunlight, water, minerals, or the resources stored in other biotic tissue. So, when large biota die, significant amounts of resources are "released." If these resources are not captured by some other organism that has survived the disturbance, resources will flow out of the system. Without roots to absorb and slow it down, water may carry away topsoil and minerals. Without plants to capture sunlight and shade the ground, the sun may scorch it, causing the soil to harden into a crust that neither rainfall nor seeds can penetrate. In this resource-poorer climate, populations of species may go extinct or become less genetically diverse, less able to

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[163] C.S. Holling and Lance Gunderson, "Resilience and Adaptive Cycles," *Panarchy: Understanding Transformations in Human and Natural Systems*, ed. Lance Gunderson and C.S. Holling (Washington, DC: Island Press, 2002), 26; and Walker and Salt, *Resilience Practice,* 18-26.

[164] Ibid., 45.

survive and adapt to new conditions. During the release phase, it is possible that the ecosystem's capacity to sustain life of various sorts may degrade as its identifiable biotic and abiotic features erode.[165]

However, such erosion is not the only possible or even the most common outcome of the Release Phase. Biota that survived the disturbance or biota from nearby areas may capture resources released when large biota died off, thereby reestablishing the ecosystem.[166] In the "Reorganization Phase" small and medium creatures capture the resources released by larger creatures.[167] Grasses and shrubs grow where they can capture sunlight under a newly opened canopy. Surviving root systems of shrubs or trees may spread into new areas. Insects and small animals return to eat and find shelter in this lower profile ecosystem. The remnants of the old eco-system and newcomers compete for newly available resources. Along the way, some species create symbiotic relationships that may improve their ability to survive and reproduce in that niche.

Once the biotic relations that retain resources like water, minerals, and nutrients are established, the system enters the "Exploitation Phase."[168] Populations and individual members continue to grow. In this phase, the slow growers are likely to accrue more and more of the system's resources. Trees begin to shade out other plants, taking up more sunlight, water, and soil nutrients. The slow growers may outcompete some species while enhancing the survival of others, by providing food and shelter to smaller animal species,

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[165] For more on maladaptive system dynamics, see Lance Gunderson, C.S. Holling, and Garry D. Peterson, "Sustainability and Panarchies," *Panarchy: Understanding Transformations in Human and Natural Systems*, ed. Lance Gunderson, C.S. Holling (Washington, DC: Island Press, 2002), 95.

[166] Walker and Salt, *Resilience Practice*, 16.

[167] Holling and Gunderson, "Resilience and Adaptive Cycles," 45-46.

[168] Ibid., 43.

and providing prey for larger predators. More and more biota come to depend upon the structure provided by slow growers. Complex interdependencies among these creatures may develop, creating negative feedback loops that further stabilize the system as a whole.

As these interdependencies crystallize, the system enters the "Conservation Phase."[169] This phase proceeds for an indefinite period, with large, slow growers accruing more and more resources. Take mature southern live oak forests, for example. Live oaks thrive in hot humid climates, at low elevations, usually in coastal forests. Fire presents a serious threat for oaks. However, live oaks' dominance in the conservation phase functionally protects them from this threat. In a forest dominated by oaks, the forest floor is shady, which prevents the growth of a flammable brushy understory. Also, the floor is covered with leaf litter, which prevents evaporation of soil moisture. Species that survive well alongside oaks benefit from these cooler, wetter conditions, or at least they do not need fire for rejuvenation. Oaks' characteristics maintain a feedback loop of shady, damp leaf cover, which prevents fire, which allows the oak to produce more shady, damp leaf cover, which prevents fire…. This feedback loop foster conditions that support the survival of shade and moisture-loving species.[170] So, the accrual of resources functions to protect slow growers in the conservation from biotic competition, and to some extent from disruptive events.

Eventually however, some disruptive event—perhaps a fire combined with a drought, or an infestation of a pest that thrives on humid conditions—will overcome the

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[169] Ibid., 43-44.

[170] Ibid., 37-38.

slow growers' dominance. This disturbance jolts an ecosystem back into the release phase of an adaptive cycle. When these disturbances occur, slow growers perish, releasing stored resources. These then become available for new ecosystem inhabitants. Provided enough physical resources and genetic memory make it through the Release Phase, the cycle will proceed. Biota can exploit this opportunity to form new symbiotic bonds, adaptations, and feedback loops. These new characteristics potentially enhance species' capacities to survive and reproduce within the ordinary and disruptive conditions of that particular place.[171]

These physical conditions, sets of species, their interdependencies, their feedback loops, and the trajectory of their adaptive cycle constitute a "regime."[172] Some locations provide the physical resources, disturbances, and genetic diversity required to sustain more than one regime. For example, the same coastal plains that host live oak dominated forests can also sustain longleaf dominated pine forests. The characteristics of pine trees support fire-spreading rather than fire-dampening conditions in the Conservation Phase. Pine needles provide quick tinder for fires, and their less-dense foliage allows enough light and airflow for the growth of a flammable understory. Among the longleaf pines, the forest floor burns hot and fast; the flames move quickly over the acres. Adult trees emerge relatively unscathed, while fire provides heat needed for seed germination, and clears room on the forest floor that can be inhabited by seedlings. Whereas the characteristics of a Conservation Phase oak forest create fire-suppressing feedback loops,

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[171] The cycle sometimes moves backwards through stages, although it is highly unlikely for a system to move from a full-fledged Release-phase back into the Conservation-phase (Ibid., 51).

[172] Ibid., 27.

the characteristics of a Conservation Phase pine forests create fire-enhancing feedback loops.[173] These different sets of species, feedback loops, and disturbances constitute two distinct regimes.

An ecosystem is resilient to the degree that it can withstand stress and still maintain its regime.[174] Which is to say, an ecosystem is resilient if, when it sustains some sort of disruption (fire, drought, logging), it either absorbs the shock (remaining in the Conservation Phase) or it enters the Release Phase and moves swiftly into its Reorganization Phase, thereby continuing its adaptive cycle. The more intense the stress an ecosystem can withstand without entering a different regime, the more resilient it is.

A system's resilience depends on the maintenance of certain "threshold" conditions. [175] When an ecosystem crosses these thresholds, it exits (often irreversibly) its current regime and "flips" into an alternate regime.[176] For instance, a long leaf pine forest might flip into a live oak forest if it crosses its minimum threshold of fire frequency. A long leaf pine stand needs to burn about every five to ten years.[177] If twenty or thirty years pass without a fire, the system may enter a new regime. Oaks and their fire suppressing feedback loops may grow to dominate the area.

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[173] Ibid., 37.

[174] Brian Walker and David Salt, *Resilience Thinking: Sustaining Ecosystems and People in a Changing World* (Washington, DC: Island Press, 2012), 17-18, 92.

[175] Walker and Salt, *Resilience Practice*, 6-10.

[176] Holling and Gunderson, "Resilience and Adaptive Cycles," 48.

[177] Jennifer H. Carey, "Pinus palustris," Fire Effects Information System website, U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, Fire Sciences Laboratory, 1992, July 10, 2017, https://www.fs.fed.us/database/feis/plants/tree/pinpal/all.html.

This example is relatively benign from a human perspective. People value both oak and pine forests for economic and aesthetic reasons. A more worrisome example of a regime change is when a pond flips from a regime of by clear water and healthy fish populations to a regime of algae-covered water with too little oxygen to sustain fish. This kind of transition often results from agricultural phosphorus runoff.[178] The danger of regime flips like this one is that new regimes may not be able to provide key ecosystem services that humans need. An ecosystem's incapacity to provide ecosystem services of critical value to humans constitutes a natural resource management crisis.

Let us return to the natural resource management crises that Resilience Theory research addresses. Resilience Theory explains why and how these crises occur. In cases like rivers infested with invasive fish species, perhaps engineers tried to hold one condition of the river—its flow rates—constant over time and geography. No doubt an engineer could give laudable reasons for this choice. Steady and slower flow rates might prevent flooding and ensure hydroelectric supply. But these calm conditions could cross an important threshold for a flashy western river's characteristic regime, namely the threshold of sufficient habitat heterogeneity. This heterogeneity would be constituted by: calm, shallow pools; rocky, white-water rapids; deep, cold, mid-river currents, etc. Fish native to these rivers would need diverse habitats for spawning, eating, and resting. Reduce habitat heterogeneity and local fish populations would struggle to survive. So would all the plants, insects, bacteria, and algae in symbiotic relationships with these fish. As these equilibrium-producing relationships crumbled, the ecosystem might enter a Release Phase in the adaptive cycle. More space and nutrients would become available.

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[178] Walker and Salt, *Resilience Thinking,* 54-8.

These conditions could provide a fish species well adapted to the river's steady flow conditions (perhaps an exotic species) an opportunity to establish itself in the river. Thereafter, the invasive fish could capture more and more nutrients and take up more and more space, setting off a Reorganization Phase of an alternative regime. This regime would likely host many invasive fish and many fewer of the native bird, plant, bacteria, and algal populations that depended on the native fish populations, although some of these species might create symbiotic relationships with the new dominant fish species. This regime shift would constitute a natural resource crisis if the former regime provided environmental services that the new regime could not, such as water purification, commercial fish stocks, or aesthetic appeal.[179]

Resilience theory holds four broad implications for natural resource management. First, it is dangerous to attempt to hold one aspect of an ecosystem (flow rates, crop yield, fire frequency, etc.) constant over time. Doing so will only make the ecosystem brittle, unable to bounce back from stress. Second, natural resource managers should avoid management strategies that cause the ecosystem to cross thresholds necessary to the maintenance of its regime. Once those thresholds are crossed, the ecosystem is in danger of losing its environmental service-provision capacity. To avoid tipping the system past key thresholds, natural resource managers should work to understand the ecosystem's adaptive cycle and the roles of thresholds therein.[180] Third, natural resource managers should expect surprises. Surprises result for at least three reasons: partial understanding

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[179] The above example is hypothetical rather than historical. It is meant to demonstrate how Resilience Theory concepts can be deployed to explain what is going on in a natural resource management crisis. Actual diagnoses of such crises rely on greater empirical data than I have utilized here for the sake of narrative clarity.

[180] Walker and Salt, *Resilience Thinking*, 36, 112-13.

of an ecosystem's key thresholds and adaptive cycle; unforeseeable impacts of environmental conditions transpiring at a larger scale than the local ecosystem (for example, climate change); and the ongoing evolution of ecosystems themselves (genetic evolution, new symbiotic relationships, etc.). By keeping an eye out for these surprises, managers can learn to understand the ecosystem better.[181] This learning process is critical to acting upon Resilience Theory's fourth insight: that managers should be ready to adapt their management strategies to changing conditions of the ecosystem.[182]

<div align="center">Adaptive Management and Environmental Prudence</div>

Overview of Adaptive Management

Resilience Theory demonstrates how ecosystems change over time. It also demonstrates that natural resource management interacts with ecosystems' internal dynamics. Hence, management changes how the system functions, often in unpredictable ways. As a result, managers can never identify the "right" ecosystem management strategy and then implement it indefinitely. Instead, they need a strategy that allows them to adjust their practices as they observe how an ecosystem responds to management; they

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[181]Walker and Salt, *Resilience Thinking,* 49.

[182]Walters, *Adaptive Management of Renewable Resources,* vii. For the sake of clarity, this section did not discuss how interscalar dynamics drive change in ecosystems. Resilience theory posits that ecosystems organize at discrete scales, which nest within each other. Systems of each scale are "defined by a characteristic set of self-organized structures and processes." See Ahjond S. Garmestani, Craig R. Allen, and Lance Gunderson, "Panarchy: Discontinuities Reveal Similarities in the Dynamic System Structure of Ecological and Social Systems," *Ecology and Society* 14, no. 1 (2009). For instance, global climate systems are organized by the Earth's rotations, composition of atmospheric gases, and amount of energy received from the sun. Regional ecosystems are organized by geological structures (like mountains and plains), temperature, and rain fall patterns. Local ecosystems are organized by local species, local soil conditions, local topography, etc. While systems at each scale are self-organized—they each exhibit their own adaptive cycles—what happens at one scale impacts what happens at other scales. These interactions are complicated—serving both to protect stability and leading to abrupt, non-linear changes in system behavior. For further discussion of these dynamics, see Gunderson, Holling, and Peterson, "Sustainability and Panarchies."

need a model of management that allows for experimentation and "learning while doing."[183] Adaptive Management provides that strategy.

A 2004 National Research Council report to the USACE summarizes the AM policymaking procedure in terms of AM's "six elements": 1) involvement of stakeholders; 2) objective setting; 3) ecosystem modeling; 4) identification and selection of management choices; 5) monitoring and evaluating outcomes; and 6) learning from results in order to incorporate them into future decision making processes.[184] These elements constitute an AM policymaking cycle.[185] The following paragraphs discuss the purpose of each element. Together, these elements allow managers to learn about an ecosystem's changing conditions as they manage it, and adjust their management practices accordingly.

This section uses the ACFS's planning efforts for their short term policy proposal for water allocation in the ACF basin to demonstrate what each AM elements can look like in practice.[186] By way of reminder, Chapter One noted that the ACFS developed both short term and long term policy proposals for water management in the ACF basin. Their short term proposal stipulated how the USACE should manage water releases from dams along the Chattahoochee and Apalachicola Rivers. The ACFS used a process that reflected the elements of AM planning cycle to craft this short term proposal. The ACFS

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[183] Walters, *Adaptive Management of Renewable Resources*, 2-3, 7; and Walters and Holling "Large-Scale Management Experiments and Learning by Doing," 2060.

[184] National Research Council, *Adaptive Management for Water Resources Project Planning* (Washington, D.C: National Academies Press, 2004), 24-27.

[185] Ibid., 7.

[186]Lindsay C. Stringer, Andrew Dougill, Evan Fraser, Klaus Hubacek, Christina Prell, and Mark S. Reed, "Unpacking 'Participation' in the Adaptive Management of Social–ecological Systems: A Critical Review," *Ecology and Society* 11, no. 2 (2006).

understood AM theory enough to realize that water management policymaking should be an iterative process.[187] Hence, their long term proposal called on the states of Alabama, Florida and Georgia to create a river basin commission—in ACFS terminology, an "interstate water management institution"—to continue AM of the basin in an ongoing way.[188] Neither the ACFS's short term nor long term proposal has been implemented. However, the ACFS's process for making their short term policy proposal does provide a handy example of how the AM policymaking cycle works.

The first element of AM is inclusion of "parties affected by the ecosystem management practices in decision making."[189] Broad inclusion of stakeholders in policymaking serves three functions. First, it encourages more ecologically and socially informed policymaking. Not only scientists, but also farmers, fishers, birdwatchers, environmental educators, and indigenous peoples may possess valuable local ecological knowledge.[190] They might supply data such as the following: which streams tend to run dry and how often; where riverbank erosion is most severe; or which species seem to be dwindling. Stakeholders also contribute information about the social values at stake in an environmental policy, for example: distaste for bureaucratic red tape; concern for grandchildren's inheritance; love of local trout streams; or an economic desire to bring tourism to the area. Such contributions help policymakers understand both *what* the goals of an environmental policy ought to be and *how* these goals can be best achieved in a

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[187]Apalachicola-Chattahoochee-Flint River Stakeholders, *Sustainable Water Management Plan,* 3.

[188] Ibid.*,* 4.

[189] National Research Council, *Adaptive Management for Water Resources Project Planning*, 27.

[190] Fikret Berkes, Johan Colding, Carl Folke, "Rediscovery of Traditional Ecological Knowledge as Adaptive Management," *Ecological Applications* 10, No. 5 (Oct., 2000): 1251-1253.

particular cultural and institutional context.[191] Second, stakeholder inclusion can improve

legitimacy of environmental policies.[192] Stakeholders may feel a stronger sense of

ownership over policies they have collaboratively crafted; they may also be less likely to

try to resolve conflicts with other stakeholders via litigation.[193] Third, stakeholder

inclusion enhances the adaptiveness of the policymaking process; the longer stakeholders

participate in AM procedures, the better they may be able recognize and respond

promptly to changing environmental conditions with new policies. This capacity results

from stakeholders' growing familiarity with their ecosystem and each other (elements

two through six explain how this familiarity develops). Familiarity with the ecosystem

gives stakeholders a shared frame of reference upon which to base their decisions.

Familiarity with each other ideally allows stakeholders to build trust and develop conflict

resolution skills.[194]

The ACFS included those stakeholders affected by basin management policies

directly (by residing in or owning property in the watershed) or indirectly (by potentially

contributing to or benefiting from inter-basin water transfers). These parties represented

fourteen interest groups: Water Supply, Recreation, Farm and Urban Agriculture, Water

Quality, Navigation, Industry and Manufacturing, Hydro Power, Thermal Power,

Business/Economic Development, Historic and Cultural, Seafood Industry,

Environmental and Conservation, Local Government, and Other. Institutions represented

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[191] Stringer et al., "Unpacking 'participation,'" 2006.

[192] Ibid.

[193] Ibid.

[194] Claudia Pahl-Wostl, Mark Craps, Art Dewulf, Erik Mostert, David Tabara, and Tharsi Taillieu, "Social learning and water resources management," *Ecology and Society* 12, no. 2 (2007).

included town and county governments, privately and publicly owned utilities, small and large businesses, and non-profits of various kinds, and a handful of private citizens.[195]

Broad though it was, ACFS membership did not actually include all affected stakeholders. ACFS membership was contingent on paying dues ranging from $250 to $2,500 depending on the size of the organization represented.[196] While these dues made participation in ACFS's management decisions reasonably accessible to a wide swath of interested parties, dues may still have been prohibitively expensive to economically marginalized groups, especially if they were not already organized into a 501(c).

The second element of AM is "regularly revisit[ing] and revis[ing] management objectives."[197] Social priorities and environmental possibilities change over time, sometimes rapidly, and this step allows managers to adjust their actions to those shifts. Conflicts often arise in the objective-setting stage. However, the more often a group effectively works through their conflicts, the more likely they are to do so quickly and effectively in the future, thereby enhancing the group's capacity to adapt to changes in their society and ecosystem.[198]

The ACFS identified two primary objectives in their water management plan: First, to maintain instream flows throughout the basin (to meet ecological functions of the river and riverine ecosystems, and oyster populations in Apalachicola Bay); second, to

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[195] "ACFS Members" ACF Stakeholders website, last accessed June 19, 2017. http://acfstakeholders.org/stakeholders/acfs-members/.

[196] Apalachicola-Chattahoochee-Flint Stakeholders, "Membership Requirements, ACF Stakeholders," ACF Stakeholders Website, accessed July 17, 2017, http://acfstakeholders.org/join-us/membership-requirements.

[197] National Research Council, *Adaptive Management for Water Resources Project Planning*, 25.

[198] Pahl-Wostl et al., "Managing change toward adaptive water management through social learning."

protect supplies for current and future consumptive and non-consumptive uses.[199] The ACFS did not have a chance to revisit these objectives, as it only undertook one cycle of AM policymaking. However, it would have been well equipped to revise these objectives, since their members developed detailed metrics for the management objectives preferred by each respective interest group, and the reasoning behind those metrics.[200]

The third element of AM is generating "model(s) of the system being managed."[201] These models may be quantitative (numerical representations of system structure, function and dynamics), qualitative (narratives of system behavior from experience) or some combination thereof. Models illustrate what policymakers know and, far more importantly, what they do not know about how their ecosystems operate. Hence, models help policymakers build hypotheses about how the system might work, how it might respond to various management decisions.[202]

Model building often requires significant technical expertise in geographic information systems, hydrology, ecology, civil engineering, etc. So, managers and stakeholders may rely on universities, consulting firms, or government agencies to help them produce these models. The ACFS commissioned Black and Veatch, Atkins, Global, and the Georgia Water Resources Institute (GWRI) at Georgia Tech to build their

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[199] Apalachicola-Chattahoochee-Flint Stakeholders, *Sustainable Water Management Plan*, 3-4.

[200] See "ACF Performance Metrics Memo" and "ACFS Performance Metrics Table" at the ACF Stakeholders Website, last accessed June 19, 2017, http://acfstakeholders.org/swmp/.

[201] National Research Council, *Adaptive Management for Water Resources Project Planning*, 25.

[202] Ibid., 26-8.

models. These modelers relied heavily upon data from the US Geological Service, the US Fish and Wildlife Service, and the USACE.[203]

They had their work cut out for them. The ACF Stakeholders' technical team used "four progressive modeling scenarios" to produce their working model of ACF instream flows.[204] The team used historical rainfall data to model how much and how fast water would be expected to flow through key nodes in the ACF basin if its rivers, streams, and lakes were not dammed at all, and if no water was withdrawn from them. Next the team modeled how passively managed dams and reservoirs impact river flows through evaporative losses. Then the team tweaked this model, building in the assumption that the dams were actively managed. Finally, the model incorporated current water withdrawals, thereby showing how withdrawals seem to interact with dam management decisions to impact instream flows. Stakeholders then used this model to hypothesize how "Water Management Alternatives" (different policy options) might impact river conditions.[205] The technical team plugged into the model different rates of water consumption, reservoir storage policies, release rates for hydropower generation, and other variables. The model then produced forecasts of how the basin might respond to each policy decision.[206]

Despite or perhaps because of the significant expertise of their partners, ACFS understood its model could not dependably predict the basin's functioning. Modeled outcomes constituted best guesses of the river basin's behavior, given what modelers knew. Thus, with the modelers help, the ACFS created a list of pressing research

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[203] Ibid., 13. Modelers literature review included over 200 total sources.

[204] Ibid., 16.

[205] Ibid., 16-17.

[206] Ibid.

questions for further study. Research topics included: "flow needs of both cold water (trout) and warm water (shoal bass) fisheries in the upper Chattahoochee River"; "[i]nterconnectivity between land application, agricultural water use, and groundwater recharge"; and "the impact of farm ponds and other impoundments and their hydrologic function."[207] Despite these and a couple dozen other lingering questions, their model gave ACF Stakeholders enough information to hypothesize which policy options seemed likely to serve which policy objectives.

The fourth element of AM is utilization of a "range of management choices" to craft a management policies.[208] In the case of river management, choices include: utilization of technologies (e.g. drip irrigations, fish gates in dams); adjustments to water withdrawal permits; adjustments to timing of dam releases; dam installation or dam removal; prohibition or encouragement of rain water harvesting; prohibition or encouragement of land applications of waste water; and so forth. These management options provide stakeholders with various methods for testing their hypotheses about their ecosystem's structure and function and pursuing their policy objectives.

The ACFS selected adjustments to dam releases as their preferred management tool. Hence, they addressed their short-term policy proposal to the USACE, which is responsible for dam management in the basin (though not for setting water allocation policies).[209] The ACFS's proposal involved a "suite of actions" at each of the reservoirs and dams along the river:

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[207] Apalachicola-Chattahoochee-Flint Stakeholders, *Sustainable Water Management Plan*, 86.

[208] National Research Council, *Adaptive Management for Water Resources Project Planning*, 26.

[209] "ACF Master Water Control Manual Update," US Army Corps of Engineers Mobile District, n.d., accessed July 10, 2017, http://www.sam.usace.army.mil/Missions/Planning-Environmental/ACF-Master-Water-Control-Manual-Update/ACF-Project-Background/.

> Raise the winter pool rule curve at West Point Lake from 628 ft to 632.5 ft…. Define new zones to coincide with the USACE reservoir recreational impact zones and then only release water from an upstream reservoir when the downstream reservoir is in a lower zone…Adjust hydropower requirements to achieve more flexibility…Provide two pulsed water releases to achieve 9,000 cfs at Chattahoochee, FL for two weeks each, one in May and one in July.[210]

This strategy was not without its challenges. For the USACE to implement these actions, it would need to publish a new *Water Control Manual*. This document would be subject to public comment from less informed participants.[211] Yet USACE's more difficult challenge likely would be avoiding and/or winning potential lawsuits from Alabama, Georgia, and/or Florida. Still, these changes in agency rules must have seemed more feasible than other management strategies, such as convincing farmers to install new irrigation technology or convincing legislators to cap Georgia's water consumption, since the USACE had encouraged ACFS's efforts in the first place.[212] Also, this water release schedule would have allowed ACFS to test their understanding of basin dynamics, especially the relationship between dam releases and productivity of oyster populations in the Apalachicola Bay.

The fifth element of AM is "monitoring and evaluation of outcomes."[213] At this stage, participants gather and disseminate data on how their ecosystem responded to management decisions. These data require interpretation: data may nullify or support policymakers' hypotheses about how the ecosystem functions; data may clarify a topic of recognized uncertainty; or data may highlight a new topic of uncertainty in the system.

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[210] Apalachicola-Chattahoochee-Flint Stakeholders, *Sustainable Water Management Plan*, 4.

[211] Office of the Federal Register, "A Guide to the Rulemaking Process," accessed June 20, 2017, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf, 2-5.

[212] Apalachicola-Chattahoochee-Flint Stakeholders, *Sustainable Water Management Plan*, 9.

[213] National Research Council, *Adaptive Management for Water Resources Project Planning*, 26.

Interpretation along these and other lines allows policymakers to evaluate the accuracy of their ecosystem models and, hence, the wisdom of their management strategies.

The sixth element of AM is "incorporating learning into future decisions."[214] Learning has two dimensions in this context: learning about the ecosystem and learning about other stakeholders. [215] One primary means of incorporating learning into future decisions is to include participants in multiple AM cycles. Hence, AM's sixth element rests on participants' ongoing willingness to participate. It also rests on incorporating the policy outcome data into subsequent ecosystem models.

Because ACFS's *Sustainable Water Management Plan* was never implemented, they did not have the opportunity to enact AM elements five or six (monitoring and evaluating outcomes and incorporating learning into subsequent decisions). But it was certainly their intention to do so:

> Given the complexity of water resource management under changing conditions, it is important to make adaptive management–or learning about what actions achieve desired results and why, and making adjustments based on lessons learned–a priority. Adaptive management does not mean creating additional conditions of uncertainty for stakeholders who depend on the results of management decisions. Rather, adaptive management, by definition, is a structured iterative process of robust decision-making in the face of uncertainty, with the aim of reducing uncertainty over time via system monitoring. Water managers in the ACF Basin are urged to track the results of their efforts, assess whether those results accomplish what Basin stakeholders are seeking to achieve, and consult stakeholders when considering changes in management decisions based on new information.[216]

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[214] Ibid., 26-27.

[215] While AM intends for stakeholders to learn about their ecosystem through policymaking, they may learn as much or more about each other and the environmental policymaking process itself. See Christo Fabricius and Georgiana Cundill, "Learning in adaptive management: insights from published practice," *Ecology and Society* 19, no.1 (2014).

[216] Apalachicola-Chattahoochee-Flint Stakeholders, *Sustainable Water Management Plan*, 3.

Relationship Between Adaptive Management and Environmental Prudence

So what does the AM policymaking cycle have to do with environmental prudence? A reasonably close resemblance exists between the ends and means of environmental prudence and the ends and means of Adaptive Management. The moral concept and the policymaking model are not identical; one cannot expect a practical decision making strategy to conform perfectly to an ideal decision making strategy. But the resemblance is there nonetheless.

Regarding ends, environmental prudence pursues the environmental conditions necessary to the flourishing of human communities; environmental prudence aims to protect an ecosystem's capacity to produce environmental services valuable to humans. By contrast, AM pursues a normatively neutral goal: whatever management objectives stakeholders set. Stakeholders may or may not understand the relationship between ecosystem services and human flourishing. Neither may they value the ecosystem conditions that support the production of ecosystem services. Stakeholders may prefer short term goals—for instance, economic profits resulting from mineral extraction or cash crops—over long term goals like habitat conservation and biodiversity protection.[217] However, the AM cycle itself offers some remedy to this shortsightedness. Other stakeholders can raise concerns, and ecosystem models can give those concerns material weight. Hence, the AM cycle provides an opportunity to educate stakeholders' desires toward the conditions of environmental flourishing.

Regarding means, the six elements of the AM cycle provides a decision-making procedure that maps nicely onto the four steps of Aristotelian deliberation. The first step

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[217] Lucy Rist, Adam Felton, Lars Samuelsson, Camilla Sandström, and Ola Rosvall, "A New Paradigm for Adaptive Management," *Ecology and Society* 18, no. 4 (2013).

of deliberation involves investigating the details of the situation at hand, both in terms of the situation's moral stakes and material conditions. Adaptive management attends to material particulars by building models of ecosystem conditions, monitoring the impacts of management decisions and incorporating those insights into the next iteration of the ecosystem model. AM attends to the moral particularity of a situation by involving stakeholders in objective setting. Stakeholders' participation in ecosystem modeling also encourages attention to moral stakes, via various research trajectories. For example, a riverkeeper group might build a model that attempts to demonstrate the impacts of land-use development on stream turbidity, a detail to which real estate developers might not otherwise attend.

The second step of deliberation involves identifying what options for action exist and/or imagining what options for action could be created in a given situation. Adaptive Management's wide inclusion of stakeholders is helpful at this point as well. Business people might see market-based regulation opportunities government officials cannot see. Alternatively, university researchers might suggest that government rely on a new GIS technology to create better maps, and so forth. Hence, diverse participation allows decision makers not only to draw on their existing toolkit of management strategies; it also enhances their capacity to create new management tools and improve old ones.

The third step of deliberation involves discerning which course of action is most conducive to human flourishing (or at least, which option is least harmful to human flourishing). The AM decisions reach closure when they meet a much lower normative bar: when stakeholders identify a policy that aims at selected management objectives. Still, one hopes that, on the one hand, inclusion of diverse stakeholders means exposing

everyone to new ideas about human flourishing, and on the other hand that ecosystem modeling might give everyone a more realistic appreciation of the environmental risks of their preferred policy proposals. This experience does not guarantee stakeholders will achieve new insights into the nature of human flourishing, but it doesn't hurt either. It is a necessary if not sufficient condition to stakeholders grasping the environmental prerequisites of the good life for their society. At the very least, a policy all or most stakeholders can live with is likely to protect at least some important ecological conditions as well as economic, political, and social ones.

The fourth and final step of deliberation is acting on a decision in a timely manner. Promptness in action aligns well with the overarching purpose of AM: informed responsiveness to changing ecosystem conditions. Responsiveness requires timeliness; if managers respond too slowly, the ecosystem may cross key thresholds that maintain its regime. Furthermore, AM is built on the principle that uncertainty must not prevent action. Environmental conditions will always be uncertain because they constantly change; stakeholders will never know enough about their ecosystem to make a perfectly informed decision. However, stakeholders can know enough to implement a reasonable policy and monitor its outcomes. In so doing, they can gather more data about ecosystem functioning. Hence, the more promptly stakeholders approve the implementation of a policy, the more quickly they will receive information regarding its appropriateness, and the more quickly they can begin the next iteration of the AM policymaking cycle.

In sum, AM procedures encourage environmentally prudent policymaking. Regarding ends, AM procedures allow stakeholders to develop a better sense of the environmental conditions necessary to human flourishing. The AM procedures give

participants an opportunity to move beyond their general understanding of the

environmental conditions humans need (e.g. recognition that smog is bad for public

health, and that climate change is probably dangerous for coastal cities) and to acquire a

more specific sense of how one's own community depends upon a particular ecosystem

for its services (drinking water supply, flood control, electricity, etc.). Regarding means,

AM procedures give participants an opportunity to undertake the steps of Aristotelian

deliberation: information gathering; option identification and generation; option

selection; and acting promptly upon that selection. While AM scholarship does not use

the term "environmental prudence," AM policymaking procedures surely support that

kind of decision making.

Despite its promise, AM faces implementation barriers. These arise from the

design of US environmental policymaking institutions. Most institutions—whether they

be a state department of natural resources, or a legislative subcommittee on

environmental protection, or the EPA—are not designed to include stakeholders directly

in crafting policies, much less to identify and recruit stakeholders.[218] Nor are those

institutions designed to equip lay people to participate in policy discussions laden with

technical jargon.[219] Even if these hurdles can be overcome, policymaking institutions

often lack authority to select and implement environmental policies preferred by

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[218] American environmental policymaking institutions do enable citizens to shape policies through written comment on published rule proposals or by verbal comment at public hearings. See Paul A. Sabatier, Will Focht, Mark Lubell, Zev Trachtenberg, Arnold Vedlitz, and Marty Matlock, "Collaborative Approaches to Watershed Management" *Swimming Upstream: Collaborative Approaches to Watershed Management,* ed. Paul A. Sabatier, Will Focht, Mark Lubell, Zev Trachtenberg, Arnold Vedlitz, and Marty Matlock (Cambridge, MA: MIT Press, 2005), 3-4. However, these opportunities give participants significantly less influence than active ongoing engagement in the AM cycle.

[219] Hanna J. Cortner, "Making science relevant to environmental policy," *Environmental Science and Policy* 3 (2000): 24.

stakeholders within an ecosystem. This is so for two reasons. First, ecosystems are often

divided by political boundaries. Stakeholders, even if they have a voice in policymaking

procedures, are divided into distinct, dyssynchronous institutions. Second, policymaking

institutions are often bound by layers of environmental regulation. While probably well

intended, these regulations often stipulate not only environmental goals but policy

strategies, such as the use of certain technologies, as required means to address local

problems. These stipulations can get in the way of local problem solving.[220] Adaptive

Governance scholarship labors to identify how policymaking institutions could be

reorganized so as to correct such problems, thereby enabling stakeholders and managers

to implement AM policymaking procedures.

<div align="center">Adaptive Governance</div>

Before diving into the content of Adaptive Governance, it will be helpful to

clarify the relationship between Adaptive Governance and Adaptive Management. First,

AM procedures help policymakers craft fitting answers to questions like "How many

gallons per day should farmers be permitted to remove from the Flint River during

drought conditions?" or "How many acre feet should be stored in Lake Lanier in wet

winters?" Thus, AM is a strategy for making policies that directly pertain to the use of an

ecosystem and its ability to provide ecosystem services.

Adaptive Governance has more to do with power infrastructure. [221] Its

institutional design prescriptions answer more political questions: What should be the

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[220] Walter A. Rosenbaum, *Environmental Politics and Policy, Ninth Edition* (Washington, D.C.: Sage, 2014), 122, 187-88.

[221] Steven Hatfield-Dodds, Rohan Nelson, and David Cook, "Adaptive Governance: An Introduction and Implications for Public Policy" (ANZSEE Conference, Noosa, Queensland, 2007), https://publications.csiro.au/rpr/pub?list=BRO&pid=procite:c0b8a544-a2ea-4156-92b8-62316694aa83, 3-4.

jurisdiction of a water allocation policymaking institution? How should membership and/or representation be organized? And, how should this policymaking institution relate to other policymaking institutions? In sum, how should policymaking institutions be designed in order for those institutions to implement AM procedures? The section below answers that question.

Adaptive Governance theory organizes jurisdiction of policymaking institutions around a "problemshed."[222] A problemshed is a geographic area in which certain decisions (water consumption, pollution, dams) contribute to a specific set of interrelated policy problems (water allocation, water quality, oyster habitat). This is not to say that behavior within the problemshed is the sole cause of policy challenges. Obviously, global climate change impacts water allocation policy in the ACF basin. Still, independent of climate change, causal linkages exist between certain behaviors in a geographic region and certain environmental challenges therein.[223] These causal linkages are precisely what policymakers attempt to explain when building ecosystem models (AM element three above). The purpose of organizing a policymaking institution's jurisdiction around a problemshed is to enhance policymakers' understanding of and political latitude to address these causal linkages.

The ACFS's long term policy proposal called on their state governments to create a policymaking institution with jurisdiction organized around a problemshed. In this case, the "problem" would be water management, and the "shed" would be the ACF basin.

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[222] Seanna Davidson and Rob C. de Löe, "Water Governance: Transcending Boundaries," *Water Alternatives* 7, no. 2 (2014): 369.

[223] Davidson and de Löe, "Water Governance: Transcending Boundaries," 369.

This "transboundary water management institution," i.e. a river basin commission, would have a four-fold task:

- Acting as a data clearinghouse and facilitator of common data standards (collection, management, etc.);
- Encouraging and facilitating coordination and consensus building and providing conflict resolution services;
- Supporting development of basin level water management plans, specifically related to conservation and returns, supply augmentation and drought management; and
- Educating the general public and specific stakeholders about the need for transboundary management and particular opportunities and strategies for doing.[224]

To support the creation of this transboundary water management institution, ACFS commissioned "The University Collaborative" (TUC) to prepare a report outlining various ways such a transboundary water management institution could be structured, should the states utilize an interstate compact toward that end.[225]

This report's recommendations exemplify AG prescriptions not only in terms of jurisdiction, but also in terms of who should participate in the institution's work. Adaptive Governance calls for diverse stakeholder participation in environmental policymaking.[226] The ACFS suggested that the river basin commission should include state governments (GA, AL, FL), and federal government agencies (USACE, primarily, but perhaps also the USFWS and EPA). These would lend binding authority to the institutions' decisions. The University Collaborative also suggested that the commission

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[224] Apalachicola-Chattahoochee-Flint Stakeholders, *Sustainable Water Management Plan*, 90.

[225] Fowler et al., "Options for Transboundary Governance to Promote Sustainable and Adaptive Water Management in the Apalachicola-Chattachoochee-Flint Basin." TUC included representatives from the University of Georgia, Albany State University, Auburn University, Florida State University and the University of Florida.

[226] Huitema et al., "Adaptive Water Governance."

should include businesses, conservation organizations, homeowners associations, utility companies, and other stakeholders.[227] However, inclusion of all these stakeholders need not entail equal authority or identical roles for all of them.[228] Governments might exercise voting power on policies, while businesses and non-profits might sit on advisory boards or ad hoc committees.[229] These non-voting members might undertake some of the work of the AM cycle by identifying management objectives, creating ecosystem models, or even implementing and monitoring policy outcomes (AM elements two to six).

One goal of including diverse stakeholders in an AG institution—which often undertakes work other than policymaking—is to increase its adaptiveness, to enhance the institution's creativity in the face of policy challenges.[230] For example, a river basin commission might charge three stakeholder members—perhaps a department of natural resources, a local university, and a local non-profit—to undertake separate stream pollution monitoring projects, thereby enhancing the reliability of the data produced. These same actors might also undertake public education programs targeting different audiences, using different communication strategies. Such redundancy could—it is hoped—enhance the overall effectiveness of the river basin commission's work.[231]

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[227] Fowler et al., "Options for Transboundary Governance to Promote Sustainable and Adaptive Water Management in the Apalachicola-Chattachoochee-Flint Basin" 19-22.

[228] Henrik Osterblom and Carl Folke, "Emergency of Global Adaptive Governance for Stewardship of Regional Marine Resources," *Ecology and Society* 18, no 2 (2013): article 4.

[229] Fowler et al., "Options for Transboundary Governance to Promote Sustainable and Adaptive Water Management in the Apalachicola-Chattachoochee-Flint Basin," 19-22.

[230] Lisen Schultz, Carle Folke, Henrik Österblom, and Per Olsson, "Adaptive Governance, Ecosystem Management, and Natural Capital," *Proceedings of the National Academy of Sciences* 112, no. 24 (June 16, 2015): Discussion section.

[231] Bobbi Low, Elinor Ostrom, Carl Simon and James Wilson, "Redundancy and diversity; do they influence optimal management?," *Navigating Social-Ecological Systems: Building Resilience for*

So much for the internal structure and function of the proposed river basin commission. Adaptive Governance also prescribes how such an institution needs to relate to other policymaking institutions in order to support AM policymaking. The guiding concept AG offers—discussed in Chapter One—is polycentricity. A polycentric governance system consists of a "collection of heterogeneous decision centers acting independently, but under a common system of rules and/or norms[.]"[232] Rule of law provides the common system of rules among policymaking institutions.[233] By this definition, the US's federalist system of government already exhibits a degree of polycentricity. Federal, state, and local governments constitute multiple decision making centers which exercise general purpose policymaking authority. However, AG calls for policymaking authority to be dispersed more broadly, allocating various kinds of policymaking authority to various special purpose policymaking institutions. This dispersal allows policymaking institutions to specialize in certain policy arenas that existing institutions may struggle to address effectively.

Special purpose policymaking institutions, particularly those that address transboundary policy issues, are unlikely to fit neatly within federalism's tri-tier hierarchy. Hence, governments and special-purpose institutions may struggle to coordinate their policy goals and strategies. Recent AG scholarship has labored to show how lawmakers working within the US's current federalist institutions could make polycentric governance more feasible. "Reflexive law" constitutes one promising path

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Complexity and Change, ed. Fikret Berkes, Johan Colding, and Carle Folke (Cambridge, UK: Cambridge University Press, 2008), 87.

[232] Vlad Tarko, *Polycentric Governance: A Theoretical and Empirical Exploration* (PhD dissertation, George Mason University, 2015), xi.

[233] Tarko, *Polycentric Governance: A Theoretical and Empirical Exploration*, 14.

forward.[234] Reflexive law avoids setting definite, static standards for environmental quality. Instead, it "establish[es] minimum requirements (floors), maximum thresholds (ceilings), and general guidelines (principles)" rather than detailing precisely how compliance should be achieved.[235] Reflexive law supports AM by giving policymakers as free a hand as is possible in local decision making. In the ACF Basin, state governments could implement reflexive law by opting not to use an interstate compact to set a fixed water allocation formula, and opting instead to usse an interstate compact to define the purpose and scope of river basin commission's authority, and its relationship to other lawmaking institutions.[236] This is precisely the thing the ACFS asked them to do. Doing so would give a river basin commission freedom to utilize a wide range of management options (AM element four).

To sum up this section: AG scholarship gives instructions for designing institutions capable of undertaking AM procedures. Toward that end, AG makes the following institutional prescriptions: jurisdiction should be organized at the level of the problemshed; participation in governance institutions should be inclusive of diverse stakeholders; and federalist governments should use their authority to encourage the development of a more polycentric governance system. The aspiration of this institutional design is to give policymakers information and expertise, a wide range of tools, and creative freedom balanced with accountability to make, monitor, and revise policies that enhance the environmental conditions valued by stakeholders in the basin.

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[234] DeCaro et al., "Legal and institutional foundations of adaptive environmental governance."

[235] Ibid.

[236] Ibid.

Adaptive Governance and Environmental Prudence

This chapter has summarized AG's means and ends. It has not proven that AG lives up to its aspirations; it has not shown that AG enables stakeholders and natural resource managers to implement AM, and thereby to improve human adaptiveness to changing environmental conditions. It has not even tried to prove that point. That kind of empirical analysis belongs more to social scientists than to political philosophers. Also, my case study does not provide firm evidence one way or another on AG's effectiveness in the ACF basin as the states have not (yet) opted to enact the ACFS's recommendations. They have made no moves to create a transboundary water management institution/river basin commission in the ACF basin.

What this chapter *has* demonstrated is that the practice of AM, at least in principle, could encourage environmental prudence in policymaking. AM does not aim explicitly at environmental prudence, but AM supports it nonetheless. That potential makes AM attractive as a policymaking strategy, and it makes AG attractive as an institutional reform agenda.

One way to strengthen the case for AG's implementation in the ACF basin is to answer Chaffin et al.'s question about the relationship between AG principles and democratic legitimacy. Can AG's institutional design agenda, on principle, support or enhance the democratic legitimacy of interstate water allocation policymaking institutions in the basin? If it could, that would be another mark in its favor. Chapters Three and Four develop the concepts needed to answer that question.

Chapter 3

Introduction

To evaluate whether Adaptive Governance's institutional design agenda supports

or undermines democratically legitimate policymaking one needs a clear sense of what

democratic legitimacy is. Hence, this chapter begins by defining the terms "political

legitimacy" and "democratic political legitimacy" as these categories are used in political

philosophy.

However, a general account of democratic legitimacy will not suffice; different

political philosophies give different normative standards of democratic legitimacy. The

political philosophy I draw upon must offer, first, a morally compelling account of

democratic legitimacy in general, and second, adequate guidance on addressing the

pragmatic challenges that arise in interstate water allocation policymaking in a

democratically legitimate way. This chapter uses the *via negativa* to identify that

philosophy: it begins by weeding out two prominent possibilities — political liberalism

and communitarianism.

These philosophies must be addressed because they both have significant

influence in academic and non-academic circles regarding the nature of democratic

legitimacy. *The Oxford Handbook of Political Theory* identifies seven of the most

prominent schools of political philosophy from the 1960s to the 2000s: Liberalism,

Liberal Egalitarianism (a variant of Liberalism), Communitarianism, Feminism, Critical

Theory (especially the work of Jürgen Habermas and his inheritors), Green Political

Theory, and Post-Structuralism.[237] This dissertation addresses the three of those seven

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[237] John S. Dryzek, Bonnie Honig, Anne Phillips (New York: Oxford University Press, 2006), 13-23.

theories which appear, admittedly anecdotally, to be the most publicly influential:

Liberalism, Communitarianism, and a Habermasian strand of Critical Theory. Liberalism

and Communitarianism deserve attention for their influence beyond academic discourses,

in policymaking circles. For instance, Liberal philosopher Martha Nussbaum served as a

research advisor at the World Institute for Development Economics Research, a United

Nations think tank that is part of the United Nations University.[238] Her work builds on

that of John Rawls, whose far-reaching impact on American political culture critics and

defenders alike acknowledge.[239] Communitarian philosopher Charles Taylor is actively

involved in Canada's political process, both as a state commissioned-researcher and a

public voice. In 2008, he co-authored a report commissioned by the Premier of Quebec

on accommodation practices for religious minorities, and his views are the subject of

significant media coverage.[240] These philosophies deserve attention because they have

influenced how North American publics understand and debate legitimate democratic

governance.

    Unfortunately, neither of these political philosophies gives the public sufficient

guidance on how the pragmatic challenges that arise in environmental policymaking can

be handled in democratically legitimate ways. These philosophies either give no guidance

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[238] "Marth Nussbaum," The Gifford Lectures Website, accessed July 10, 2017, http://www.giffordlectures.org/lecturers/martha-nussbaum.

[239] Jerome Foss, "The Hidden Influence of John Rawls on the American Mind," The Heritage Foundation, September 22, 2016, accessed July 10, 2017, http://www.heritage.org/political-process/report/the-hidden-influence-john-rawls-the-american-mind; Steven B. Smith, "The Philosopher of Our Times," *New York Sun*, May 11, 2007, http://www.nysun.com/arts/philosopher-of-our-times/54265/; Douglas Martin, "John Rawls, Theorist on Justice, Is Dead at 82," *New York Times*, November 26, 2002, http://www.nytimes.com/2002/11/26/us/john-rawls-theorist-on-justice-is-dead-at-82.html.

[240] Caroline Plante, "Couillard welcomes Charles Taylor's change of heart," *Montreal Gazette*, February 14, 2017, http://montrealgazette.com/news/local-news/times-have-changed-charles-taylor-says-of-reasonable-accommodation.

or they give the wrong kind of guidance for handling the following issues: the role of experts in policymaking; policymaking involving two sovereign governments; the role of economically or socially marginalized communities in policymaking; and assessing the value of non-private goods at stake in a particular policy. This chapter argues that these failures are significant enough that the public would do better to take its guidance from another source. Chapter Four will discuss that source: a version of Deliberative Democracy derived from a Habermasian strand of Critical Theory.

<center>Political Legitimacy and Democratic Legitimacy</center>

Definition of Political Legitimacy

A general understanding of political legitimacy is necessary to understand the particular nature of democratic legitimacy. Political legitimacy is the recognition of the moral appropriateness of the behavior of the governing institutions that make and enforce laws and/or the moral appropriateness of the content of laws.[241] Operating under this recognition, governed populations feel morally obliged to adhere to laws not simply to avoid punishment but because adhering to laws is the right thing to do. This is not to say that the legitimation process requires a conscious decision. Each spring, most people do not carefully weigh the moral merits and demerits of the tax code or the government that makes it before deciding to file their taxes; most people simply pay their taxes. Some people do this to avoid penalties, but many people file honestly and pay taxes in full because they feel they ought to do so. They deem tax laws and/or the government that makes tax laws sufficiently legitimate to deserve their adherence.[242]

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[241] John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (New York: Oxford University Press, 2006), 21-22.

Political legitimacy grows from two sources: first, from broad popular acceptance of the content of the laws the government makes, and second, from broad popular acceptance of the procedures and institutions used to make those laws.[243] In short, the public may accept a law's legitimacy either because they believe it imposes a morally valid rule on governed actors' behavior or because they believe the law was made in a morally appropriate way. These two justification strategies can operate at the same time, even within the same person. Operating thus, they may reinforce or compete with each other. For instance, an American Catholic who believes IUD birth control is a form of (perhaps inadvertent) homicide may still believe the policies that allow and fund IUD supplies were made appropriately by lawmakers who represent the moral diversity of the populace. That same American Catholic may deem a new law eliminating the death penalty both substantively and procedurally valid: substantively, because she believes the death penalty is the state's version of murder, and procedurally, because she thinks the non-violent protests which motivated the new law are appropriate democratic political tactics and because she trusts the legislative process.

Definition of Democratic Legitimacy

What distinguishes democratic legitimacy from other forms of political legitimacy—monarchic, oligarchic or theocratic legitimacy—is its justificatory logic. Democratic governments do not appeal to the divine right of kings, aristocratic virtue, or

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[242] According to the Pew Research Center, 57 percent of Americans believe they pay about the right amount or even too little in taxes. Americans may complain that corporations or poor people are not paying enough, but most people seem to accept income taxation itself as a legitimate practice (Seth Motel, "5 facts on how Americans view taxes," Pew Research Center Website, April 10, 2015, accessed July 10, 2017, http://www.pewresearch.org/fact-tank/2015/04/10/5-facts-on-how-americans-view-taxes/).

[243] Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy*, 21-22.

the dictates of scripture to win governed populations' moral respect.[244] On the contrary,

legitimate democratic governments are thoroughly humanistic. They accrue moral

authority by upholding two principles: popular sovereignty and individual rights.[245]

Popular sovereignty claims posit that legitimate government receives its authority from

the will of the people. Individual rights claims posit that all persons (or citizens) have an

equal and fundamental claim to certain freedoms and treatment.[246]

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[244] Rosanvallon, *Democratic Legitimacy*, 1-2.

[245] John Rawls, *Political Liberalism*, Expanded Edition (New York: Columbia University Press, 2005), 4-5.

[246] M. Rejai, *Democracy: The Contemporary Theories* (New York: Atherton Press, 1967), 12-14, 24-25.

Throughout this work, I use the phrase "individual rights" without the modifiers "natural" or "human." The absence of these modifiers is intentional. Neither term reflects what the thinkers discussed here—Rawls, Nussbaum, Walzer, or Taylor and later Jürgen Habermas and other Deliberative Democrats—mean when they express how "rights" sustain legitimate democratic governance. In each thinker's usage, rights refer to individual entitlements owed to citizens by their governments. The moral authority of these rights is supposed to derive from a social contract, shared cultural norms, some combination thereof, or the logic of practical discourse.

By contrast, the moral weight of "natural rights" is supposed to derive from some essential facet (or facets) of the human condition (Francis Fukuyama, "Natural Rights and Human History," *The National Interest,* no. 64 [2001]: 22-6). The authors discussed here do not see rights claims as arising from the human condition, per se, but from historically produced moral norms. Nussbaum is a possible exception to this rule as she grounds her argument for the validity of rights-as-capabilities in "human dignity." Despite this grounding, Nussbaum acknowledges that specific rights claims can and should vary somewhat from one society to another (see discussion below). Hence, even she acknowledges that rights claims are, in important ways, socially constructed.

Advocates of "human rights" claims are generally less specific about the source of rights claims' authority (Ibid, 22). They do, however specify the scope of human rights: rights are universal; all persons everywhere are entitled to certain kinds of treatment by governments (J. Roland Pennock, "Rights, Natural Rights, and Human Rights—A General View," *American Society for Political and Legal Philosophy,* 23 [1981]: 6).

The authors discussed in this chapter have a narrower focus. They are concerned with the particular rights claims established in and by particular nation-states for *their own citizens*. This concern is especially obvious in Communitarian reflections on rights, which attend closely to the implications of moral and cultural particularity, but it also crops up in Liberal accounts of rights. Rawls thinks different societies will have different "conceptions of justice" and hence different schemas of rights that result from those conceptions (see discussion below).

Some but not all Deliberative Democrats treat rights as universal entitlements. Seyla Benhabib is one prominent example (see Chapter Four). But Habermas, whose account of democratic legitimacy most strongly influences my own, gives individual rights claims a more limited scope. In his view, constitutional rights to freedom of speech, freedom of religious, etc., maintain the conditions necessary for individual citizens to participate freely, openly, and effectively in public discussions of policy matters. Such participation gives those governed democratic control over their own laws, thereby legitimizing them. Entitlements to discursive participation may occasionally need to be extended to non-citizens in order to

Disagreement, however, arises regarding the priority of these two fundamental claims. More "individualistic" philosophies see the people's sovereignty as derivative of individuals' moral value, explained either with reference to persons' capacity for reason or their individual human dignity. This moral value produces individuals' "inalienable" or "natural" rights, such as life, liberty, and property (specific lists vary). [247] In this view, governments arise and endure at individuals' behest, for the purpose of formally securing individual citizens' rights and providing for their mutual benefit. Since the government exists to serve citizens, naturally citizens are entitled to participate in it, thereby achieving popular sovereignty. In this view, individuals are prior to society (morally if not ontologically). By contrast, more "collectivist philosophies" see persons as embedded in social systems.[248] Individual rights only feel "self-evident" because social convention has normalized them. Despite their constructed nature, rights, specifically political rights, serve an important social function. They enable society to develop its common will continually through individual members' participation in the political system. This common will instructs the government on how to uphold the whole of society's interests.[249]

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maintain the communicative rationality of public discourse (see Chapter Four). But the recognition that non-citizens may occasionally have a legitimate role to play in another nation's public discourse is a far cry from the range of material, social, and political entitlements human rights advocates believe all persons are owed. Following Habermas, I treat rights primarily as entitlements of those governed to have a say in the formation of the laws that rule them, not as a suite of thicker entitlements to education, public safety, clean drinking water, etc., important those these claims may be to human flourishing.

[247] Ibid., 24.

[248] Ibid., 24.

[249] Ian Shapiro, *The Real World of Democratic Theory* (Princeton, NJ: Princeton University Press, 2011), 253-54.

The foregoing discussion paints with broad strokes the democratic debates regarding the nature of legitimate government and the role of both individual rights and popular sovereignty therein. I draw attention to that debate here for two reasons. First, it is a constitutive element of any democratic philosophy. Therefore, a handy way to summarize the contours of a democratic philosophy is to show where it lands in that debate. Second, where a philosophy lands in this debate profoundly impacts the kinds of guidance it gives for handling the pragmatic problems that beset environmental policymaking in principled ways.

Four such pragmatic challenges are especially important in the ACF case. The first challenge results from the transboundary nature of this water allocation policy. Democratic policymaking usually involves one government exercising its jurisdiction over one territory and its populace. This case requires cooperation or coordination among governments. How should that cooperation/coordination be handled? What forms of representation and accountability are appropriate to a policymaking challenge that affects citizens across state lines?

The second challenge is that water allocation policy decisions involve a great deal of ecological, technological, hydrological, economic data and theory. Few citizens—or for that matter, few politicians—are competent interpreters of these data.[250] What role should experts assume in this context? Should they function as educators to policymakers, and/or to the general public? Should they assume more technocratic authority? If so, how would accountability work?

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[250] Rosenbaum, *Environmental Politics and Policy,* 70-74, 90-91.

The third challenge—which pertains beyond environmental policy decisions—is that it takes time and money to participate in the democratic process, time and money poorer citizens may not have. Hence, certain persons tend to be underrepresented in decisions that impact them disproportionately.[251] The ACF Stakeholders' process demonstrates this point: membership dues ranged from $250 to $2,500. While not an unreasonable price given the costs of hiring a consulting group, hosting meetings, and publishing reports, it still may have presented a roadblock to membership for poorer groups and citizens. Is this situation a lamentable but acceptable reality or does it require redress? If so, why and how?

The fourth challenge—which also pertains to many policy decisions—is that goods at stake in this decision are a mix of private and non-private goods. (I call them non-private rather than public goods, common goods, or collective goods because each of those terms is employed in a variety of ways across philosophical and AG literature, and their multiple meanings threatens to confuse this author. My point is simply that something more complicated than a private good, like personal property, is at stake.) It is unclear how the value of these goods should be assessed in policymaking. For instance, how should society value biodiversity, recreation, or cultural continuity in the Apalachicola Bay? Do these non-private values trump the private economic value of agricultural production? How should trade-offs be made?[252]

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[251] Ibid., 147-56.

[252] Environmental economics attempts to answer this question by assigning a dollar value to environmental services (see for instance, Kathleen Segerson, "Valuing Environmental Goods and Services: An Economic Perspective," in *Primer on Nonmarket Valuation*, ed. Patricia Champ, Kevin Boyle, and Thomas Brown, The Economics of Non-Market Goods and Resources 13 [Springer Netherlands, 2017]). By contrast, some public affairs scholars argue that the use of Cost Benefit Analysis, in which environmental economics participates, is inappropriate for environmental policymaking (see for instance, Kwangseon Hwang, "Cost-benefit analysis; its usage and critiques," in *Journal of Public Affairs* 16:1,

The next two sections summarize Liberal and Communitarian accounts of democratic legitimacy. At the end of each section, I discuss the quality of the guidance each political philosophy gives (or fails to give) for dealing with environmental policy challenges in principled ways. This discussion moves us closer to the guiding account of democratic legitimacy we need by eliminating less than illuminating (if distractingly prominent) candidates.

<div align="center">Liberal Political Philosophy</div>

Of the two principles of democratic legitimacy, Liberal philosophies tend to place more moral weight on individual rights than popular sovereignty.[253] Liberals measure a government's legitimacy by how well it protects the rights of all citizens, especially the rights of minority populations whose interests popular majorities tend to overlook or squash.[254] Liberals have good historical reasons to avoid heavy emphasis on popular sovereignty claims, to distrust powerful majorities: white American majorities have done little to protect Native Americans territorial rights; or to protest civil right violations against Japanese Americans' internment during World War II; or to end McCarthyism. German majorities elected Hitler. According to liberal standards of justice, a democratically legitimate government cannot rule *without* the consent of those governed,

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February 2016: 75-80). Economics seems unable to assess definitively the value of ecosystem services as the sum of their individual utility, measured in dollars. So, we need a political philosophy that can assess the value of non-private goods.

[253] According to Rawls, a society can be "decent" if it honors human rights, even if it is not fully democratic, i.e. does not give the citizenry political power to influence policymaking through elections, political protest, etc. See John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Harvard University Press, 2003), 13.

[254] Martha Nussbaum, *Creating Capabilities* (Cambridge, MA: Harvard University Press, 2011), 73-74.

but it must also find some moral measure in addition to popular will to guide its decisions constructively.[255] In large part, human rights lists provide that measure.

This emphasis is so thoroughgoing that one can organize an account of liberal philosophy around three rights-oriented questions. First, what is a right? This substantive question has a procedural twin: How should a society select its rights? Third, once a society has established its rights, how should it make the rest of its laws?

John Rawls and Martha Nussbaum provide two prominent examples of how liberal thinkers answer these questions. Rawls offered "the defining statement of liberalism relative to which all other versions of liberalism are understood."[256] This includes Nussbaum, who (arguably) leads the field at present.[257] Rawls' work focused on societies with relatively settled constitutional schedules of rights, while Nussbaum primarily targets new and emerging democratic states. (Neither of them focus exclusively on one or the other; the difference is a matter of emphasis.) Taken together, these thinkers demonstrate some of the most important points of continuity and divergence within contemporary Liberalism. In short, Rawls' and Nussbaum's examples suggest where to find the strengths and weaknesses of the field as a whole.

Environmental policymaking is one of its weaknesses. Liberalism offers too little guidance for handling in principled ways the pragmatic challenges that arise in environmental policymaking. To make this point, I first summarize each thinker's

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[255] Rawls, *Political Liberalism,* 4.

[256] Marcel Wissenberg, "Liberalism," in *Political Theory and the Ecological Challenge*, ed. Ecklersley Dobson and Robyn Ecklersley (New York: Cambridge University Press, 2006), 25.

[257] "Martha Nussbaum Named the 2017 Jefferson Lecturer in the Humanities," National Endowment for the Humanities Website, January 18, 2017, https://www.neh.gov/news/press-release/2017-01-18.

political philosophy, using the questions in the paragraph above to structure my summary. Then I show what guidance these political philosophies give or fail to give regarding environmental policymaking.

John Rawls' Account of Democratic Legitimacy

What is a right for Rawls?

Rawls' definition of a right can only be understood with reference to the defining task he attributes to legitimate governments, namely, the intergenerational maintenance of a "fair system of cooperation" among free and equal citizens.[258] This system exists within a territorially bounded state that citizens enter upon birth and exit upon death.[259] The system's "basic structure" results from the way "the main political and social institutions of society fit together."[260] These institutions include:

> [t]he political constitution with an independent judiciary, the legally recognized forms of property, and the structure of the economy (for example, as a system of competitive markets with private property in the means of production), as well as the family in some form.[261]

Rights provide the basic ground rules for citizens' activities within the basic structure. They consist of "basic liberties" to which "everyone has the same indefeasible claim."[262] According to Rawls, these liberties are of several basic kinds:

> freedom of thought and liberty of conscience; political liberties (for example, the right to vote and to participate in politics) and freedom of association, as well as the rights and liberties specified by the liberty and integrity (physical and

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[258] Rawls, *Justice as Fairness,* 5-6, 28.

[259] Rawls, *Political Liberalism*, 40-41.

[260] Rawls, *Justice as Fairness,* 10.

[261] Ibid., 10.

[262] Ibid., 42, 46-48.

psychological) of the person; and finally, the rights and liberties covered by rule of law.[263]

Constitutions entrench these rights and thereby guarantee their observation across society's basic institutions.[264] In so doing, rights protect and encourage citizens' exercise of two moral powers: rationality and reason. As shall be discussed presently, Rawls claims that citizens' freedom and equality derive from the exercise of these moral powers.[265]

These two moral powers allow modern persons respectively to live lives they deem worthwhile and to live cooperatively in society.[266] "Rationality" enables the former; it consists in a person's ability to "form, revise, and pursue" an understanding of what it means to live a good life.[267] (Rawls calls this capacity "rationality" because it operates on a means/ends logic, not because the ends persons select are scientifically verifiable.) Rational comprehension of one's own good often derives from some "comprehensive doctrine," such as a philosophical or religious vision

> of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole.[268]

Two kinds of rights—freedom of conscience and freedom of association rights— are especially important to the exercise of this moral power.[269] Freedom of association

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[263] Ibid., 44.

[264] Ibid., 48.

[265] Ibid., 18-24.

[266] Ibid., 19.

[267] Rawls, *Political Liberalism*, 72.

[268] Ibid., 13.

[269] Rawls, *Justice as Fairness*, 45.

allows citizens to gather with likeminded persons and collaboratively enact their values; this freedom allows for monks to build monasteries, treehuggers to form communes, and Harley Davidson riders to form riding groups. Freedom of conscience allows persons to select and, just as importantly, revise their understandings of a good life. Such revisions may result in ejection from a particular association—a monastery, commune, or riding club—but they will not result in expulsion from or targeted coercion within society's basic economic and political institutions. So, "while churches [or any other association] can excommunicate heretics, they cannot burn them" as the state will not allow it.[270] Freedom of conscience gives persons the ability to enter and exit social associations as well as adopt and revise visions of the good life as they see fit.

While the first moral power enables persons to pursue lives they deem valuable, the second moral power enables persons to live together cooperatively, despite their different visions of a good life. "Reasonableness" entails a willingness to exercise reciprocity, to entertain only those social expectations by which one is personally willing to abide and would still be willing to abide by even if one were in another person's position.[271] Rawls does not expect citizens to exercise this moral power in all their relationships. Communities and associations may derive non-reciprocal expectations for their members' behavior from sacred texts, patterns of tradition, or the group's mission.[272] While appropriate within the confines of an association or community, such expectations cannot regulate a pluralistic society's basic institutions in an orderly way.

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[270] Ibid., 11.

[271] Rawls, *Political Liberalism*, 49-50.

[272] Ibid., 43.

Only reasonableness can do this. When considering the rules governing political,

economic, and social institutions,

> persons are reasonable…when…they are ready to propose principles and
> standards as fair terms of cooperation...and they are ready to discuss fair terms
> that others propose…and [when they are ready] to abide by them [fair terms]
> willingly, given the assurance that others will likewise do so.[273]

Reasonable political leaders produce fair rules to govern society's basic institutions, and

reasonable citizens adhere to those rules willingly so long as they can expect others to do

the same.[274] In so doing, members of a reasonable society can live cooperatively even

though they adhere to different moral frameworks.[275]

Rights enable such reasonable coexistence in various ways.[276] Political rights

encourage reasonableness by giving all citizens a chance to "propose" and "discuss" the

fairness of laws governing political, economic, and social behavior.[277] Rights to liberty

and integrity of the person encourage reasonableness by preventing coercion. Powerful

actors cannot easily bully citizens whose bodies and property are protected by the state;

they have to reason with them instead, using private contracts or the public political

process. Lastly, rule of law rights encourages reasonableness by ensuring laws are fairly

enforced—even against the state—and hence that mutual compliance can be expected.

In sum, Rawls defines rights as those basic liberties which protect and encourage

citizens' exercise of their moral powers: rationality and reasonableness. In so doing,

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[273] Ibid., 49.

[274] Rawls, *Political Liberalism,* 214-5; Rawls, *Justice as Fairness,* 9.

[275] Rawls, *Political Liberalism*, 13.

[276] Rawls, *Justice as Fairness,* 44.

[277] Rawls, *Political Liberalism*, 49.

rights enable citizens to cooperate economically, socially, or politically with each other

on free and equal footing as they pursue their own ends (I deal with how Rawls addresses

material inequality in subsequent sections).[278] While Rawls lays out categories of rights

he believes to be especially important to the exercise of citizen's moral powers, he does

not specify a list of rights to be enshrined in state constitutions. So, how ought a society

identify what its particular schedule of rights should include?

How does Rawls argue rights should be selected?

To help citizens and lawmakers generate a concrete list of rights, Rawls offers

them a thought experiment: reasoning from the "original position."[279] In the original

position, citizens' representatives stand behind a "veil of ignorance."[280] They know no

details regarding their own religion, gender, ethnicity, economic status, personal talents,

social relationships, or those of the citizens they represent. Not only do persons behind

the veil of ignorance lack information, they are free from all "force and coercion,

deception and fraud."[281] Of course, persons cannot actually get behind a veil of

ignorance; legislators and citizens cannot forget who they are or to whom they owe their

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[278] Freedom and equality in Rawls' philosophy have to do with the exercise of moral powers. Persons are equal in so far as they have the capacity, over the course of their whole lives, to exercise a minimum level of rationality and reasonableness, thereby allowing them to participate willingly in a fair system of cooperation. Persons are free in so far as they can select their own rational ends. They are also free in that "they regard themselves as self-authenticating sources of valid claims." In short, persons are free to the extent that they see themselves as having a right to select and pursue rational ends and to receive institutional protection to select and pursue their rational ends (Rawls, *Justice as Fairness*, 20-3). Rawlsian rights do not guarantee material freedom and equality, for instance by stipulating a basic universal income or guaranteed access to public transportation. Rawls does provide for citizens' material freedom and equality in his second principle of justice, which dictates how primary goods should be distributed (Rawls, *Justice as Fairness*, 42).

[279] Rawls, *Justice as Fairness,* 14-6.

[280] Ibid., 15-16.

[281] Ibid., 15.

positions. Still, the thought experiment helps citizens and lawmakers discern the kinds of

reasons that are appropriate or inappropriate to the consider in judging which rights

should be constitutionally entrenched. Inappropriate reasons derive from one's own or

one's constituents' position in society. Reasons arising from a comprehensive doctrine

belong in this category. For instance, the claim that abortion should be constitutionally

prohibited because life is sacred from the moment of conception is disallowed. This claim

expresses a religious conviction which a person behind the veil of ignorance could not

recognize as her own. Happily, standing behind the veil of ignorance does not remove a

person's ability to offer any reasons to justify a particular rights claim. It only limits her

considerations to what Rawls calls "public reasons."[282]

Public reasons arise from "the public political culture of a democratic society."[283]

Public reasons may very well be compatible with comprehensive doctrines held by the

citizens, and such "overlapping consensus" may strengthen their appeal.[284] Nonetheless,

public reasons should not derive their fundamental authority from comprehensive

doctrines. Rather, their authority should result from the fact that these principles help

society avoid or work through social problems in a broadly acceptable way. For instance,

"the acceptance of the principle of toleration came about…following the Reformation: at

first reluctantly, but nevertheless as providing the only workable alternative to endless

and destructive civil strife."[285] For another example, the US only clearly perceived the

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[282] Rawls, *Political Liberalism*, 223.

[283] Ibid., 223.

[284] Rawls, *Justice as Fairness*, 32-33

[285] Rawls, *Political Liberalism,* 159.

evil of slavery after it caused a bloody civil war. Such historical experiences generate a

society's shared public values that are not attached to religious sensibilities (at least

according to Rawls).[286]

So how should lawmakers and citizens utilize these public reasons initially to

draft and subsequently to revise a national constitution? The first step is to identify if any

logical connection exists among various settled public principles. In this step, lawmakers

and citizens probe whether some underlying "conception of justice" supports seemingly

unrelated principles like religious toleration and the prohibition of slavery.[287] Lawmakers

and citizens consider various conceptions of justice, weighing their plausibility and

explanatory power. They try to imagine how valid each of these conceptions of justice

would seem to them behind the veil of ignorance. After undertaking this investigation,

lawmakers and citizens adopt one of these conceptions of justice. They can use that

conception in tandem with public reasons to identify and select rights claims.[288]

Rawls offers "justice as fairness" as his organizing conception of justice. The

content of this conception is summarized in the above discussion of society as a system

of fair cooperation among free and equal citizens over time. The maintenance of this

system depends on the protection of citizens' moral powers, rationality, and

reasonableness. Hence, Rawls asks legislators and citizens to consider which rights are

most important to protect the exercise of these powers.[289] This list should begin with

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[286] Ibid., 8.

[287] Ibid., 7-9.

[288] Ibid., 156.

[289] Ibid., 293.

those rights necessary to distribute and exercise political power. Then, lawmakers and

citizens should continue to develop their schedule of rights, stipulating other basic

liberties necessary to fair social cooperation as the importance of these liberties becomes

clearer.[290]

Rawls' account of how other policies should be made

Rawls treats the constitutional protection of a "fully adequate scheme of basic

liberties" as a major step towards the achievement of democratic legitimacy.[291] Basic

liberties give citizens a chance to cooperate freely and equally. However, rights are a

necessary rather than sufficient condition to such cooperation. Rawls introduces the

concept of "primary goods" to explain this insufficiency. Whereas basic liberties provide

society's basic institutions with ground rules that protect the exercise of persons' moral

powers, primary goods include any condition—not only rules but also resources—

necessary to the exercise of the two moral powers. These goods include:

  a. basic rights and liberties…
  b. freedom of movement and free choice of occupation…
  c. powers and prerogatives of offices and positions of authority and
     responsibility in…political and economic institutions…
  d. income and wealth
  e. the social bases of self-respect. [292]

Unequal access to primary goods can result from the social class into which one was

born, native endowments, and bad luck, such as the collapse of one's professional

industry.[293] Regardless of their cause, unequal distributions of primary goods tend to

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[290] Ibid., 228-30.

[291] Ibid., 331-33.

[292] Ibid., 181.

[293] Rawls, *Justice as Fairness*, 55.

accumulate over generations, rendering society's basic institutions unaccountable to its least advantaged citizens.[294] Disadvantaged citizens are left without resources to pursue the lives they deem valuable (rationality) and without the leverage necessary to motivate legislators and other citizens to engage reciprocally with them regarding society's shared rules of conduct (reasonable). Justice as fairness cannot abide this situation.

Rawls charges lawmakers to correct this situation through economic and social legislation.[295] High estate taxes on the wealthy are one obvious way to do this. Education reform is another.[296] In these cases, the pursuit of equality is a fairly straightforward matter: tax the advantaged, give to the disadvantaged. But not all policy cases are so simple. Often, public incentives are required to motivate privileged citizens to act in ways that improve the lot of the least advantaged in the long run. For instance, in order to increase the earning potential of nurses' aides, it might be necessary to award research grants to relatively privileged, white collar researchers to create new medical communication technologies. In these cases, the unequal distribution of resources (to the researchers) is justified because it renders nurses' aides better off than they would have been otherwise.[297] Rawls summarizes this point in the "difference principle": "social and

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[294] Ibid., 53.

[295] Rawls' vision does not involve eliminating differences in wealth and income. Doing so would hinder citizens' pursuit of the diverse rational ends, some of which weight the accumulation of wealth much more highly than others. Rather, he proposes that the government should regulate the economic system—redistributing wealth through taxation and public expenditures, regulating financial industries, awarding government grants and jobs—in such a way that the class into which a citizen is born need not sharply, disproportionately, delimit her prospects for pursuing the kind of life she values. Rawls' economic/political vision is more about distributing opportunity than it is about distributing wealth (*Justice as Fairness*, 52-56).

[296] Rawls, *Justice as Fairness*, 53.

[297] Ibid., 57.

economic inequalities [are justified when] they are to…the greatest benefit of the least advantaged members of society."[298] Legislators may use the difference principle to weigh the appropriateness of a particular piece of legislation and also to discriminate among pieces of legislation, to see which policy proposal is of the most benefit to the disadvantaged group.[299]

Summary of Rawls' account of democratic legitimacy

In sum, Rawls provides considerable guidance for writing constitutional amendments and laws that aim to enhance citizens' exercise of their two moral powers. When selecting rights, lawmakers should rely on public reasons to identify the basic ground rules of a fair system of cooperation. When crafting regular statutes, lawmakers should work to reduce serious inter-generationally cumulative economic and social inequality that inhibits the exercise of moral powers.

Rawls gives considerably less guidance on how citizens and lawmakers should address policy problems that cannot be easily understood in terms of citizens' moral powers. Environmental policy challenges fall under this heading, including: "statutes protecting the environmental and controlling pollution; establishing parks and preserving wilderness areas and animal and plant species."[300] Rawls states that these are not the subject of public reasoning, but he does not suggest how society should reason about them. On the contrary, he leaves that instruction out of his theory. Rawls' discussion of property rights make that omission clear:

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[298] Ibid., 42-43.

[299] Ibid., 69-72.

[300] Rawls, *Political Liberalism*, 214.

> Two wider conceptions of the right of property as a basic liberty are to be avoided. One conception extends this right to include…the right to own means of production and natural resources. On the other conception, the right of property includes the equal right to participate in the control of the means of production and natural resources, which are to be socially owned. These wider conceptions are not used here because they cannot, I think, be accounted for as necessary to the development and exercise of the moral powers. The merits of these and other conceptions of the right of property are decided at later stages [after the constitutional convention] when much more information about a society's circumstances and historical tradition is available.[301]

Not only does Rawls leave environmental policy matters off the constitutional agenda, he does not suggest any principles by which these matters should be handled in statutory (vs. constitutional) policymaking. Conceivably, one could add environmental health to Rawls' list of primary goods, as clean air and water are clearly as important as wealth to the achievement of citizens' various conceptions of a good life. But this addition would be of little help in policy making that utilizes the difference principle, since ecosystem services are hard to measure and harder to distribute to discrete individuals. How does one distribute biodiversity equally among citizens?

A subsequent section will discuss in more detail the guidance Rawls gives, or fails to give, for handling the pragmatic challenges that arise in environmental policymaking. For now, suffice it to say that Rawls offers a highly individualistic account of political justice and democratic legitimacy. He views the just state and just society as having no agenda for their shared life beyond the maintenance of a fair system of cooperation. Fairness in Rawls' account is a strictly inter-human matter. It has nothing to do with society's relationship to its ecosystem. So, Rawls does not comment on handling policy matters that pertain to that relationship.

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[301] Ibid., 299.

Rawls' example suggests but does not prove that environmental ethics is not a strong point of Liberal philosophy. The next section turns to another Liberal philosopher to see if she does any better. That thinker, Martha Nussbaum, both draws heavily from and innovates upon John Rawls' work. Nussbaum shares Rawls' ethical individualism. She is "convinced that the political principles of a decent society ought to be respectful of a wide range of comprehensive doctrines"[302] She agrees government should not dictate the kind of life citizens should value or lead; that task belongs to individual persons. To do this, persons need the government to protect and uphold their individual rights. Activity toward this end defines legitimate governance.

Martha Nussbaum's Account of Democratic Legitimacy

What counts as a right for Nussbaum?

As with Rawls, Nussbaum's account of rights results from her overarching vision of what government is supposed to do. Where Rawls wants government to secure a fair system of cooperation for free and equal citizens across generations, Nussbaum wants government to "mak[e] people able to pursue a dignified…life."[303]

Nussbaum defines human dignity as the entitlement of every person to be treated as an end in herself, rather than simply a means to someone else's ends.[304] Respecting a person's human dignity therefore entails honoring her entitlement to strive to live a meaningful life. That striving entails the exercise of a broad range of "capabilities."[305]

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[302] Nussbaum, *Creating Capabilities*, 76.

[303] Ibid., 33.

[304] Ibid., 18.

[305] Ibid., 20-23.

For instance, a person needs the capability to own property if she wishes to strive to run a business; she needs the capability to vote if she wishes to influence political leadership, etc. A person has dignity whether or not she enjoys these capabilities. However, without certain capacities, a person lacks the opportunity to live in ways "worthy of [her] human dignity."[306]

Many capabilities are of trivial importance or are very important only to a few people, for instance "the freedom not to wear a seat belt."[307] However, a handful of capabilities are critically important to every citizen because these capabilities constitute prerequisites to all the various and sundry projects for which people might strive. For instance, striving after many kinds of goals—educational, economic, social, political— hinges on the capability to live in a reasonably safe environment. War-torn towns incubate few small businesses or budding artists. Without fundamental capabilities—like bodily safety—Nussbaum believes most persons will not be able to lead lives of potentially fruitful, active striving.[308]

Nussbaum defines as rights that handful of critically important capabilities.[309] Nussbaum herself identifies ten such capabilities (all of which I have abbreviated here, except those capabilities most pertinent to environmental policymaking):

1) *Life….*
2) *Bodily health….*
3) *Bodily integrity….*
4) *Senses, imagination, and thought….*
5) *Emotions….*
6) *Practical reason….*

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[306] Ibid., 31.

[307] Ibid., 70.

[308] Ibid., 35-36.

[309] Ibid., 70, 78.

7) *Affiliation….*
8) *Other species.* Being able to live with concern for and in relation to animals, plants, and the world of nature.
9) *Play.…*
10) *Control over one's environment.* (A) Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation: protections of free speech and association. (B) Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.[310]

These capabilities have two aspects: first, persons' "internal" aptitude to exercise them; and, second, social-political-economic structural opportunities to exercise them.[311] For instance, to have a decent shot at participating effectively in the political system, most citizens need both the legal right to vote (structural) and practical reasoning skills to select intentionally between candidates (internal). Taken together, these two aspects result in "combined capabilities."[312] Human rights claims—in Nussbaum's philosophy— are supposed to generate legislation that protects and supports both the internal and structural dimensions of critical human capabilities.[313]

How Nussbaum argues rights should be selected

The list above seems to remove any need to select a human rights list; Nussbaum has done this for us. But that interpretation misses the point of Nussbaum's list. Her target audience consists of policymakers with opportunities to shape national

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[310] Ibid., 33-34.

[311] Ibid., 21-22.

[312] Ibid., 21.

[313] Ibid., 21-24.

constitutions.[314] While Nussbaum—like Rawls—acknowledges the possibility that a society might operate according to a set of fundamental, widely-shared, unwritten normative political principles, she posits that most states need written constitutions. Her list is meant to offer grist for constitutional mills.[315]

Nussbaum offers two forms of guidance on how constitutional rights schemes could be initially crafted or amended. To generate an initial list of rights, Nussbaum urges "political actors" to identify those capabilities most critical to citizens' striving after good lives.[316] Trivial capabilities, like the ability "to whistle Yankee Doodle while standing on one's head" can be dismissed out of hand.[317] Similarly, capabilities that empower some citizens and degrade others can also be dismissed. Constitutions should not uphold, for instance, a husband's right to demand sex with his wife at any time, as a husband's capability to do so would undermine the wife's capability to control what happens to her own body.[318] Rather, policymakers should identify particularly "fertile capabilities," such as the right to affiliation or education, which generate a vast array of other capabilities.[319] In addition, policymakers should identify "thresholds," minimum standards for the exercise of each capability necessary to honor human dignity.[320] These standards should be aspirational but realizable, not utopian. For instance, a "constitutional maker" might

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[314] Ibid., 1, 3, 12, 46.

[315] Ibid., 36, 74.

[316] Ibid., 70.

[317] Ibid., 32.

[318] Ibid., 32.

[319] Ibid., 44-45.

[320] Ibid., 35-36, 42.

determine that living a life worthy of human dignity requires access to some kind of vocational education, which might require the development of a public secondary educational system.[321]

In order to test an initial list of rights and extend it in principled fashion, Nussbaum suggests policymakers labor to identify a general theory of justice that might underlie various rights claims (her account of human dignity is one such general theory).[322] To develop this theory, policymakers should begin with widely held, secure claims about political justice. For instance, a society might begin with claims like "slavery is wrong" or "all citizens need a basic education."[323] Policymakers, in conjunction with their societies, should then probe the moral premises that ground such claims and investigate whether some unifying, general principle underlies them.[324] The goal of this exercise is to "find a stable fit between judgments [on particular policy issues] and theoretical principles."[325] This general principle could then be applied to uncertain policy questions—for instance, the political status of women. Thereby a scheme of constitutional rights can be generated and extended. An important caveat: a stable fit between general principles and particular judgments is never final. New general theories of justice and new particular political judgments may arise at any time.

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[321] Ibid., 42.

[322] Ibid., 77-78.

[323] Ibid., 78.

[324] Nussbaum is a little vague on the role citizens play in the work of policymaking, constitutional or otherwise. She leaves these matters to "democratic deliberation" and the "political process," without giving much information about what these terms practically entail (Nussbaum, *Creating Capabilities*, 36, 74).

[325] Following Rawls, Nussbaum refers to this stable fit after investigation as a "reflective equilibrium" (Nussbaum, *Creating Capabilities*, 78).

Nevertheless, a relatively stable fit between general principles and particular applications is sufficient to the initial development and later revision of constitutions.[326]

How Nussbaum argues other policies should be made

Nussbaum recognizes that rights-as-capabilities—unlike their Rawls' rights-as-basic-liberties—may not be immediately achievable legislatively for many governments. Developing nations may struggle to conduct free and open elections; provisioning an adequate education system may seem entirely out of reach.[327] Governments will need to make legislative trade-offs. Nussbaum posits that when a society faces such "tragic" decisions, it "should not wring [it]s hands." Rather "we ask what the best intervention point is to create a future in which this choice does not confront people. We must also consider how to move people closer to the capability threshold right away, even if we can't immediately get them above it."[328] For instance, even if a society cannot afford to equip citizens with a secondary education, in the first instance it could still work to equalize access to primary education.[329]

The instructions above provide guidance to policymakers' moral reflections on policies. They do not precisely spell out a legitimate political process. Nussbaum recognizes that gap, and cites it as a growing edge of the Capabilities Approach:

> A major challenge for the Capabilities Approach in the future…is to think more systemically about political structure. To some extent this cannot be done in an

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[326] Nussbaum does not want constitutional revision to be too easy, however. She argues that revision of constitutions should require supramajoritarian support. Rights need to be entrenched for the capabilities they protect and promote to remain secure. The best way to offer that protection "from an impatient majority" is to make the constitutional revision process quite difficult (Nussbaum, *Creating Capabilities*, 73).

[327] Ibid., 37-39.

[328] Ibid., 38-39.

[329] Ibid., 39.

abstraction from each nation's history and circumstances (the educational level of voters, the likelihood that judges are in touch with the lives and opinions of voters, and so on). Nonetheless, public choice literature, and the literature on deliberative and participatory democracy, show us progress on specific questions, and it seems important to connect the Capabilities Approach to that sophisticated body of work.[330]

The "body of work" Nussbaum cites here is actually a highly diverse collection; "bodies of work" would have been more accurate. So, the task for Capabilities scholars is twofold: first, to identity which of these normative accounts of democratic procedure they find most compelling; and second, to connect that procedural account to Capabilities' more substantive account of just government.

Summarizing Rawls and Nussbaum

The paragraphs above have attempted to show that, while Rawls and Nussbaum give somewhat different accounts of 1) what rights are, 2) how rights should be selected, and 3) how other laws should be made once human rights have been identified, Rawls and Nussbaum define political justice quite similarly. They both place heavy emphasis on the legitimating principle of human rights. A just government by definition protects human rights, and in so doing, protects individuals' freedom to pursue the kinds of lives they deem worthwhile. The people's role in self-governance fades far into the background in liberal accounts of legitimacy. The next section discusses what guidance Liberal philosophies offer, or fail to offer, to societies facing environmental policy challenges

Liberal Guidance on Environmental Policymaking

Liberal philosophy's best guidance on environmental policymaking results from extending its core project—the entrenchment of a scheme of rights that secures citizens'

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[330] Ibid., 180.

capacities to live lives they deem worthwhile within diverse societies—to environmental

concerns. Liberal philosophy evinces a dawning recognition of the environmental rights

necessary to individuals' pursuit of meaningful lives. Nussbaum's eighth capability,

"Being able to live with concern for and in relation to animals, plants, and the world of

nature" is one example.[331] The UN General Assembly's 2010 acknowledgement of access

to clean water for drinking and sanitation as a human right is another example.[332] This

right carries two implications for water policymaking, one quantitative and the other

qualitative. First, in terms of water quantity, this right implies that everybody is entitled

to use some water, roughly as much as they need to drink, cook, clean their homes, and

wash their bodies, and that no one person is entitled to use too much water. Second, in

terms of water quality, this right implies that water must be clean enough to prevent

disease, though it need not necessarily meet high aesthetic standards (it may contain safe

but unpleasant levels of sulfur or chlorine, etc.). In identifying these normative outcomes,

Liberal philosophy offers important guidance on the minimum environmental conditions

legitimate water policies must strive to maintain; water sources must not be drawn down

too much nor should they be polluted in ways that compromise any citizen's access to

water for drinking and sanitation. As this example suggests, Liberalism offers helpful

guidance on identifying the *minimum* environmental conditions necessary to individual's

wellbeing.

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[331]Ibid., 34.

[332] UN-Water Decade Programme on Advocacy and Communication and Water Supply and Sanitation Collaborative Council, "The Human Right to Water and Sanitation," accessed July 10, 2017, http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf, 1.

There is a downside to this minimalism: it sets a rather low bar in terms of environmental quality. After all, rights claims identify "threshold conditions" not robust ones. So it should not surprise us that many environmental rights claims can be satisfied even by quite degraded environments (degraded in terms of their capacity to provide ecosystem services). For instance, Flint, Michigan's recent lead crisis notwithstanding, most US citizens enjoy sufficient access to water for drinking and sanitation to satisfy their human right.[333] Technology enables American municipalities to pre-treat water taken from rivers and streams, thereby removing disease-causing levels of contaminants. But the fact that Americans can drink clean water does not mean the water in our rivers and streams is clean. Georgia EPD's 2016 list of impaired streams documents fecal coliform bacteria and PCBs in Peachtree Creek, which is to say, in the drinking water supply of metropolitan Atlanta.[334] Rawls would worry about this situation *if* it seemed likely to impact future generations' drinking supply.[335] Nussbaum might protest this situation in the name of her eighth capability if biodiversity were unduly impacted by the pollution. But how much biodiversity loss would be acceptable? Nussbaum does not tell us, and her philosophy only aims at achieving threshold biodiversity conditions. This situation is problematic because, if Resilience Theory (Chapter Two) teaches us anything,

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[333] "Improved water source (% of population with access)," The World Bank website, accessed July 10, 2017, http://data.worldbank.org/indicator/SH.H2O.SAFE.ZS.

[334] Georgia Department of Natural Resources, Environmental Protection Division, "Draft 2016 Integrated 305(b)/303(d) List-Streams," accessed July 10, 2017, https://epd.georgia.gov/sites/epd.georgia.gov/files/related_files/site_page/303d_Draft_Streams_Y2016.pdf, 12.

[335] In *Theory of Justice,* Rawls indicates that, in the original position, a policymaker does not know to which generation she belongs. Hence, she should make a policy which is fair to future generations (Cambridge, MA: Harvard University, 1971), 137.

it is that hovering close to important ecosystem thresholds is a good way to trigger

regime change and perhaps environmental service loss.[336]

Low bar environmental quality goals cause another kind of problem: they can

undermine citizens' capacities to live meaningful lives. Low bar environmental standards

may not have this effect on all citizens, but they do have it on those citizens who deem

meaningful existence to depend on environmental conditions not protected by minimum

standards. For instance, some indigenous group's religious and cultural practices depend

upon the protection of certain species and their habitats.[337] These groups' account of a

good life may conflict with that of, say, real estate developers. *Both* lifestyles depend

upon certain community-wide planning decisions: land use zoning, watershed

management, green space budgeting, etc. *Both* lifestyles depend on certain ways of

arranging property ownership. *Both* lifestyles could be justified through reasonable

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[336] By way of reminder from Chapter Two, a regime change occurs when stress to an ecosystem results in fundamental changes to native populations of biota, their symbiotic and competitive relationships, and the stabilizing negative feedback loops these relationships generate. With regime changes, ecosystems are likely to provide a different range of environmental services (and perhaps a smaller range) than they did before. For instance, overharvesting of trees can cause a forest (one type of regime) to flip into a desert regime (another type of regime). Deserts may very well provide cultural ecosystem services, as they can be beautiful and awe-inspiring. But deserts do not provide nearly as many supporting ecosystem services like soil production or photosynthesis as do forests. Once a regime shift has transpired, it can be difficult to shift the system back to a previous, and perhaps more desirable, regime.

[337] The USA's current property rights system heavily privileges the lifestyles of the real estate developers. This system views land as a private possession that citizens may use to pursue the lives they deem valuable. Absent community zoning laws (which are more often geared toward maintaining market values than ecosystem services), a landowner can do whatever she wishes on her property. It is equally acceptable for a landowner to plant native species, avoid land disturbance, and control light pollution as it is for a landowner to pave a whole plot with concrete. This system views land as discrete parcels of private property rather than as parts of a larger ecosystem. Because adjoining pieces of land do exist within a biophysically functioning system, environmental degradations of one piece affect the others. Operating *according to this definition of property*, liberal philosophy does not clearly oppose this reduction in ecosystem service provision provided someone else's rights are not infringed upon. For instance, liberal philosophy would recognize an injustice if excessive runoff from the paved yard caused flooding and material damage to her neighbor's plants. But note, in this case, the primary moral concern is that another person's right to own and protect their property has been damaged; the ecosystem's biophysical functioning does not come into view except in so far as it is attached to an individual's rights.

arguments that exhibit an attitude of reciprocity. Nonetheless, these lifestyles are mutually exclusive. Low-bar and high-bar environmental quality standards—which necessarily apply across society—both thwart somebody's or some group's pursuit of a meaningful life as she/they understand. But the logic of rights-as-minimum-thresholds tends to favor the latter over the former.[338]

The above-mentioned policy decisions—land use zoning, watershed management, green space budgeting, property institutions—all point to a procedural weakness in Liberalism's account of legitimate governance, a weakness that undermines Liberalism's usefulness to societies facing environmental policy challenges. The weakness is this: Liberalism offers scant guidance for crafting policies that aim to protect or enhance something valuable to society as a whole. Rather, Liberalism instructs policymakers to resolve non-constitutional policy controversies by determining how various policy options would impact individuals and selecting the policy option that produces the most just outcome for individuals. For Rawls, the most just outcome is the one that encourages economic equality among individuals. For Nussbaum, the most just outcome is the one that moves individuals closer to the threshold capability conditions that honor their human dignity. Both of them limit their guidance for judging policies' merits to concern for individuals.

Here's the problem with such individualistic instructions for environmental policymaking: it is difficult and perhaps impossible to assess the impacts of environmental policies on individuals in Liberalism's normative terms. To make such an assessment, lawmakers need, first, to determine how particular policies will impact

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[338] To his credit, Rawls' conception of justice as fairness is open both to communal and private ownership of natural resources (*Political Liberalism*, 299).

environmental service provision. As discussed in Chapter Two, a high degree of uncertainty attends these questions. Lawmakers will need to settle for probable ecosystem service provision outcomes. So far, so good. The next step is the more difficult one. Second, lawmakers need to know what ecosystem services persons need to live freely and equally or to live with dignity. Do they just need clean drinking water, or do they also need clean streams and rivers in which to play? Such questions are unavoidably laden with value judgments that cannot easily be answered with reference to basic liberties, primary goods, or threshold capabilities (at least, such questions cannot be answered in a non-reductionistic way with reference to these concepts, which means persons who can live lives they deem meaningful under degraded environmental conditions are always favored). Third, lawmakers need to know whom a policy benefits and from which environmental services. Fourth, policymakers need to determine which distribution of environmental services among individuals is most conducive to individuals' freedom and equality or to individuals' human dignity. As with step two, legislators will almost certainly need to introduce extra-political value judgments at this stage. This process requires lawmakers to jump through an awful lot of mental hoops, and it seems unlikely that the second and fourth hoop can be jumped through at all without the importation of other extra-political values.

It would be far simpler to identify the ecosystem conditions and services that society as a whole values and design legislation to pursue them. On principle, Liberalism can entertain such simple arguments. Liberalism is not opposed to legislation that promotes the common good rather than individuals' goods, nor is it opposed to the introduction of nonpolitical values in policy decisions that cannot be settled solely with

reference to primary goods, constitutional rights or other public reasons.[339] Nonetheless, Liberalism *gives very little procedural instruction for handling the value conflicts that might arise in these policymaking decisions*. Liberalism trusts the "political process" to handle these conflicts. Unfortunately, Liberalism gives almost no practical instructions—beyond the presumption of fair elections and vague references to democratic deliberation—on how the political process is supposed to work.

Liberalism gives the same (vague) counsel for dealing with transboundary environmental policymaking challenges as it does for domestic ones. It urges representatives of the peoples involved to be reasonable, to practice reciprocity, to select the policy they would choose behind the veil of ignorance.[340] In the ACF case, an attitude of reciprocity between Georgia and Florida would constitute quite a step forward. Liberalism's advice is good; it is simply insufficient. It does not show how conflicts over the social value of ecosystem services should be handled appropriately. Liberalism leaves the work of conflict resolution to the political process without defining the normative standards of that political process.

In sum, Liberalism's substantive guidance for environmental policymaking sets a rather low bar in terms of environmental quality goals, and Liberalism's procedural guidance for environmental policymaking is scant. Therefore, it is worth considering what guidance is to be found in another prominent democratic theory, namely, Communitarianism.

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[339] Rawls, *Political Liberalism,* 215.

[340] John Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited,"* Revised ed. (Cambridge, Mass.: Harvard University Press, 2001), 17.

Communitarian Political Philosophy

To begin, let me draw an overly stark but helpful contrast between Liberals and Communitarians. Liberals think legitimate governments free persons *from* tyranny and deprivation; Communitarians believe legitimate governments free peoples *for* participation in societal self-rule. Where Liberals want governments to free persons to pursue individually good lives, Communitarians want governments to free political communities to pursue a collectively good life. Former Czechoslovakian President Vaclav Havel, while obviously not himself an American Communitarian, captures the main thrust of Communitarians' vision of legitimate government:

> Let us teach ourselves and others that politics ought to be a reflection of the aspiration to contribute to the happiness of the community and not of the need to deceive or pillage the community. Let us teach both ourselves and others that politics does not have to be the art of the possible, especially if this means the art of speculating, calculating, secret agreements, and pragmatic maneuvering, that that it can also be the art of the impossible, that is the art of making both ourselves and the world better.[341]

The government's ability to undertake this moral/political task depends fundamentally upon the citizenry's active participation. By bringing their values to bear on policy debates, citizens add moral weight to the political process. This causal link between the people's value-laden will and the government's action legitimizes a government's moral authority to make and enforce laws.

Suffice it to say that Communitarians lean more heavily on the principle of popular sovereignty than do Liberals. Most Communitarian philosophers—themselves beneficiaries of liberal western regimes—place high value on individual rights and recognize that individual rights enjoy exalted status within their societies' moral culture.

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[341] Robert N. Bellah, Richard Madsen, William M. Sullivan, Ann Swidler, and Steven M. Tipton, *The Good Society* (New York: Alfred A. Knopf, 1991), 139.

Nonetheless, communitarians view individual rights claims as derivative of popular moral/political tradition.[342] It is the moral will of the people as it is rearticulated in each generation, rather than the rights themselves, that legitimize a democratic government. What matters is that a legitimate democratic government instantiates the will of the people regarding the shape of its life together, with greater or lesser reference to human rights.[343]

This account of democratic legitimacy raises four broad questions (and series of sub-questions) for Communitarians to answer. The way a Communitarian philosopher answers these questions demonstrates how she thinks "rule by the people, for the people" should work in practice. First among the broad questions, who are "the people?" Does "the people" consist of citizens, permanent residents, historical ethnic groups, or some other kind of group? Second, what is the will of the people? Is the people's will a monolithic stance or is it a constellation of shifting perspectives? Is it synonymous with the majority's viewpoint or do the perspectives of traditional authorities or intellectual elites hold more weight than other citizens? Third, how does the people's will develop and change? How can or should new technologies or cultural movements affect long-held political values? Fourth, how should the (normative) will of the people be translated into (actual) law? Should the people have representatives or should they participate in political decisions directly? If they have representatives, should representation be based on geography, ideology, gender, age, or some other characteristic? Should representatives act as advocates, with a degree of autonomy to change their positions in light of political

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[342] Shapiro, *The Real World of Democratic Theory,* 253-54.

[343] Rejai, *Democracy: The Contemporary Theories*, 24.

debate, or should they act merely as messengers, declaring their coalitions' positions and voting according?

The following subsections trace how two influential Communitarian philosophers, Michael Walzer and Charles Taylor, answer these questions. I use these thinkers to represent Communitarian philosophies for two reasons. First, both thinkers belong to a common short list of exemplary Communitarian thinkers.[344] Second, they give markedly different answers to a key question within their field: How should cultural conflict be handled in democratic societies, if it can be handled at all? Walzer answers that question with confidence and optimism, while Taylor answers it with caution and concern. After exploring the general contours of each thinker's political philosophy, the next section considers the strengths and weaknesses of the guidance Communitarianism gives for handling the pragmatic challenges of environmental policymaking in democratically legitimate fashion.

Michael Walzer's Account of Democratic Legitimacy

How Walzer defines "the people"

Walzer defines "the people" as all those persons who have membership in the "political community."[345] Citizenship is the legal requirement for membership, but membership involves significantly more than legal status. Membership means participation in "*communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of

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[344] Daniel Bell, "Communitarianism," Stanford Encyclopedia of Philosophy, March 21, 2016, last accessed July 10, 2017, https://plato.stanford.edu/entries/communitarianism/.

[345] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (USA: Basic Books, 1983), 31.

their common life."[346] That "special sense" is multi-faceted, involving: a shared history

filled with the proper names of famous people and well-known events; a shared culture of

songs, stories, and institutions (for example, monogamous vs. polygamous marriage,

patrilineal vs. matrilineal naming systems, or careers open to talents vs. family trades);

and, most importantly, a shared ethical system that defines the meaning of various social

goods (wealth, beauty, social status, educational achievement, etc.) and prescribes

principles for the just distribution of those goods (fair competition, natural endowment,

charm, studiousness, etc.).[347] This "thick" common sense defines who makes up political

community and how they should live together; it defines "the people."[348]

Walzer not only uses the idea of a thick commonsense to define who the people

are, he also uses it to define one people's relationship to other peoples. Walzer urges

political communities to honor each other's boundaries.[349] This instruction results from

Walzer's descriptive observation that peoples with different thick commonsenses cannot

possibly fulfill each other's moral expectations in a fulsome way; they may not even be

able to understand each other's expectations. This ethical disconnect results from

societies' different histories and cultures, which lead them to define differently "the good

life" for persons and for society.[350] Members of different societies have no way of

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[346] Ibid., 62.

[347] Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, Indiana: Notre Dame University Press, 1994), 3, 63-64; Walzer, *Spheres of Justice*, 6-10.

[348] Ibid., 2-6.

[349] Ibid., 81-82.

[350] For example, one society might view a person as a potential author of a career. Above all else then, a person needs the freedom to choose her own profession, even if that freedom entails bearing significant personal economic risks. Another society might see a person as primarily a member of her family or clan. Above all else then, a person needs to fulfill her reciprocal, though often asymmetrical, social duties and obligations, thereby maintaining her place in the community. For another example, while

knowing what they owe to each other.[351] They share only a "thin" moral understanding that certain actions—mass murder, theft from the desperately poor by the rich— undermine almost all societies' moral expectations.[352] Therefore, Walzer urges political communities to do what justice they can to each other by avoiding gross abuses and by respecting each other's sovereignty. (As we shall see below, this account of international relations has ramifications for environmental issues, which cross political boundaries and social systems.)

How Walzer defines the people's will and how it develops

In Walzer's account, the people's will is more or less synonymous with their historically, culturally, and ethically thick commonsense. Though Walzer describes a people's commonsense as continuous from one generation to another, he does not treat it as static.[353] Cultural evolution takes place via two mechanisms. The first mechanism involves the creation of new social goods through new technologies. Walzer takes as his example the advent of modern western medicine in Europe. Modern science drove unprecedented advances in healthcare. The availability of this new service prompted communities to consider both its value and how to distribute it. As it became clearer that healthcare could "'liberate [patients] from a number of disorders, both of the mind and

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one society might view itself as a collection of engaged citizens whose government exists to serve their individual and common needs, another society might view itself as a hierarchy of classes who together serve the greater glory and good of the *body politic*. These "thick" beliefs about what persons and society are and what it means for them to flourish, define what members of a society owe to each other and why (Walzer, *Thick and Thin*, 21-25).

[351] Ibid., 21-25.

[352] Ibid., 16-19.

[353] Ibid., 31.

body,'" people started to call for its broad distribution using public funds.[354] The

Christian rites of confession, catechism, and communion—previously provided for the

entire population through public funds—were thus supplanted.[355] Instead, "tax money

was assigned to public health, hospital construction, medical training and much else."[356]

To sum up a rather complex process, technological innovation produced a new

social good. Society then had to identify the value of that good and determine how it

ought to distribute that good. As society grew to value one good (healthcare) more, it

valued another good (care of souls) less, or at least differently. And society accepted a

different distributive principle for the old good (priests were no longer expected to

provide religious services to all souls). And so, the society's ethical expectations shifted.

The second method by which political communities' thick commonsense changes

is through "internal…criticism."[357] Internal criticism occurs when one community

member draws on her community's collection of shared ethical expectations to critique

another community members' behavior. This activity functions first to reinforce the

people's existing commonsense and only secondarily to introduce historical-cultural-

ethical innovation.

Walzer uses the example of feudal Europe to demonstrate internal criticism's dual

conservative and innovative functions. In feudal Europe, a courageous scribe might

criticize an aristocrat for failing to protect his subjects from violent treatment. In these

cases, a scribe's criticism rested on the shared belief that the strong should protect the

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[354] Ibid., 30.

[355] Ibid., 28.

[356] Ibid., 30.

[357] Ibid., 41.

weak. This belief in the ideal of service justified feudalism's unequal distribution of honor and power.[358] Lords were honored because they protected serfs, and they needed to be mighty to do that. By using the ideal of service to criticize an individual aristocrat, a scribe would have been reinforcing her community's ethical commonsense; "the bad aristocrat is castigated while aristocracy itself is celebrated and the ideal of service reaffirmed."[359]

But internal criticism can have innovative as well as conservative consequences, expanding and morphing cultural-historical-ethical commonsense. This eventually happened to feudal Europe as internal critics in various social roles noted how rarely aristocrats upheld the ideal of service. Over time, Walzer claims, the critics turned their attention to the political structure of feudalism itself—rather than individually bad aristocrats—as the source of the problem, as the reason the weak did not receive the protection that was their due. Through internal criticism,

> a helpful lord or baron [came to be] seen as a contradiction in terms (much like a benevolent despot—the adjective is readily deployed against the noun). And then there is no way to justify hierarchical standing. The whole system collapses. I would suggest that the egalitarian doctrine of the "the rights of man" was the product of, or made possible by, this collapse. The feudal fortress was not stormed from without before it had been undermined from within. Or, to shift the metaphor, equality grows out of the critique of a failed hierarchy.[360]

Such collapses provide openings for internal critics to offer new ideas and thereby introduce innovation into their community's historical-cultural-ethical common sense.

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[358] Ibid., 44.

[359] Ibid.

[360] Ibid., 45.

Internal critics usually source these ideas within their own cultural common sense.[361] Occasionally, however, critics source their new ethical and cultural ideas externally, from other political communities. Such borrowing only occurs after a community's long efforts of trying out internal cultural-ethical resources fail. As an example, Walzer points to Eastern European critics of communism in the twentieth century. These critics made various attempts to reform communism, critiquing first Leninism and then Stalinism before coming to the conclusion that

> a state committed, even hypothetically, to simple equality and radical redistribution was necessarily too powerful, a threat to every other aspect of its own (putative) idealism, beyond reform. Only after experimenting with their internal paradigms—various forms of communism and socialism—did these internal critics commit themselves to "liberalism, democracy, [and] 'bourgeois civil rights.'"[362]

In summary, internal criticism responds to the failure of a community's members and/or institutions to meet that community's ethical expectations. Internal criticism reinforces ethical expectations when they successfully correct members' behavior, bringing the members and institutions back in line with the community's ethical standards. However, when a community's members and institutions continually fail to meet ethical expectations, internal criticism provides a path to historical-cultural-ethical innovation. These innovations usually result from critics re-purposing ideals and institutions familiar to the community. However, these innovations sometimes result from critics borrowing ideals and institutions from other societies, usually after the critics have become thoroughly disillusioned with their own community's internal ethical and cultural resources.

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[361] Ibid.

[362] Ibid., 46.

Walzer's account of what the people's will is (historical-ethical-cultural commonsense) and how it changes (through new technologies and through internal criticism) is majoritarian but not monolithic. He seems to believe most people will agree on the meanings of social goods and appropriate principles for distributing them; a shared way of life would not be possible without such agreement." [363] Hence, the majority view defines the contours of justice. But, he thinks that internal critics—both conservative and creative—will crop up in every society, and all across society.[364] They have a role to play in shaping the people's commonsense over the long term, and in enacting it in democratic politics.

How Walzer claims the government should instantiate the people's will

In Walzer's account, democratic policymaking procedures exist to facilitate internal criticism (of both conservative and innovative sorts).[365] Democratic institutions facilitate this criticism by providing places for arguments, such as caucuses, committee meetings, party conventions, and public debates.[366] In the push and pull of argument, political actors convince each other to see political issues in the same light, to align their causes. Hence, democratic "[p]ower belongs to persuasiveness."[367] This persuasion shapes the common will of the politically engaged. Eventually, the will of the politically engaged shapes the people's laws.[368]

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[363] Walzer, *Spheres of Justice*, 46-48.

[364] Walzer, *Thick and Thin*, 51.

[365] Ibid., 97-104.

[366] Walzer, *Spheres of Justice*, 304.

[367] Ibid., 306.

[368] Ibid., 304.

Walzer's model of policymaking is neither populist nor egalitarian. "The people" and "the politically engaged" are not synonymous terms; the latter is a subset of the former, consisting of political professionals and unpaid activists.[369] What matters for Walzer is not that every citizen wields strictly equal influence. On the contrary, he worries about disengaged voters wielding too much power.[370] What matters is that our political institutions be organized such that every citizen who wishes to participate meaningfully in the policy arguments has a chance to do so, if she is willing to put in the time and effort.[371] This is why Walzer favors caucuses over primaries in the selection of party candidates. Caucuses force candidates to engage local elected officials, religious leaders, activists, lesser party hacks, and engaged citizens, and try to win them over, either by persuading this motley crew or allowing the motley crew to persuade them. Caucuses require many people to participate in the political process in a more or less ongoing way. In primaries, by contrast, a disengaged populace takes a day to vote between celebrity candidates they do not know. All citizens wield the same amount of power—just enough to elect someone but not enough to influence her political stance with a good argument. This powerlessness troubles Walzer. That is because the capacity to shape the laws of particular importance to oneself is, for the individual, an important basis of self-respect in democratic societies and, for the populace, a means to shape and enact a people's thick commonsense through politically effective internal criticism.[372]

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[369] Ibid., 308.

[370] Ibid., 307.

[371] Ibid., 307-10.

[372] Walzer, *Spheres of Justice*, 307-10.

Despite Walzer's worry over disengaged majorities, he seems fairly confident in skillful political actors' capacities win each other over, to work through conflict effectively, with reference to their thick commonsense. He also seems fairly confident in internal critics' capacity to hold hypocritical political actors accountable to the ethical standards of the people's thick commonsense. What he seems not to anticipate is that a democratic people might lack a thick commonsense altogether. He seems not to consider the possibility that a democratic people might be so divided along ideological, ethnic, religious, or class lines that policymakers cannot compellingly justify legislation in terms of the good it will for do for society as whole, precisely because the people define society's good in mutually exclusive ways.[373]

Charles Taylor's Account of Democratic Legitimacy

Taylor's philosophy is more cautious, even apprehensive, on this count. He argues that democratically legitimate governance *functionally requires* social cohesion, but he views social cohesion as a goal that a democratic society must achieve rather than a secure possession it reliably enjoys. Therefore, his philosophy builds the challenge of historical, cultural, ethical diversity within the *demos*—and the disagreements such diversity sparks—into his account of legitimate democratic governance.

How Taylor defines "the people"

For Taylor, the citizenry constitutes the people, but the people is not simply the sum of all citizens. Rather, the *demos* is defined by citizens' shared

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[373] Walzer appreciates this painful possibility in places like the Balkans, where years of ethnic oppression and conflict make cohabitation impossible. For these situations, he recommends political divorce. But he does not seem to anticipate this possibility in democratic states (Walzer, *Thick and Thin,* 63-84).

identity, their shared sense of who *we* are.[374] Taylor claims that a democratic

system of government functionally relies upon the people's possession of three

attitudes. First, *solidarity* with other citizens as members of a community

pursuing common goals;[375] second, *loyalty* to democratic institutions as a means

of just conflict resolution;[376] and third, *respect* for other citizens.[377]

These attitudes motivate citizens' "participatory self-rule," i.e. the

definition and pursuit of their common good through government.[378] This task

requires significant voluntary labor: citizens must devote time and energy to

participating in political processes; they may be called upon to give their lives in

military defense of their country; and they will certainly need to obey laws and

pay taxes to support programs that they collectively establish through self-

government. What motivates these "disciplines and sacrifices" in democratic

regimes?[379] This problem notably does not arise in despotic regimes. Despots

simply coerce the people into doing the work required to maintain political order

(minus democratic participation, of course). But, "in order to have a free society,

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[374] Charles Taylor, "Political Identity and the Problem of Democratic Exclusion," Australian Broadcasting Corporation, Religion and Ethics website, April 29, 2016, 2017, http://www.abc.net.au/religion/articles/2016/04/29/4452814.htm.

[375] Charles Taylor, "Some Conditions of a Viable Democracy," *Democracia Republicana/Republican Democracy* (Santiago: LOM Ediciones, 2012), 76-78.

[376] Ibid.," 76-78.

[377] Charles Taylor, *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1995), 281-83 and Taylor "Some Conditions of a Viable Democracy," 82-83.

[378] Ibid., 280-81.

[379] Ibid., 187.

one has to replace this coercion with something else."[380] The three attitudes listed

above provide that "something else."

The first two values Taylor names—solidarity with citizens and loyalty to

democratic institutions—are closely connected. As he writes,

> it is essential to [a democratic] government…that the participants see
> themselves as being involved in a common enterprise of safeguarding their
> citizen right…The impetus that a citizen feels to defend his own
> constitution…must come from a sense of solidarity, which, more than just
> a general commitment to democracy, binds me with these other particular
> people, my compatriots.[381]

Citizens are willing to fight—politically or militarily—for the democratic right to

participatory self-government their constitution establishes because they care

about each other. Citizens care about each other, in large part, because they feel a

shared sense of identity and common purpose. These, too, depend upon

democratic institutions. Constitutions enshrine a shared history by giving

evidence of "climactic transitions" in the nation's political life.[382] Constitutions

give citizens a shared future by providing them with legislative institutions by

which they can chart their society's course.[383] So, solidarity to other citizens and

loyalty to democratic institutions are closely related feelings.

The third popular attitude needed to sustain participatory self-government

is respect for other citizens. Respect here primarily means recognizing other

citizens' equal entitlement to basic liberties and welfare provisions.[384]

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[380] Ibid.

[381] Taylor, "Some Conditions of a Viable Democracy," 76-77.

[382] Taylor, *Philosophical Arguments*, 188.

[383] Taylor, "Political Identity and the Problem of Democratic Exclusion."

Enumerating these liberties and provisions is not a central focus for Taylor. He mentions central rights in passing as "rights to life, liberty, due process, free speech, free practice of religion, and so on," while acknowledging that different societies will develop different "schedule[s] of rights."[385] To these individual liberties, he adds certain individual benefits all citizens must feel they can access, such as healthcare and basic welfare services.[386]

Respect for all citizens' equal entitlement to individual liberties and provisions does not just benefit individuals; it maintains social solidarity and thereby citizens' participation in self-rule. Respect for all citizens' equal entitlements assures society's worst off members that they matter to their society, that government is not simply a tool of one social or economic class against another, that they too belong.[387] This assurance gives them good reason to cooperatively pursue—or at least removes a barrier to pursuing—a common future with the rest of that society through participation in self-government. The opposite is also true. Distrust in other citizens' or the governments' moral regard is apt to undermine cooperative participatory self-government. Why participate in a system that doesn't care about you?

In sum, Taylor describes 'the people' as a community of citizens who have authority to pursue their common good through participation in self-government. This authority defines the people as collective agent, and its exercise

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[384] Taylor, "Some Conditions of a Viable Democracy," 84.

[385] Taylor, *Philosophical Arguments*, 247-49.

[386] Ibid., 281-84.

[387] Ibid.

constitutes them as such.[388] Three popular attitudes sustain the exercise of

collective, participatory self-government: solidarity with other citizens, loyalty to

free institutions, respect for other citizens.

How Taylor defines the people's the will and how it develops

For Taylor, 'the people's will,' like the people's identity, is a goal to be

achieved rather than an existing reality. The people achieve a collective will when

they produce a "public opinion" regarding a particular collective decision (where

to put roads, how to structure taxes, at what age the state should provide early

childhood education, etc.).[389] The people produce their public opinion through

discussions and debates that grant—and are felt to grant—all parties a fair

hearing.[390] The subject matter of public opinion often pertains to common and

collective goods, not just the distribution of private goods.[391]

Because the scale of modern societies makes face-to-face interactions of

the entire populace impossible, Taylor relies on free public spheres to host public-

opinion forming debates.[392] In "the public space of dispersed discussion

circulating through neutral media outside the political system" citizens can hear

and respond to each other.[393] Admittedly, they hear and respond in indirect

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[388] Taylor, "Political Identity and the Problem of Democratic Exclusion."

[389] Taylor, *Philosophical Arguments*, 261-64.

[390] Ibid., 277.

[391] Taylor defines "collective" goods as those which are supplied by the state to individuals, and could not be secured any other way, such as police services. He defines "common" goods as those which citizens enjoy with each other, as members of a community, for instance a publicly funded and performed concert (Taylor, *Philosophical Arguments*, 277).

[392] Taylor, *Philosophical Arguments*, 262-66.

[393] Ibid., 274.

fashion, but some exchange of insights, some moderation and clarification of positions is possible.[394] If the people in modern nations are to achieve a public opinion at all they will have to do so in this way.

How Taylor claims the government should instantiate the people's will

Taylor posits that modern democratic governments can only instantiate the people's will by paying close attention to deliberations in public spheres. How else will the government know what public opinion is? Practically speaking, fulfilling this obligation requires a "maximally porous…boundary between the political sphere and the public sphere."[395] Taylor names three structural conditions necessary to maintain such porous boundaries. Each of these conditions creates a different pathway of communication between governments and various kinds of public spheres.

Taylor's first and perhaps most important structural condition is that the government should use "subsidiarity" as its organizing principle.[396] Laws and policies should be made on as small a scale as they can reasonably be made. Decentralization allows citizens to exercise more influence over local matters.

Subsidiarity has the added benefit of encouraging the formation of "nested public spheres."[397] Local and regional political control encourages the development of local and regional media. These not only facilitate more informed debate among those affected by these geographically specific issues, they allow

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[394] Ibid., 278.

[395] Ibid., 280.

[396] Ibid., 286.

[397] Ibid., 279.

for information flow from the periphery to the center, such that "what goes on in the smaller [public spheres] feeds into the agenda of the national sphere."[398]

The second structural condition that maintains a porous boundary between governments and public spheres is the existence of vibrant social movements, like feminism.[399] Like nested government structures, social movements produce their own public spheres. The primary difference between these types of public spheres is their center of gravity.[400] The former organize around a geographic locale, the latter organize around a social issue. At their best, social movements contribute to public conversation by publicizing debates within their movement. The ecological movement provides a helpful example of this dynamic.[401] Some environmental groups clamor for a carbon cap and trade system, others for governmental investment in renewable energy technology, others for heavy monetary penalties for carbon polluters. To the degree activists hold these debates in public—in magazines, social media, town council meetings—they introduce citizens outside their movement to their goals and strategies. In so doing, they both educate the citizenry and shape public opinion.[402]

At least, that is how Taylor hopes social movements will operate. Taylor sees great danger in social movements that embrace identity politics. These

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[398] Ibid.

[399] Ibid., 280.

[400] Ibid., 279-80.

[401] Ibid., 280.

[402] Ibid., 280.

activists do not always seek to engage the broader public. Quite the contrary, their internal group bonds arise out of a need for self-defense, as a result of animosity from the broader public to them as racial, religious, ethnic, or other kinds of minorities. Taylor calls this dynamic "fragmentation."[403] Society fragments when groups within it lose—both in reality and in perception—the bonds of a shared fate with society as a whole. Fragmentation occurs when identity groups feel that society neither takes their perspectives and needs into consideration nor has any intention to do so.[404] Hence, these groups feel little impulse to use the political process to pursue common goods. They will seek their own good instead; they will organize "political campaigns for narrow objectives, each [group] mobilizing a constituency determined to defend its turf at all costs."[405] Often enough, these groups pursue their agendas through litigation rather than legislation.[406] They give up shaping public opinion and choose instead to leverage existing laws in the judicial system for their group's benefit.

Taylor sees fragmentation as a grave danger to democratic societies. But he sees political parties—the third structural condition of porous government-public sphere boundaries—as a possible protection against this danger. Political parties cannot focus too narrowly on any one group's agenda. They must appeal to large numbers of voters because they gain and lose power through mass elections. Taylor names two ways political parties win broad support. First, they

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[403] Ibid., 282.

[404] Ibid., 281.

[405] Ibid., 282.

[406] Ibid., 283.

can build diverse coalitions around connected issues.[407] For instance, they might

build a criminal reform agenda that appeals to farmers who wish to grow medical

marijuana *and* groups concerned with the incarceration of drug offenders *and*

fiscal conservatives who want to reduce the tax-burden of enormous prisons.

Second, political parties may attract many voters by building "majority coalitions

designed to address the major problems of society as a whole."[408] Policies that

promote an effective national healthcare system are a good example. Broad

swaths of the population benefit from such policies. Policy agendas that aim to

build majority coalitions will need to ensure equal treatment for minority groups,

but need not target them specifically. In building both kinds of coalitions, parties

synthesize the public opinions formed in geographically nested public spheres and

social movements' public spheres into broader platforms. [409] From these

platforms, political parties pursue their visions of the nation's shared fate.

In sum, Taylor names three structural conditions that allow governments

to learn from and interact with public spheres: 1) a decentralized government

structure that operates on the principle of subsidiarity; 2) a legal environment that

makes space for formation of lively social movements; and 3) political parties

who win or lose power in mass elections. These first two conditions enable the

demos to form and communicate public opinions to the government. The last

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[407] Ibid., 286.

[408] Ibid., 282.

[409] Ibid., 286.

condition enables political parties to synthesize that multi-faceted public opinion into a coherent and workable political agenda.

These conditions set a government up for democratic legitimacy, but they do not finish the job. Something more is needed: active attention on the part of elected officials to public opinions. In nations that enjoy these three conditions, government officials may still ignore or misunderstand public opinion. Taylor's point is only that the government cannot even hope to heed public opinion in ways that legitimize their authority if these structural conditions are not in place.[410]

Summarizing Walzer and Taylor

To sum up, Walzer and Taylor offer different accounts of who the people are, what the people's will is and how it is formed, and how the government should instantiate the people's will. Despite these differences, communitarians all assess a government's legitimacy using the standard of the people's will, which necessarily reflects the people's shared historical, cultural, and ethical expectations. In liberal, western societies, these ethical expectations include individual human rights. Yet, a legitimate government's primary duty is not to honor human rights, per se. It is to uphold and remain accountable to the moral values of the people it governs.

Communitarian Guidance for Environmental Policymaking

The section below evaluates the strengths and weaknesses of Communitarian philosophy's guidance for addressing the pragmatic challenges of environmental policymaking in a democratically legitimate fashion. To begin, we can note

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[410] Ibid., 286-87.

communitarian philosophy's great advantage over liberal thought: Communitarian philosophy gives procedural instructions for crafting policies that pursue society's wellbeing. These political process instructions include: a preference for caucuses over primaries, as caucuses encourage accountability between elected officials and engaged citizens (Walzer); and the maintenance of porous boundaries between governments and public spheres (Taylor). These instructions show how society ought to handle claims about what society wants/needs rather than what individuals need. These instructions show a society how to address in just fashion claims like "we want our streams and lakes to be fishable (and those fish to be edible)" or "we don't want muddy shorelines on our lakes" or "we want to prioritize ecotourism over hydroelectric power." These hypothetical policy goals obviously impact individuals, and these impacts need to be accounted for, but they need not be assessed *only* on those terms (which is the only kind of assessment Liberalism gives any guidance for undertaking). Provided a majority of politically active people can come to an agreement on these goals using participatory democratic institutions, Communitarianism acknowledges the authority of a government to pass and enact the requisite laws. Such laws might require taxation, restriction of real estate development and industry regulations. No human right needs to be under threat in order to justify these actions. Hence, on principle, Communitarians give policy-makers license to address environmental problems long before they approach a crisis stage.

Unfortunately, this attractive feature—license to pursue collective wellbeing without direct reference to individuals' rights—has an ugly downside. Policies that pursue collective well-being do not necessarily pursue a fully inclusive collective well-being. The placement of landfills provides a good example. The selection of a landfill

location is often driven by real estate prices. Cheap land reduces costs to the city or county using the landfill, leaving more revenues for other services. But it turns out the cheapest land is often occupied by people of color, many of whose residential choices have been seriously constrained by a history of discriminatory banking and real estate policies, combined with decreased access to educational and employment opportunities. The danger and cost of having a landfill placed in their backyard profoundly outweighs any collective benefit they might enjoy from low taxes.[411]

Walzer's account of democratic legitimacy struggles to offer principled protections against this sort of policy because it affords the majority's thick commonsense such great moral weight. Provided the majority really does value cost saving over public health, Walzer's argument implies that such landfill placement decision would be legitimate even though they harmed one group more than others. In his defense, Walzer would probably rely upon a politically skillful internal critic to protest that the majority does not really value governmental cost saving over public health, *per se*. Rather, the majority values governmental cost saving over *other people's* health, or perhaps over *people of color's* health. Yet, he would also acknowledge that internal critics do not define the standards of democratic legitimacy unless they wield sufficient influence among the politically engaged. He offers no principled corrective to policies aimed at the achievement of non-inclusive collective goods.

Taylor's account of democratic legitimacy shows a slightly different majoritarian weakness. He defines democratically legitimate policy as that which conforms to the majority's public opinion *after* it has been formed through deliberation in the public

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[411] Rosenbaum, *Environmental Politics and Policy*, 147-56.

sphere. But what if the majority is too blinded by their own self-interest to engage in honest deliberation? What if a majority does not identify enough with those who are excluded from the proposed collective goods to give them much political concern? What then? Taylor recognizes and worries about this possibility.

> [D]emocracies are in a standing dilemma. They need strong cohesion around a political identity, and precisely this provides a strong temptation to exclude those who can't or won't fit easily into the identity which the majority feels comfortable with, or believes alone can hold them together. And yet exclusion, besides being profoundly morally objectionable, also goes against the legitimacy idea of popular sovereignty, which is to realize the government of all the people. The [functional] need to form a people as a collective agent runs against the [normative] demand for inclusion of all who have a legitimate claim on citizenship. This is the source of the malady. The remedies are a lot harder to find.[412]

Taylor's observation about democracy's "dilemma" signals a crucial task for the political philosophy we need to guide environmental decision-making. The philosophy we select must show us how we should address the tendency of democratic majorities to produce "democratic exclusions," i.e. majorities' tendency to pursue a political agenda that protects their own group's social wellbeing without giving minorities' needs and arguments equal consideration.[413] This ever-present tendency to exclude minorities' moral and material concerns threatens to undermine democratic legitimacy. Taylor knows this quite well, probably better than Walzer, but he cannot offer a solution to it. His instructions regarding the three structural requirements of democratically legitimate governance go a long way in this regard, but they do not go quite far enough. These instructions lay out a governmental architecture that supports inclusive democratic deliberation. However, these instructions do not spell out how actors can utilize such

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[412] Taylor, "Political Identity and the Problem of Democratic Exclusion."

[413] Ibid.

structures in ways that remedy democratic exclusions. It as if Taylor has offered us a blueprint that will help us build a very useful machine (a democratic state government), but has not provided the user's manual. As I will argue below, Deliberative Democracy offers a more explicit, more detailed account of how governed actors can use government structures to improve the inclusiveness of democratic deliberation.

Our chosen philosophy would need to answer another question on which Communitarian thought gives insufficient guidance: the role of experts in democratic deliberation. Walzer's account leaves very little room for subject matter experts (e.g. geologists, chemists, ecologists). His account of legitimate policy-making privileges political experts, whose skill in various decision-making venues wins them political authority.[414] Only in so far as these political insiders rely upon subject matter experts to make compelling arguments do they have any role in political deliberations. As the Republican party's dismissal of climate change science indicates, political experts may opt to utilize subject matter experts very little indeed.

Communitarian philosophy seems to miss the possibility that subject matter experts could face a problem similar to the one that Taylor acknowledges racial/ethnic/religious minorities face: the majority may not be able to identify with them enough to concern themselves with what experts say. In the US, a political culture of anti-intellectualism makes alienation between geologists, ecologists, chemists, and the average voter not only possible but probable. We need a political philosophy that clearly shows why disregard of subject matter experts within democratic deliberation undermines

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[414] Walzer, *Spheres of Justice*, 306-308.

democratic legitimacy and how such disregard could be appropriately addressed. Communitarian philosophy cannot do this.

The last problem with Communitarian philosophy for our purposes is that it provides inadequate guidance for democratically legitimate, transboundary policy-making. Walzer and Taylor expect distinct populations, within distinct geographies, to develop distinct histories, values, and traditions. This distinctiveness allows a people to cooperate amongst themselves. But the other side of the coin is that two or more peoples, lacking such shared frames of moral reference, can hardly be expected to cooperate well. Hence, Walzer defines just international relations as those which uphold only "thin" sets of shared moral expectations.[415] Which is to say, while nations can and should operate according to some very minimal standards of what persons and governments ought not do to each other, they should not be expected to develop extensive patterns of life together (presumably including environmental consumption patterns). No doubt Communitarians would expect much sharper cultural distinctions between nation states than between states within the Union. Nonetheless, consider how sharply states disagree over gun control or healthcare policies. States can and do disagree just as sharply about environmental policies. Democratic states need some way of overcoming these disagreements in democratically legitimate fashion, since watersheds usually straddle political boundaries (which generally use the river—the very center of the watershed—as the dividing line). But communitarianism gives us little guidance about making democratically legitimate decisions across moral/political cultures.

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[415] Walzer, *Thick and Thin*, 2-9.

Conclusion

This chapter has covered four political philosophers. This conclusion summarizes the guidance provided by each political philosophy for handling the challenges that commonly beset interstate water allocation policymaking. These are: transboundary policymaking; dealing with data and the role of experts; the role of socially or economically marginalized communities in policymaking; and assessing the value of private and non-private goods at stake in environmental policy decisions.

Transboundary policymaking

Liberal philosophy gives rather scant procedural guidance as to how democratic societies should craft transboundary policies. Rawls does suggest each state should exhibit reciprocity, putting forth only those policy proposals that they would themselves be willing to live with if they were in the other party's position. Nussbaum does not (to my knowledge) comment directly on that problem. Communitarian philosophy is even less helpful in this regard. It seems to suggest that states with different political cultures will have a hard time working together. The best they can do is respect each other's autonomy. Unfortunately, in water allocation policymaking, such autonomy functionally supports the unchecked dominanceof the upstream state.

Dealing with data and the role of experts

Liberal philosophy gives rather scant procedural guidance on this matter, too. Rawls acknowledges that reasonable people can disagree on technically complex policy challenges. He trusts the fairness of the "political process" to enable policymakers to craft a legitimate policy. But Rawls tells us very little about what that process would entail. Nussbaum is, again to my knowledge, silent on this issue. Communitarian philosophy

shows a marked worry regarding the influence of experts in policymaking. Walzer

worries about experts expanding their authority beyond their appropriate limits; he wants

technocrats to apply policies, not make them[416] — a fair enough point, except that he

does not suggest how the populace or policymakers are supposed to acquire the

competence to set policy goals in the first place. The most persuasive politicians—the

persons Walzer claims ought to exercise democratic policymaking authority—may not be

particularly savvy interpreters of hydrologic flow data or the problems and possibilities of

drip irrigation technology, etc. [417] Even if politicians, aided by consultants, get a sense of

what is going on ecologically, what are they supposed do to in the face of ecologically

illiterate public opinions? None of these thinkers answer that question (although, it may

be that other Liberals and Communitarians do, and I have simply missed their analysis).

The role of socially and/or economically marginalized communities

　　　Liberal political philosophy uses a long game approach to address the reality that

poorer communities and communities of color often have less access to the political

process than wealthier, whiter communities. Liberals would address this problem through

redistribution of primary goods like income or education (Rawls) or the achievement of

adequate thresholds of internal and structural capabilities necessary to political

participation, which would also likely entail economic or education policy changes

(Nussbaum). These efforts aim to remove the condition of inequality itself, not

necessarily to make the political process more inclusive to socially or economically

disadvantaged groups. This approach may be of great help in the long term, but it is not

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[416] Walzer, *Spheres of Justice,* 284-90.

[417] Rosenbaum, *Environmental Politics and Policy,* 90-91.

of much help in the short term. Communitarianism does a little better on this front. Taylor echoes Liberals' commitment to welfare programs. Additionally, he emphasizes the importance of decentralizing governmental power. The goal of decentralization is to make governments more susceptible to citizens and social movements like the Environmental Justice Movement, which exists to make sure that marginalized communities get a fair hearing in policymaking decisions. But he recognizes that the majority's tendency to exclude minorities—who are often both socially and economically marginalized—endures even when these structural conditions pertain. Moreover, he recognizes that this tendency continuously threatens democratic legitimacy. Taylor recognizes this dilemma as an ongoing and important one, but offers little guidance for addressing it.

Assessing the value of private and non-private goods

Liberalism gives extensive instruction for assessing the impacts of a policy on individuals with reference to the person's needs. Rawls' original position helps policymakers assess whether a policy contributes to individual citizens' freedom and equality. Nussbaum's various capabilities allow for even richer assessment of whether a policy contributes to individual citizens' capacity to live the kinds of lives they deserve by virtue of their human dignity. Unfortunately, it is difficult to interpret the value of environmental services in such individualistic terms. For instance, how much biodiversity does human dignity require? Communitarianism does a little better on this front too. It suggests that, either through argument of engaged political actors (Walzer) or through argument in public spheres (Taylor), a democratic society can identify goals for its common life, including environmental goals. Taylor gives a little instruction on how

government should be organized to encourage such arguments. While valuable, this definition still leaves the concept of an "argument" rather underdefined. The philosophy upon which we rely to assess AG's merit will have to be clearer on that point. Also, it will need to give clearer instructions on handling transboundary policymaking, including the role of experts, and it needs to include marginalized groups in such arguments. For that, I turn to a Habermasian strand of Deliberative Democracy.

Chapter 4

Introduction

To evaluate Adaptive Governance's institutional design agenda for an ACF river basin commission, we need an account of democratic legitimacy to serve as our normative standard. This account must meet two criteria. First, it must supply a morally compelling account of democratic legitimacy in general. Second, it must give principled guidance on addressing the pragmatic challenges that arise in interstate water allocation policymaking. Chapter Two entertained two candidate political philosophies—Liberalism and Communitarianism—and found them both wanting with respect to the second criteria. Chapter Two did not assess whether these political philosophies provide compelling accounts of democratic legitimacy in general.

This chapter argues that a strand of political philosophy developed by Jürgen Habermas, Seyla Benhabib and John Dryzek (and others, but these are the primary figures) satisfies both criteria. Their political philosophy is rooted in Discourse Ethics, a moral philosophy that probes how persons and groups develop common norms under conditions of moral uncertainty and/or disagreement. Discourse Ethics uses the concept of "practical discourse" to model ideal conversations capable of producing valid shared moral premises under such conditions. Habermas, BenHabib, and Dryzek utilize the logic of practical discourse to demonstrate how policymaking procedures and institutions can be (re)designed to achieve democratic legitimacy in culturally, religiously, and hence, ethically, diverse modern societies.

In this chapter, I refer to the political philosophy developed by Habermas, Benhabib, and Dryzek as Deliberative Democracy. In fact, the label of Deliberative

Democracy has been embraced subsequently by other schools of political thought (including John Rawls).[418] But "Deliberative Democracy" flows better than "the political philosophy grounded in Discourse Ethics developed by Habermas and others." So, I use the shorter moniker.

This chapter's overarching goal is to demonstrate the appropriateness of Deliberative Democracy's account of democratic legitimacy as an evaluative standard for AG. That argument is primarily worked out in the last section. To set the stage for that argument, the first section summarizes Discourse Ethics' moral philosophy, and the second section summarizes Deliberative Democracy's political philosophy.

Discussion of Deliberative Democracy's ontological and ethical premises is necessary here—and was not necessary in Chapter Two—because I want Deliberative Democracy to bear more weight in my argument than I wanted Liberalism or Communitarianism to bear. I did not need to investigate the moral validity or empirical plausibility of their accounts of democratic legitimacy in general because they offered such little guidance for handling the pragmatic challenges of interstate water allocation conflict. Deliberative Democracy gives significantly clearer guidance for handling those challenges. But does it give morally sound advice? That is a question I need to answer before applying it to AG. The first two sections of this chapter labor to show that Deliberative Democracy does offer a morally and empirically compelling account of democratic legitimacy.

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[418] Rawls, *The Law of Peoples*, 138-40.

Discourse Ethics[419]

Discourse Ethics works to answer the question: How can a religiously, culturally, and ideologically diverse, modern society find or craft shared moral expectations?[420] This challenge arises in contemporary societies because technology enables the swift immigration of people and ideas. Moral worldviews inevitably clash, for example over the role of women in society, over what counts as a licit marriage, over the permissibility of alcohol consumption, over humans' obligations to other sentient animals, how land ownership works, etc. No overarching moral authority exists to render judgment on these various disagreements.[421]

Furthermore, and perhaps more importantly, these clashes transpire in Enlightenment-shaped societies. The Enlightenment bequeathed the imperative to question all authorities, to distrust claims to truth without proof. Traditional authorities—holy texts, ancestral leaders, spiritual visions, etc.—often fail to meet this standard and consequently tend to lose credibility. At the same time, this Enlightenment inheritance aids the natural sciences, whose research methods can produce evidence to nullify false empirical claims. But the natural sciences cannot simply replace traditional moral

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[419] Jürgen Habermas distinguishes between moral norms (universal claims about right and wrong) and ethical expectations (particularist claims about good and bad). See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, (Cambridge, Mass.: The MIT Press, 1996),160-62. In sections that discuss Habermas' work, I tend to follow his usage, but in general throughout this dissertation and chapter I use the terms "ethical" and "moral" interchangeably to mean normatively appropriate or worthwhile.

[420] Discourse Ethics is certainly not the sole moral or political philosophy to consider this question. Rawls is deeply concerned with it. His whole political philosophy aims to protect persons' exercise of their two moral powers within a governmental, economic, and cultural system of pluralistic tolerance. Also, Taylor's philosophy labors to demonstrate how a society can develope a shared and binding identity amidst diversity.

[421] Habermas, *Between Facts and Norms*, 25.

authorities, because they make truth claims of different kinds, truth claims that do different kinds of work.[422] The scientific method provides data about how the empirical world definitely does not or probably does function (science cannot prove positive theories, but it can provide data to support them). Morality tells people how the world should be, and how they should act in it; morality is a constructive venture while science is a descriptive one.[423] So, modern, aspirationally rational societies need a rational moral method in addition to a scientific method. Discourse ethics offers them one. This method exhibits the Enlightenment commitment to questioning everything (i.e. to rationality), even while it aspires to produce valid moral claims to guide individual and collective action. The moral method that Discourse Ethics supplies is "practical discourse."[424]

Before discussing practical discourse, I need to take several steps back to present Discourse Ethics' accounts of rationality and validity. This section will also discuss the theory's defining category of "discourse," of which practical discourse is just one type.

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[422] Jürgen Habermas, *The Theory of Communicative Action* (Boston: Beacon Press, 1985), 10-12.

[423] Jürgen Habermas, *Truth and Justification* (Cambridge, MA: MIT Press, 2003), 256-59.

[424] Habermas, *A Theory of Communicative Action*, 19.

Discourse Ethics' Account of Rationality

Discourse Ethics distinguishes between two models of rationality.[425] The first is

"cognitive-instrumental rationality," i.e. means-end, rationality.[426] An agent exercises this

kind of rationality when she selects a realistic method to accomplish her goals. This

ability reflects an attunement to the empirical world as it really is; "[i]t carries with it

connotations of successful self-maintenance made possible by informed disposition over,

and intelligent adaptation to, conditions of the contingent environment."[427] Habermas

refers to action guided by this form of rationality as "strategic action."[428] Cognitive-

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[425] The term "rationality" has many meanings. Scholars use it to describe 1) actions that aim to maximize self-interest (economic rationality), 2) actions that aim to achieve the good life as one understands it (Rawls), 3) beliefs and choices that can be explained with reasons, 4) beliefs that are logically consistent with the other beliefs a person holds, and/or 5) judgments that are dispassionate and impartial. Alasdair MacIntyre, *Whose Justice, Which Rationality* (Notre Dame, IN: University of Notre Dame Press, 1988), 2. Roy Sorenson, "Rationality as an Absolutely Concept, *Philosophy* 66, no. 258 (1991): 473-4. Many more accounts of rationality could be discussed. Mahmoud Sadri has argued that Max Weber alone used "rationality" in six different ways. "Reconstruction of Max Weber's Notion of Rationality: An Immanent Model," *Social Research* 49, no. 3 (1982): 622. It is not necessary here to give an exhaustive account of every possible definition of rationality nor to provide an overarching theory that connects these wildly diverse usages of the term. But a little more should be said to clarify what Habermas means by rationality.

For Habermas, rationality is about acquiring and utilizing information in ways that attune a person to reality. Reality has two dimensions in his account; it consists both of the empirical world and of social worlds of shared meanings and norms. A rational actor may utilize her attunement to the world to achieve her own goals (instrumental rationality, see footnote #428) or to achieve social consensus (communicative rationality, see discussion in footnote #428). In either case, however, Habermas presumes that some reality exists with which an actor may succeed or fail to comport; reality is not merely an illusion or a personal construction; reality has substance that places limits on and affords opportunities to human actors. Rational actors recognize and work within those boundaries—both empirical and social. Perhaps more importantly, rational actors adjust their understanding of the empirical and/or social world when they receive empirical and/or social data that invalidate their assumptions of how the world in fact works. Fred Dallmyr, "Habermas and Rationality," *Political Theory* 16, no. 4 (1988): 557-59.

[426] Habermas, *A Theory of Communicative Action*, 19.

[427] Habermas, *A Theory of Communicative Action*, 10.

[428] Strategic action always utilizes instrumental rationality; it is always oriented to the achievement of ends. However, strategic action may be undertaken in an "open" or a "concealed" way. In open strategic action, the goal the person seeks is clear. For instance, a person could exercise open strategic action by asking her dining partner to pass her the salt at dinner because, just as it would seem, she would like a little more salt on her meal. In concealed strategic action, the goal the person seeks is hidden, either to the person herself or to others with whom she interacts (Habermas, *A Theory of Communicative Action*, 333). For instance, a person might exercise concealed strategic action by asking her dinner partner to pass

instrumental rationality and strategic action can be (though are not always) undertaken by an individual acting alone.

By contrast, "communicative action" requires interaction among persons. Communicative action is speech undertaken with the aim of achieving "communicative rationality," i.e. the justification of some claim as valid (in terms of accuracy, moral/ethical rightness, and/or sincerity) through a conversation in which speakers honestly exchange information and perspectives, and thereby come to an agreement based on reasons the soundness of which they are mutually convinced.[429] This form of rationality characterizes a speaker's attempts to "reach an understanding about something in the world with at least one other participant in communication."[430]

How does this work in daily life? Communicative action begins when a speaker puts forth a conversational topic on which she seeks to elicit her listener's agreement. A man might say to his neighbors, 'My son ought to visit more often.' In offering this statement, the speaker exhibits a belief that his claim could be justified to his neighbor with good reasons: 'He won't have me around very much longer, I need some help around the house, and my son has lots of free time.' If the listener/neighbor asked, the father/speaker could provide those reasons (or at least work to express his intuition of these reasons). The listener/neighbor might immediately agree with her neighbor, in

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the salt because, at some unconscious level, she is upset by the topic of conversation and wishes to interrupt it. Or, a person might exercise concealed strategic action by asking her dinner partner to pass the salt because she wants, and knows she wants, to redirect the flow of the conversation. In either case, the goal of her speech act has little to do with salt. See also Hugh Baxter's discussion of strategic action in chapter one of *Habermas: The Discourse Theory of Law and Democracy* (Stanford, CA: Stanford University Press, 2011).

[429] Habermas, *A Theory of Communicative Action*, 10, 19.

[430] Ibid., 11.

which case the communicative action would have achieved its goal: consensus.[431]

Alternatively, the neighbor might respond with her own questions, objections, new information or alternative perspectives: 'But perhaps your son has a great deal to do. Didn't he visit last weekend? You know, Lyft makes it much cheaper for you to visit him now than it was last year. Perhaps you could arrange to go there sometime.' So long as both neighbors maintain a communicative attitude (seeking agreement based on the truth to the best of their understanding) rather than a strategic attitude (oriented to achieving some end either than reasoned agreement—including but not limited to the end of simply getting out of the conversation), speakers will continue to give and receive, rebut and amend positions until finally "all participants…either take a 'yes' or [a] 'no' position on the...claims of others, and thereby reach agreement about something in the world."[432]

Admittedly, this process is fallible.[433] The man may never convince his neighbor to agree that his son ought to visit more; they may fail to reach consensus. Worse yet, the neighbors may come to an agreement based on an accurate understanding of *each other's honest beliefs* but an inaccurate understanding of *some aspect of the world*. These inaccuracies might concern: empirical reality, i.e. how many hours off from work the son actually has; ethical or moral imperative, i.e. how much time the son owes his father as opposed to his spouse and children; or aesthetic/expressive truth, i.e. what the father really wants.[434] For instance, the father might think he wants more frequent filial visits,

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[431] Ibid., 10.

[432] Habermas, *Between Naturalism and Religion: Philosophical Essays* (Cambridge, UK: Polity Press, 2008), 16.

[433] Habermas, *A Theory of Communicative Action,* 11.

[434] Ibid., 23.

but actually he misses his childhood friend who passed away recently, and really wants the company of someone who has known him all his life. Should the neighbors make these sorts of mistakes—empirical, ethical, or expressive—they could achieve a communicatively rational agreement, but their conclusions would still be erroneous in important ways.

But fallibility does not negate the value of communicative rationality. After all, instrumental rationality can also fail through misapprehension of the empirical world, and we do not cease relying upon it. Both forms of rationality are valuable not because they are infallible, but because they sustain processes of self-correction and on-going learning. Through giving and receiving claims in communicative interactions, speakers open themselves to the possibility to seeing the world differently and perhaps more clearly.[435]

Discourse Ethics' Account of Validity

Discussion of the fallibility of communicative rationality throws a little indirect light on Discourse Ethics' account of validity. Let me throw a bit more light on that subject here. Discourse Ethics distinguishes between the kinds of truth claims that can be made about the empirical world on the one hand and the common "social world" on the other.[436] In regard to the former, claims are valid to the degree they enable persons to cope effectively with the material world.[437] Which is to say, Discourse Ethics does not employ a radically constructivist account of reality; the material world is what it is regardless of what humans think/feel/wish about it.[438] This material world and its

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[435] Habermas, *Between Naturalism and Religion*, 28; Habermas, *A Theory of Communicative Action,* 18.

[436] Habermas, *A Theory of Communicative Action,* 16.

[437] Habermas, *Truth and Justification,* 78.

physical and biological properties provide both limits and opportunities for human activity. Empirical claims are valid—deserve to be taken seriously and relied upon—to the degree they can withstand empirical scrutiny, including but not limited to the scientific investigation.

The vast majority of claims humans make, however, are not purely factual statements. Most claims are about what something in the world means, personally, aesthetically, morally, or ethically. These kinds of claim mix together assumptions about the empirical world and the common social world, i.e. the repository of shared meanings regarding how the world is and how it should be, especially "'the human being's place in the world.'"[439] This world exists in and through human efforts to make meaning together, efforts which are driven by our desires for survival and intimacy.

Humans achieve a common social world of meanings through language, which provides us a shared medium of concepts, metaphors, symbols, and values.[440] Through language, speakers sustain, reinforce, and reshape their understanding of their common social world, and hence sustain, reinforce, and reshape its content. Speakers reshape shared meanings by persuading each other to see some aspect of the world as they see it. In so doing, speakers and listeners produce "intersubjectively" justified claims, including claims about right and wrong, better and worse behavior.[441]

Intersubjective validity is an achievement in any age, but it is perhaps doubly so in modernity. Enlightenment epistemologies tend to suck the air right out of many

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[438] Ibid., 255.

[439] Habermas, *Between Naturalism and Religion*, 14.

[440] Ibid., 15.

[441] Habermas, *Theory of Communicative Action*, 14.

religiously-based moral, ethical and aesthetic truth claims by degrading the authority of

the metaphysics upon which they rely. Class hierarchies, for instance, become suspect

because modernity supplies no easy way to justify status inequalities based on birth.[442]

While we may celebrate the advent of more egalitarian class relations, this dearth of

moral, ethical, and aesthetic truth claims still presents a challenge for moderns in so far as

they seek to live alongside each other in principled fashion.[443] Lacking religiously or

culturally justified norms, from where are moderns to draw moral and ethical guidance?

Habermas remarks upon the moral/ethical difficulty that modernity presents:

> The beginnings of modernity are marked by the emergence of a pluralism of
> worldviews. In this situation, the members of moral communities face the
> dilemma that they must continue to engage in disputes about their actions and
> omissions in cases of conflict by appealing to moral reasons, despite the fact that
> the cultural and religious consensus in which these reasons were embedded has
> disintegrated.[444]

Discourse Ethics' Account of Discourse

Discourse is the procedure Habermas offers moderns to address this challenge.[445]

Discourse is an idealized model of a conversation. It consists entirely of communicative

speech acts (rather than strategic ones), and it has a particular goal: agreement regarding

the validity of premises that can be used in further conversation and subsequent

conversations. The premises sought may be theoretical, aesthetic/expressive, moral, or

ethical in nature.[446] Ethical or moral premises are sought through "practical discourse."

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[442] Seyla Benhabib, *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), 32.

[443] Habermas, *Between Facts and Norms*, 25.

[444] Habermas, *Between Naturalism and Religion*, 87.

[445] Habermas, *A Theory of Communicative Action*, 18-19.

[446] Ibid., 18-25.

The above mentioned hypothetical conversation between neighbors gives us a first glimpse of how discourse works. This conversation consists of speakers exchanging claims they assumed could be justified with good reasons, i.e. they undertook communicative interaction. This kind of conversation would become a discourse if speakers not only exchanged statements they believed could be justified with good reasons, but they also investigated whether the reasons justifying those statements withstood criticism.

A fresh example will be helpful here. In a communicative interaction (a conversation between two people seeking reasonable agreement based on truth and mutually acceptable reasons), Jamie might say to Michaela, 'We'd better go or we'll be late.' They would achieve immediate consensus if Michaela said, 'Yes, you're right. It wouldn't do to be late for this meeting,' thereby tacitly agreeing that lateness is bad behavior. This communicative interaction would become a discourse if Michaela instead replied 'Late? Do you think it matters very much when we get there?' and then Jamie responded with some statement like 'Yes, I think it matters a great deal if we are late. Arriving after the scheduled start time indicates we think our time is more valuable than everybody else's; it's arrogant and disrespectful.' In speaking thus, Jamie would be attempting to validate the underlying premise upon which her proposed action is based, that being late is bad behavior and ought to be avoided. She would have pursued the goal of a discourse: to use an argument to achieve agreement on the validity of underlying reasons one could deploy in further or subsequent communicative interactions. (This example happens to be a practical discourse, since it investigates ethical premises.)

A discourse not only aims at a particular goal—the identification of intersubjectively valid premises—it also operates according to certain rules. These rules demonstrate the conditions that must obtain in a conversation for the "unforced force of the better argument" alone to determine whether a party reaches consensus.[447] These rules demonstrate how a conversation would have to proceed in order to prevent deceit, manipulation, coercion, or simply the smallness of personal perspectives from determining a conversation's outcomes. Habermas calls the most important of these conditions the "pragmatic presuppositions" of a fair argument.[448] They are:

(a) inclusivity: no one who could make a relevant contribution [to the argument] may be prevented from participating;

(b) equal distribution of communicative freedom: everyone has an equal opportunity to make contributions [giving reasons, raising questions, introducing a new topic, etc.]

(c) truthfulness: the participants must mean what they say; and

(d) absence of contingent external constraints or constraints inherent to the structure of the communication: the yes/no positions of participants on criticizable validity claims should be motivated only by the power of cogent reasons to convince.[449]

These are demanding conditions, and no actual conversation fully satisfies them.[450] Some conversations do, however, come closer to others. These presuppositions show truth-seekers how to improve the quality of their discussions and thus produce more rational outcomes.

These conditions improve the rationality of a discussion in three ways. First, they improve reasoners' access to information about the empirical and social world; all

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[447] Habermas, *Between Naturalism and Religion*, 82.

[448] Ibid.

[449] Ibid., 82. Presupposition (d) means that nothing besides the motivation to seek the truth prompt participants' agreement to a particular point of consensus.

[450] Benhabib, *Situating the Self,* 47.

relevant contributions are invited.[451] Access to information alone, however, is not

sufficient for generating rational understanding. Think how misleading a Google search,

which presents nearly limitless access to data, can be. Understanding can only result from

sifting through this information critically. That is the second virtue of conversations that

adhere to the pragmatic presuppositions. Conversations that give speakers an opportunity

to question each other's assumptions, reframe an interpretation of a situation, raise a new

question, and so forth (see the second pragmatic presupposition) provide their

participants with opportunities to understand the empirical or social world better. This

learning process is not always pleasant; it often involves being disabused of premises

based on ignorance, slips in logic, personal bias, etc. It is also thoroughly fallible;

speakers may confuse rather than enlighten each other with their responses. Yet, this type

of conversation at least provides an opportunity for correction of previously held

views.[452] Third, the possibility of having one's claims examined encourages a degree of

reflexivity about claims a speaker puts forward in the first place.[453] Knowing one's

claims will be scrutinized by others motivates speakers to consider whether her listeners

will find them convincing. As Seyla Benhabib explains,

> This process of articulating good reasons [to other participants in a discourse]
> forces the individual to think of what would count as a good reason for all others
> involved. One is thus forced to think from the standpoint of all involved for
> whose agreement one is 'wooing.' Nobody can convince others…of her point of
> view without being able to state why what appears good, plausible, just, and
> expedient to her can also be considered so from the standpoint of all involved.[454]

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[451] Ibid., 169.

[452] Habermas, *Between Naturalism and Religion*, 28; Habermas, *A Theory of Communicative Action,* 18.

[453] Benhabib, *Situating the Self,* 52-54.

[454] Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton, NJ: Princeton

A speaker cannot simply say 'this premise is so because I like it!' Rather, she must be able to offer reasons for her premise that others can accept, based on their own understanding of how the world is and should be. When speakers succeed at reaching rational consensus in this way, they also acquire a shared premise from which to launch further rational discussions.[455]

Discourse Ethics' Account of Practical Discourse

Practical discourses aim at communicatively rational agreement regarding moral and ethical principles.[456] This goal defines who needs to be included in a discussion in order for it to achieve intersubjectively rational force. Discourse Ethics posits that anyone who is affected by the ethical/moral principle under consideration can make a relevant contribution and hence should be included.[457] In a fair argument, someone who is expected to uphold a particular principle, perhaps "It is wrong to lie," needs to be able to counter argue, "but it might occasionally be morally right to lie, such as when Nazis want to know where to find political dissidents." Rationality also requires that those who are affected by other's observance of particular principle—in this case, the political dissidents—should be able to make contributions like, "but isn't preserving my life more

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University Press, 1996), 71-72.

[455] Though my discussion of discourse focuses on its potential to achieve consensus, Benhabib is also interested in other outcomes. Namely, Benhabib sees discourse as valuable because it has the potential to encourage mutual understanding between and among participants regardless of whether they manage to reach an agreement (*Situating the Self,* 38). Recognizing discourse's capacity to aid mutual understanding in modern societies allows Benhabib to articulate an ethical agenda that extends well beyond the political realm; it helps her articulate "those normative practices and moral relationships within which reasoned agreement *as a way of life* can flourish" (ibid., italics original).

[456] Habermas, *A Theory of Communicative Action*, 19.

[457] Ibid.

important than telling the truth all the time?" It is almost as if practical discourse turns the Golden Rule's internal thought experiment into a social dialogue; rather than one person pondering how she would want others to treat her, speakers explain to each other how they in fact want to be treated and what principles underlie their expectations.[458] Both practices exhibit a principle of reciprocity, but the latter also generates discussions of social perspective to enlighten that reciprocity.

Habermas's "Discourse Principle" summarizes this point formulaically: "Just those action norms are valid to which all possibly affected persons could agree as participants in a rational discourse."[459] Clearly, under this standard no universal principle can achieve perfect validity. Still, some moral/ethical claims could attain a great deal of contextual validity. For instance, a church might validate the norm 'It is wrong for us to use violent force, even in self-defense.' Also, some universal norms could attain quite weighty though imperfect validity, for instance, 'Genocide is wrong.' Hence, practical discourse provides modern societies a rational method for generating broadly acceptable norms of conduct even if it does not provide a mechanism for producing unquestionable moral claims.[460] As the next section shall argue, this capacity enables modern societies to govern themselves democratically.

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[458] Benhabib, *Situating the Self*, 32.

[459] Habermas, *Between Facts and Norms*, 107.

[460] Habermas maintains that ethical discernment for modern people involves using discourse to seek out universal moral norms, even while recognizing the logistical impossibility of fulfilling the pragmatic presuppositions of discourse through which specific universal moral claims could be definitively validated. The reason modern ethical discernment must seek out universally applicable moral norms is that modern persons only going looking for moral norms at all when the moral norms of their local, community lifeworlds have broken down, usually through an encounter with another lifeworld which adheres to a different set of moral norms (*Truth and Justification,* 263). In such circumstances, persons meet each other as equals, all of them bereft of moral authorities like scripture, custom, ancestors, etc. (ibid., 264). In this situation, modern people are left with only one moral world wherein they must find some way to create "well-ordered interpersonal relations" (ibid., 271). The only method they have to determine which norms

Deliberative Democracy

Deliberative Democracy—at least, the strand of it informed by Discourse

Ethics—places great trust in the idea that good arguments sustain legitimate governance.

This trust is a common thread in democratic philosophy, reaching all the way back to

Athens. Of the philosophers summarized in Chapter Two, this idea is most evident in

Charles Taylor's account of democratic legitimacy, but the assumption of government-

through-argument crops up in all of them. What is distinctive about Deliberative

Democracy is that it utilizes a particularly well-defined theory of what constitutes a good

argument. Good arguments are those which have the potential to produce

intersubjectively valid claims through their adherence to the pragmatic presuppositions of

discourse. No argument adheres to these presuppositions perfectly, but some arguments

do much better than others. Through this kind of good argument, Deliberative Democracy

posits that society can produce legitimate government to organize its life together. In

Seyla Benhabib's words, "legitimacy in complex democratic societies must be thought to

result from the free and unconstrained deliberation of all matters of common concern."[461]

Like Liberalism and Communitarianism, Deliberative Democracy hangs a

government's legitimacy on its respect for popular sovereignty and its protection of

individual rights. Deliberative Democracy's definition of both concepts is keyed to its

account of discourse. Public discourse—which approximately satisfies the pragmatic

presuppositions of a fair argument—allows those governed to intersubjectively validate

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are "worthy of recognition" in regulating their relations is to consider impartially what would be in the best
interest equally of everyone in the world affected by that norm (Ibid., 264, 267, 274-5). Hence, modern
moral reflection requires moral universalism.

[461] Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," 68.

(legitimize) the procedures by which laws are made, and so exercise popular sovereignty over the government. Individual rights protect governed persons' ability and sustain their motivation to participate freely in public discourse. Hence, Deliberative Democracy treats popular sovereignty and individual rights as "co-original"; both are equally constitutive of the practice of public discourse on political matters.[462] The section below discusses these claims in more detail.

Discourse Ethics' Account of Popular Sovereignty

Definition of the populace

One way to unpack Deliberative Democracy's account of popular sovereignty is to show how it defines each of those terms—"popular" and "sovereignty." Deliberative Democracy defines the populace as anyone who is governed by a particular law.[463] Those governed hold the moral authority to legitimize (or delegitimize) a law, to acknowledge or deny its moral force. This group obviously includes citizens, but Deliberative Democracy posits that this group can also include resident aliens or persons living in a different polity altogether whose behavior is substantially circumscribed, even if not officially dictated, by a neighboring government's laws.[464]

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[462] Habermas, *Between Naturalism and Religion,* 79-80.

[463] Nancy Fraser's "all subjected" principle offers an especially clear explanation of how Deliberative Democracy defines the sovereign populace. In her words, "what turns a collection of people into fellow subjects of justice is neither shared citizenship or nationality, nor common possession of abstract personhood, nor the sheer fact of causal interdependence, but rather their joint subjection to a structure of governance that sets the ground rules that govern their interaction. For any such governance structure, the all-subjected principle matches the scope of moral concern to that of subjection" (*Scales of Justice: Reimagining Political Space in a Globalizing World* [New York: Columbia University Press, 2010], 25).

[464] Benhabib "Toward a Deliberative Model of Democratic Legitimacy, 70-1.

This definition of the populace results from Deliberative Democracy's account of intersubjective validity. A standard of conduct achieves ethical/moral validity only to the degree that, through discourse, it can win the reasoned agreement of those who are affected by it. There is no a priori transcendental law to appeal to; imminent justification is modern society's only source for shared ethical standards. Laws are quite similar to other standards of conduct, distinguishable from them primarily in that laws are formally constituted and coercively enforced.[465] So, laws have to be validated the same way as other standards of conduct. A law's legitimacy depends on the validation of those who are affected by it. Hence, the populace who legitimizes a law (or opts not to) consists of all those governed by it, and not simply citizens.

Definition of sovereignty

So how do governed populations effectively (de)validate laws? How does the populace exercise its "sovereignty"? Governed populations exercise sovereignty in part through "free and unconstrained deliberation of all about matters of common concern."[466] Through deliberation, those governed can develop informed political opinions and agendas. The populace achieves sovereignty when their political wills achieve the status of enforceable law.[467] But before this happens, a dilemma presents itself. On many policy issues, reasonable people can be expected to disagree, especially in culturally diverse societies, especially if non-citizens' perspectives count. Clearly, not every political disagreement can be resolved through deliberation, and, just as clearly, not every political

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[465] Habermas, *Between Facts and Norms*, 28-32, 71-73.

[466] Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," 68.

[467] Habermas, *Between Facts and Norms*, 168-71.

opinion can be made into enforceable law. So, how can popular sovereignty be achieved at all?

To address this dilemma, the populace needs policymaking procedures that can adjudicate fairly among competing political opinions.[468] Historically, democratic governments have used majority rule as the justifying principle for their policymaking procedures, but this strategy has its downsides. Foremost among them is that there is nothing particularly rational about a majority vote: the most popular policy proposals are not always the best thought out; and the most popular elected officials are not necessarily the wisest.[469] Deliberative Democracy seeks procedural fairness in a different way. Rather than utilizing a static principle—majority rule—to validate policymaking procedures, it relies on the ongoing efforts of governed populations to build widespread (though not full) consensus regarding what constitutes a fair policymaking procedure.[470] While Deliberative Democracy is skeptical that a governed population can achieve broad agreement on the content of laws, it does hold out hope that a governed population can achieve widespread consensus regarding the fairness of the procedures by which laws are made. For example, while it seems unlikely that Americans will ever reach consensus on abortion rights or prohibitions, Americans do broadly agree that women should have the right to vote. The people achieve sovereignty when their consensus on a procedural matter—for instance, all citizens have the right to vote regardless of gender—is embodied in actual policymaking practices—for instance, in referenda on local policies.

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[468] Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," 73.

[469] Ibid., 72.

[470] Dryzek and Niemeyer, *Foundations and Frontiers of Deliberative Governance*, 12.

In sum, as Seyla Benhabib states, "[p]roceduralism is a rational answer to persisting value conflicts at the substantive level."[471]

Deliberative Democracy does not see the production of procedural legitimacy as a one-time event, achieved at the founding of a Constitution and settled from there on out. Rather, procedural legitimation is an ongoing task, sustained by continual public discourse regarding both the content of the law and the procedures and institutions by which the laws are made.[472] Not all social systems can sustain public discourse. Hence, not all social systems can sustain popular sovereignty. Those societies that can achieve popular sovereignty—under Deliberative Democracy's definition—exhibit four structural/functional conditions: 1) public spaces for deliberation, 2) empowered spaces for policymaking, 3) transmission of political opinions from public spaces to empowered spaces, and 4) accountability of actors in empowered spaces to those they govern. These structural conditions sustain a "deliberative system."[473]

"Public space" conversations transpire among those who are governed.[474] As I will discuss more below, the public sphere is secured by various rights to free speech, freedom of the press, and freedom of association. It is a "freewheeling" arena of discussion in which speakers debate matters of common concern.[475] Because members of

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[471]Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," 73.

[472] Dryzek and Niemeyer, *Foundations and Frontiers of Deliberative Governance*, 12.

[473] Ibid.

[474] Dryzek and Niemeyer, *Foundations and Frontiers of Deliberative Governance*, 12. Habermas uses the term "public sphere" to refer to the flow of uncoerced conversations throughout and between civil society and formal policymaking centers, like parliaments (*Between Facts and Norms*, 298-9). The account of Deliberative Democarcy that Dryzek and Niemeyer offer describes the same dynamic. However, their account deconstructs the flow of public sphere conversation into its discrete parts and represents these parts and their relationships with the concept of a "deliberative system."

[475] Dryzek and Niemeyer, *Foundations and Frontiers of Deliberative Governance*, 146.

the public space lack the state's coercive power, discussions in the public space can approximate, though never fully achieve, the presuppositions of practical discourses. As paraphrased by Benhabib, these requirements are:

> 1) all have the same chances to initiate speech acts, to question, to interrogate, and to open debate; 2) all have the right to question the assigned topics of conversation; and 3) all have the right to initiate reflexive arguments about the very rules of the conversation.[476]

These presuppositions could not even be approximated by any one conversation at any given time. However, they can be significantly, if not perfectly, satisfied by an overlapping network of conversations undertaken among "a *plurality of modes of association*….rang[ing] from political parties, to citizens' initiatives, to social movements, to voluntary associations, to consciousness-raising groups and the like."[477] Through their internal dialogues, these semi-public conversations produce coherent perspectives to contribute to broader public conversations, through "interlocking and overlapping networks and associations of deliberation, contestation, and argumentation."[478] As members of a society participate in these networks, they develop their own convictions about how the government ought to respond to matters of common concern. Hence, the public conversation enables the formation of public opinions and wills.[479]

Discourse ethics presumes that public opinions formed through public space engagement have the potential to be communicatively rational and intersubjectively valid

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[476] Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," 70.

[477] Ibid., 73, italics original.

[478] Ibid., 74, italics original.

[479] Habermas, *Between Facts and Norms*, 362.

precisely to the degree that the public space exhibits characteristics of practical

discourses. No public space does this perfectly. In many countries, for-profit media

corporations control much of the information distributed via television. These companies

have far greater chances to "initiate speech acts, to question, to interrogate, and to open a

debate" than say, social workers or poor persons, who could no doubt offer relevant

information to public conversations on welfare policy. Furthermore, what mass media do

have to say is not always accurate.[480] On the other hand, the advent of popularly

accessible media forms—podcasts, blogs, Youtube videos—has opened up the public

conversation to a whole new range of speakers and listeners.[481] These speakers may still

rely on traditional media outlets for information about goings on at the centers of power

(Capitol Hill, Wall Street, UN Headquarters), but they can also use such information to

ask new questions, reframe issues, or reflexively evaluate the media system. In so doing,

these small media actors can improve the discursive quality of the public conversation.

Popular sovereignty requires not just that those governed form political opinions,

but that political opinions be transmitted to the empowered spaces where policies are

made.[482] Transmissions take many forms on the path between public spaces and

empowered spaces. These include: calls, letters, and emails to elected officials or

regulatory agencies; protests and marches; civil disobedience that draws media attention;

white papers; public art; social media; town hall meetings; citizen referenda; public

debates; polls; op eds; lobbying; citizen advisory councils, etc.

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[480] Parkinson, *Deliberating in the Real World*, 102-103.

[481] Ibid., 101.

[482] Dryzek and Niemeyer, *Foundations and Frontiers of Deliberative Democracy*, 11.

"Mini-publics" provide another, and a relatively new, route of transmission between public spaces and empowered spaces.[483] Mini-publics gather a sample group of the governed population to discuss and make recommendations regarding particular policy challenges. Ideally, participants represent the perspectives and interests of the populace, as they pertain to the problem at hand. So, one mini-public might seek diverse religious representation to deliberate whether religious expressions like church bells or calls to prayer constitute noise pollution, while another mini-public might seek diverse economic representation among participants in a discussion on ten-year public transportation plans, and so forth.[484] The focus of most mini-public's work is the clarification and generation of policy recommendations; they usually have very little binding authority.[485] But, they can quite directly transmit a range of discursively formed opinions to lawmakers. In so doing, they provide another channel of communication between policymakers and the governed.[486]

For the moment, let us assume that transmission is successful, and policymakers clearly understand public opinions. What precisely does Deliberative Democracy recommend policymakers do with the political opinions that reach them? What is supposed to happen in empowered spaces? To craft a policy from public opinions, lawmakers face two kinds of challenges. First, lawmakers cannot simply instantiate public opinion because public opinion is itself diverse. Doing precisely what the public

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[483] Ibid., 155-56.

[484] Parkinson, *Deliberating in the Real World,* 35.

[485] Dryzek and Neimeyer, *Foundations and Frontiers of Deliberative Democracy*, 168-69.

[486] Ibid.

told them to do would create schizophrenic policies. A lawmaker must decide where she stands in relation to the range of public opinions with which she is presented.

Second, lawmakers must work within legal and material constraints. From these constraints arise a key distinction between public spaces and empowered spaces. Members of the public spaces can indulge in endless idealistic debates.[487] By contrast, members of empowered spaces must actually get something done.[488] Given that necessity, what sorts of procedures should lawmakers use? Discourse ethics presumes that, in general, a just policymaking procedure will involve dialogue constituted by communicative interaction and/or a practical discourse. Legislatures provide one forum where such conversations are possible.[489] However, even good faith legislative discussions cannot guarantee that policymakers will actually achieve consensus on any given topic. For this reason, Deliberative Democracy accepts the necessity of compromise, bargaining, and eventually majority rule voting to resolve conflicts that cannot be worked out through dialogue.[490] Voting is used here not because the popularity of a policy determines its rightness. Validity is determined through discourse. However, voting is an appropriate way to break ties when discourse has produced all the agreement that is possible in a given situation.[491]

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[487] Habermas, *Between Facts and Norms*, 362.

[488] Hayley Stevenson and John S. Dryzek, *Democratizing Global Climate Governance* (Cambridge, UK, and NY: Cambridge University Press, 2014), 203.

[489] Habermas, *Between Facts and Norms,* 181-92.

[490] Ibid., 180-181.

[491] Ibid., 181-182.

While Deliberative Democracy presumes that legitimate policymaking procedures will usually be deliberative policymaking procedures, it recognizes that some situations call for a different strategy. For instance, natural disasters require quick decision making, quicker than legislatures can achieve. Also, national security decisions must often be made by a small group experts in order to protect vulnerable informants. Deliberative Democracy accepts the appropriateness of these non-discursive policymaking procedures as long as the procedures themselves can be discursively justified.[492] For instance, it is conceivable that secret policymaking procedures regarding national security matters could gain broad, discursively formed, popular support. Popular sovereignty is not threatened by non-deliberative procedures, so long as the procedures themselves (rather than their content) enjoy public support and remain open to ongoing public scrutiny.

Regardless of the procedure, once a policy decision has been made, the populace exercises sovereignty by holding policymakers accountable for their decisions.[493] Accountability takes many forms, the most powerful and obvious of which is regular elections. However, elections are occasional events, and Deliberative Democracy posits that accountability should be an ongoing process. Its advocates have utilized Iris Marion Young's conception of representation-as-relationship to explain that process.[494] In her view, accountability involves a "cycle of anticipation and recollection between constituents and representative, in which discourse and action [i.e. decision on a policy] at each moment ought to bear traces of the others."[495] The objects of a policymaker's

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[492] Dryzek and Neimeyer, *Foundations and Frontiers of Deliberative Governance*, 12.

[493] Ibid., 11.

[494] Parkinson, *Deliberating in the Real World*, 32.

[495] Iris Marion Young, *Inclusion and Democracy* (New York: Oxford University Press, 2002), 29.

anticipation and recollection should include conversations with constituents, and not just elections. Such discursive accountability transpires formally through "[o]fficial means of accountability…[such as] civic review boards, implementation studies, and periodic official participatory hearings" and informally through public space conversations that that question, praise, criticize or judge the policymakers' decisions.[496]

Ideally, these four structural/functional conditions facilitate popular sovereignty. Ideally, they provide those governed with opportunities to shape the content of laws and reform the institutions by which laws are made. However, in real societies these conditions are only ever partially achieved. As discussed in the paragraphs below, Deliberative Democracy provides insight into common failures and remedies to those failures in popular sovereignty of deliberative systems.

Failures in popular sovereignty and their remedies

Public space conversations can go awry in several ways. The most obvious involve the restriction of individual rights (the role rights play in popular sovereignty will be discussed in more depth below).[497] Polarization also undermines healthy public discourse. The rationality of public discourse relies on citizens' ability and willingness to communicate across social niches and ideological divides. [498] Polarized media sources

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[496] Ibid., 132.

[497] Habermas, *Between Facts and Norms*, 99, 103-104; Jürgen Habermas, "Three Normative Models of Democracy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton, NJ: Princeton University Press, 1996), 27.

[498] Dryzek and Neimeyer, *Foundations and Frontiers of Deliberative Democracy*, 161-62. Dryzek and Neimeyer seem less worried than many that polarization prevents ideological cross pollination. They posit that ideological enclaves can generate unique perspectives that can eventually enrich the public conversation. I personally worry the acrimony of a two-party system makes such cross pollination less possible in US than in multi-party systems of Europe and Australia.

and polarizing social media algorithms may discourage such communication. Under these conditions, public opinions may drift further and further apart, making it harder and harder for policymakers in empowered spaces to craft agendas broadly acceptable to those governed. Popular sovereignty is undermined thereby.

Empowered space conversations can also fail to support popular sovereignty. This happens when lawmakers are not motivated to listen to those governed, when they may feel unconcerned with opinions generated in public conversations. This motivational breakdown results when those governed by a particular law do not enjoy a binding agent-principal relationship with a policymaker, wherein the policymaker knows she will have to answer to those impacted by the laws she helps craft.[499] Such accountability gaps have several causes: deep social divisions (whether along lines of religion, ethnicity, or party affiliation) that cause elected officials to ignore the needs of constituents unlikely to vote for them in any case; large, permanent, non-citizen populations living within a country without voting privileges or secure rights to free speech, freedom of association, etc.; elite, non-representative governance institutions like the World Trade Organization; or geographical mismatches between the area a lawmaking body represents and the area affected by its laws.[500]

This last type of representation gap often besets environmental policy decisions, including the ACF conflict. The people of Florida (not to mention its ecosystems) are functionally governed by a combination of water policies written by the State of Georgia

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[499] Parkinson, *Deliberating in the Real World,* 31-35.

[500] Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Malden, MA: Polity, 2011), 109, 164-65.

and the USACE. Floridians can express their opinions during the public comment period on USACE's dam operating rules, but USACE is not bound by those opinions. Floridians have even less influence over the Georgia's water policies, as these are set by the Georgia legislature and the governor. Admittedly, Florida has recourse to SCOTUS, but that is hardly a setting for generating policies that reflect Florida's interests. It mainly functions—and rather poorly at that—to protect Florida from blatant harm from Georgia.[501]

Regardless of whether they transpire in public space, empowered space, transmission, or accountability conversations, communication failures weaken the sovereignty of those governed; they undermine governed actors' capacity to have a hand in authoring their laws and shaping policymaking procedures and institutions. Hence, these failures erode the law's legitimacy. Deliberative Democracy not only conceptualizes these failures, it also theorizes how these conversational failures can be diagnosed and remedies attempted. Toward that end, two ideas are especially important: meta-deliberation and democratic iterations.

Meta-deliberations are arguments about the appropriateness of policymaking procedures and institutions.[502] Familiar meta-deliberation topics include: the relationship between states' rights and federal power; gerrymandering; voter registration requirements; the scope of judicial power; transparency of security agencies; and the discretionary range of regulatory agencies. These conversations may transpire in public

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[501] As noted in the Special Master Lancaster's report on Florida v. Georgia, no. 142, Georgia agriculture has almost certainly harmed Florida, but he judges that the SCOTUS can offer no remedy to that harm (27, 69-70).

[502] Dryzek and Neimeyer, *Foundations and Frontiers of Deliberative Democracy*, 11.

spaces, empowered spaces, transmission or accountability conversations. When held in

public spaces, they bring to light policymaking procedures that the governed deem

illegitimate, and they express a governed populace's ideas for institutional innovations

that would be more appropriate.[503]

The political effectiveness of these conversations ultimately depends upon

reformers having sufficient influence within current policymaking institutions.

Marginalized groups—the groups whose meta-deliberations are the most likely to

produce critiques of policymaking procedures and institutions—by definition lack such

power. Nonetheless, Seyla Benhabib's concept of "democratic iterations" names one way

disadvantaged perspectives find a way to exert political influence:[504]

> democratic iterations [are] complex processes of public argument, deliberation
> and exchange through which universalist rights claims and principles [especially
> regarding political participation] are contested and contextualized, invoked and
> revoked, posited and repositioned, throughout legal and political institutions, as
> well as in the associations of civil society. These can take place in "strong" public
> bodies of legislatures, the judiciary, and the executive, as well as in the informal
> and "weak" publics of civil society and media.[505]

Democratic iterations could, in theory, involve persons and groups advocating on

their own behalf for recognition by policymaking institutions, as Civil Rights activists

did. But Benhabib tends to describe democratic iterations as occasions when actors who

have influence within a policymaking institution advocate that others who do not have

such influence be given it, either through an amendment to the existing policymaking

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[503] Deliberative Democracy's repertoire of institutional innovations has grown in recent years. See, for example, discussion in Dryzek and Neimeyer, *Foundations and Frontiers of Deliberative Democracy*, 151-52.

[504] Benhabib, *Dignity in Adversity*, 164.

[505] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (New York: Cambridge University Press, 2004), 179.

institution or through the creation of an entirely new policymaking institution. Benhabib uses the example of "Turks currently living in Germany or Mexicans living in the United States' whose "kin and relatives [with citizenship]...ought to—and in fact they do— mobilize on [their] behalf."[506] These family members advocate that their loved ones be granted legal status, recourse to judicial systems to redeem their human rights, and an opportunity for the voting privileges of citizens.

The ACFS's work represents one long effort in democratic iteration, and for that matter, meta-deliberation. All members appealed to their respective governments to create a transboundary water management institution better able to respond to the changing conditions and needs of the basin (meta-deliberation). They also wanted that institution to correct the division of the basins' stakeholders into upstream, represented actors of Georgia and downstream, unrepresented actors of Florida and Alabama (democratic iteration). Democratic iterations do not guarantee that such accountability gaps will be filled (as evident in the ACF case), but they certainly keep that possibility open. If the biblical story of the unjust judge and the poor widow has any truth to it, this possibility deserves attention.

Through meta-deliberation and democratic iterations, the governed populace can reform policymaking procedures and institutions, making them more popularly legitimate. In so doing, those governed exercise sovereignty. This exercise relies, however, on the populace's possession of certain constitutional rights. The next section discusses those rights as they are treated by Deliberative Democracy.

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[506] Benhabib, *Dignity in Adversity*, 164.

Discourse Ethics' Account of Individual Rights

Deliberative Democracy's account of democracy legitimacy, like

Communitarianism, places a great deal of weight on popular sovereignty. However,

Deliberative Ethics does not follow (some versions) of Communitarianism in locating

moral authority in groups.[507] Rather, Deliberative Democracy sees moral authority arising

from individuals. Individuals—perhaps blessedly but certainly ineluctably—are bound up

in identity defining, linguistically constructed, morally/ethically accountable relationships

with other people.[508] Through these relationships, individuals generate shared meanings

and shared moral and ethical norms. While these norms are often the possession of

human groups, and they are always the product of linguistically mediated social life, their

source lies in individuals-participating-in-community. Individuals, through their

interactions, generate moral meaning and moral authority.[509] Thus, individuals rather than

groups generate the moral judgements that legitimize or delegitimize governments. The

claim that those governed have a right to exercise sovereignty does not rest on an

understanding of the people as a collective agent, but on an understanding that

individuals capable of moral discretion cooperatively generate and revise moral norms.

Constitutionally guaranteed rights honor and protect individuals' capacity to

generate intersubjective moral consensus—both in their private and public relationships.

Perhaps surprisingly, Deliberative Democracy posits that both privately exercised rights

and publicly exercised rights play an important role in the maintenance of popular

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[507] Habermas, "Three Normative Models of Democracy," 22-23.

[508] Habermas, *Between Naturalism and Religion*, 12-15.

[509] Benhabib, *Dignity in Adversity*, 67.

sovereignty.[510] The latter secure the means to participate in public space discussions on political matters, but the former provide the content and motivation for such participation. This relationship between individual rights and popular sovereignty is particularly evident in Habermas's account of public and private autonomy.

In Habermas' account of democratic legitimacy, individual rights exist to secure two kinds of liberty: public autonomy and private autonomy. Public autonomy consists in the ability to participate authentically, without coercion or threat in deliberations regarding matters of common concern, and it consists in access to the public institutions that hold lawmakers accountable to those discussions.[511] Free speech, freedom of the press, and suffrage are the most obvious examples of rights that secure public autonomy. Private autonomy consists in the ability to live the kind of life one deems valuable, to pursue one's own happiness.[512] Rights that secure private autonomy include freedom of religion, freedom of association, property rights, and various welfare rights.

Whereas public autonomy *empowers* participation in deliberations regarding common concerns, private autonomy *enhances* the quality of such discussions. Private autonomy does this in at least two ways, both of which derive from the fact that the rights of private autonomy secures persons' ability to participate as one wishes in religious or cultural communities.[513] These communities give persons powerful, often early experiences of morally binding relationships. These experiences instill a desire for

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[510] Habermas, *Between Facts and Norms,* 99-108.

[511] Ibid., 93-94.

[512] Ibid., 401-403.

[513] Habermas, *Between Naturalism and Religion*, 87-88.

principled—rather than just instrumental—relations with others.[514] In addition to providing *motivation* to participate in public political deliberation, membership in a religious or cultural community also provides *material* to enrich the content of public political deliberation. According to Habermas,

> the major world religions belong to the history of reason itself….On these premises, it would be irrational to reject those 'strong' traditions as 'archaic' residua instead of elucidating their internal connection with modern forms of thought. Even today, religious traditions perform the function of articulating an awareness of what is lacking or absent. They keep alive a sense of failure and suffering. They rescue from oblivion the dimensions of our social and personal relations in which advances in cultural and social rationalization have caused utter devastation. Who is to say that they do not contain encoded semantic potentialities that could provide inspiration if only their message were translated into rational discourse and their profane truth contents were set free?[515]

And

> churches and religious communities fulfill indispensable functional imperatives for the reproduction of American democracy. They provide arguments for public debates on crucial morally loaded issues and fulfill tasks of political socialization by informing their members and encouraging them to participate in the political process.[516]

Religious communities provide their members with important and unique moral/ethical insights and motivation to articulate those insights. The fact that those insights arise from religious worldviews does not doom them to irrationality. Quite the opposite. Secular people may find innovative moral intuitions within religious arguments that they can embrace for secular reasons and utilize in political deliberation. Hence, the exercise of

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[514] Ibid., 110-11.

[515] Ibid., 6.

[516] Ibid., 125.

private autonomy can enhance the quality of public autonomy. Taken together, both forms of liberty enable the populace to exercise sovereignty.

In sum, Deliberative Democracy views the establishment and protection of individual rights as functionally necessary to popular sovereignty. Moral authority arises from individuals, and rights protect individuals' capacities to participate freely and substantively in public space conversations through which that moral authority is shaped and expressed. Hence, Deliberative Democracy—unlike Communitarianism, which also places heavy emphasis on popular sovereignty—does not see constitutional rights as "something secondary. Rather, it conceives the principles of the constitutional state as a consistent answer to the question of how the demanding communicative forms of a democratic opinion- and will-formation process can be institutionalized."[517]

Deliberative Democracy allows that various societies will use somewhat different schedules of rights to protect private and public autonomy. For instance, Germany has less free speech than the USA, but we still think of that country as relatively democratic. However, Deliberative Democracy insists that those governed by a democratic government—citizens or citizens of neighboring states constrained in important ways by a democratic government's laws—do have the "right to have rights."[518] That is, they have

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[517] Habermas, "Three Normative Models of Democracy," 27.

[518] Benhabib treats as a universal moral claim the "right to have rights"—the right to belong to a society of reciprocal moral accountability that is guaranteed by the equal protection of everyone's individual rights, especially rights to political participation (*Dignity in Adversity*, 68-69). From this claim she extrapolates that all persons have a right to democratic governance. I find that idea appealing, though I hesitate to make such universal claims. I do agree, however, that for those modern societies which have adopted popular sovereignty as their governments' legitimating principle, moral consistency requires them also to acknowledge that whoever is forced to be governed by their laws—as are both citizens and those beyond the border whose choices are radically constrained by another government's decisions—has a right to participate in the procedures by which those laws are made. I agree with Benhabib that if a person is ruled by a self-identified democratic government, on the government's own justificatory terms, she has a right to participate in its policymaking processes.

a right to participate effectively in the political process, especially in political processes that specify the rights that secure public and private autonomy.[519] If individuals did not have this basic communicative freedom, discursively generated popular sovereignty would have no moral weight.[520]

The Appropriateness of Deliberative Democracy as an Evaluative Standard of AG

Deliberative Democracy as a Morally Compelling Democratic Philosophy

Deliberative Democracy offers a more compelling account of democratic legitimacy than does Liberalism or Communitarianism, for three reasons. First, Deliberative Democracy distributes normative weight more evenly between individual rights and popular sovereignty than Liberal or Communitarian philosophies do. It treats both principles as irreducible, equally important conditions of democratically legitimate governance. Unlike Communitarianism, it does not privilege groups' moral authority over individuals' moral authority. Unlike Liberalism, it offers an in-depth explanation of how individuals can collaboratively exercise popular sovereignty. Second, Deliberative Democracy offers help dealing with the reality of moral, religious, and cultural diversity that challenges modern societies. Unlike Liberalism, it does not suggest that such diversity presents no barriers to principled collective decision making, so long as a fair system of cooperation is maintained or individuals' human dignity is respected. Nor does it make Communitarians' mistake of relying on extant shared values in increasingly diverse societies. Rather, Deliberative Democracy offers a way to rebuild social solidarity in the face of moral uncertainty, to work through the conflicts of interest and

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[519] Benhabib, *Dignity in Adversity*, 68-69.

[520] Ibid., 67-69.

values that beset all collective action problems in diverse societies. For this reason alone, it deserves significant attention in the modern world. Lastly, Deliberative Democracy is institutionally reformist without being institutionally utopian. It picks up on discursive potential already embedded in constitutionally structured governments. It offers meta-deliberation as a conceptual explanation of how governed populations may develop institutional reform agendas. It offers democratic iterations as a means to pursue those reform agendas, first by expand membership in constitutionally defined communities and, second, by motivating the creation of new political institutions to host new sites of political representation. In sum, Deliberative Democracy offers modern societies guidance to face many of our most pressing political challenges in principled ways, despite the erosion and/or multiplication of traditional moral authorities.

Deliberative Democracy's Guidance for Addressing Pragmatic Challenges of Interstate Water Allocation Policymaking

Chapter Three discussed four practical challenges that beset environmental policymaking: 1) assessing the value of private and non-private goods at stake in environmental policies; 2) the data-intensiveness of environmental policymaking and the role of experts therein; 3) the role of economically and socially marginalized communities in policymaking; and 4) the transboundary nature of environmental policies. The following paragraphs discuss the principled guidance Deliberative Democracy gives for addressing those challenges.

Assessing the value of private and non-private goods

Unlike Liberal philosophy, Deliberative Democracy gives instructions for how conflicts between private and non-private interests can be legitimately mediated, i.e.

through procedures deemed fair by large majorities of those governed through public discourse in a functioning deliberative system. This instruction is procedural rather than substantive; Deliberative Democracy renders no a priori judgment on what balance lawmakers should strike between private and non-private interests. Policies that survive critique in a deliberative system seem likely to favor the adoption of environmentally friendly policies, in so far as these are easier to justify in terms of general interest. But, of course, economic growth also strikes many people as an important general interest. What is interesting about this example is that, even here, private interests (such as when private companies seek profit through mining on public lands) can only find justification by appealing to a wider interest. Mining companies have to show not just that they can turn a profit (private interest) but that they can increase the tax base or provide the community with jobs (general interest). While public discourse encourages the passage of laws justified in terms of the public good, Deliberative Democracy does not substantively mandate how policies should in fact balance private and non-private interests.

The role of economically or socially marginalized communities

Charles Taylor diagnoses a common failure of democratic politics: democratic exclusions, i.e. the tendency of citizen majorities to exercise popular sovereignty over public policies in ways that disregard the interests and concerns of marginalized groups. Deliberative Democracy, like Communitarianism, recognizes this tendency as a threat to the legitimacy of democratic laws. It suggests that policymaking procedures need to be designed, and redesigned if necessary, to encourage reasonable, fair arguments in which every governed actor's concerns get a fair hearing. Democratic iteration provides a means to correct the problem of democratic exclusions, as the Environmental Justice Movement

has done with some success in recent years.[521] Such efforts can shape meta-deliberation

in the public space, beyond the movement itself. While neither democratic iterations nor

meta-deliberations provide a guaranteed safeguard against democratic exclusions, they at

least provide a means to address it, something Communitarianism does not offer.

Dealing with data and the role of experts

 While minority populations have a say in environmental policy deliberations

primarily for reasons of justice, Deliberative Democracy demands scientists be included

in environmental policy deliberations primarily for reasons of rationality, instrumental as

well as communicative. Scientific data constitute extremely "relevant contributions" to

environmental policy discussions. This information can only be provided by specialists.

Hence, scientists are needed both in public conversations—where their task is to interpret

scientific data to the average person—and in empowered deliberations—where their task

to interpret scientific data to elected officials (often lawyers) with not much greater

understanding of environmental sciences than the average person.[522] Like

Communitarians, Deliberative Democracy does not recommend simply delegating

environmental policy decisions to scientists; both philosophies oppose the growth of

democratically unaccountable technocratic power.[523] However, Deliberative

Democracy's procedural standards bring to light how crucial is the role scientists play in

environmental policy deliberations. Policy decisions devoid of available scientific

insight—such as the GOP's climate denial platform—are not rationally validated by

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[521] Rosenbaum, *Environmental Politics and Policy,* 146-54.

[522] Ibid., 70-74, 90-91.

[523] Jürgen Habermas, *The Lure of Technocracy* (Malden, MA: Polity, 2015), 3-4; Taylor, *Philosophical Arguments*, 208.

those who can make relevant contributions. Hence, they are not fully legitimate even if they enjoy popular support. To correct this rationality deficit, we need scientists to play a more prominent role in public space and empowered space deliberations, without delegating policymaking authority solely to them.

Transboundary politics

Last but not least, Deliberative Democracy provides guidance for handling geographic mismatches between the area a policymaking body represents and the area its policies impact. It begins with the moral premise that persons have a right to participate in shaping the laws that govern them; they have a right to participate in public conversations and to enjoy influential, accountable representation in empowered space. If governance institutions do not currently exist to fulfill that right, then new institutions ought to be created. That effort may very well involve clashes in culture, values, and interests (problems with which Communitarian philosophy gives little guidance for dealing). Deliberative Democracy's account of political legitimacy can address such conflicts. Deliberative Democracy suggests that populations on either side of a boundary do not need to share a culture to craft a democratically legitimate, popular sovereignty-honoring, policymaking institution. Rather they need public conversations—meta-deliberation—through which to develop a mutually acceptable (though perhaps not ideal) transboundary policymaking procedure. Deliberative Democracy both expects and allows that some new institution may be needed to facilitate such a procedure. In so doing, it invites the kind of institutional problem solving needed to address intractable policy conflicts like the ACF Water Wars.

Conclusion

This chapter has argued that Deliberative Democracy offers a morally compelling account of democratic legitimacy in general, and one that shows how the pragmatic challenges that beset interstate water allocation policymaking can be addressed in principled ways. As such, Deliberative Democracy provides an appropriate standard of democratic legitimacy with which to assess AG prescriptions for the design of policymaking institutions. The next chapter undertakes that task.

Chapter 5

Introduction

This chapter completes my answer to this dissertation's driving research questions: Does Adaptive Governance's institutional design agenda deserve more political support in the Apalachicola-Chattahoochee-Flint (ACF) basin? Does it offer a promising means to address the basin's ongoing interstate water allocation policymaking challenges? My answer to those questions hangs on two criteria: AG prescriptions' potential to encourage *environmentally prudent* policymaking; and AG prescriptions' potential to support *democratically legitimate* policymaking.

In Chapter Two, I argued that AG satisfies the first criteria. Adaptive Governance prescriptions for designing transboundary water management institutions, like an ACF basin commission, aim to enhance policymakers' freedom to employ Adaptive Management in their water allocation decisions. AM procedures do not guarantee, but they certainly have the potential to support, environmentally prudent policymaking. Hence, AG satisfies my first criteria.

This chapter assesses AG institutional design prescriptions in terms of my second criteria. It argues that AG prescriptions do indeed chart a promising path to improving the democratic legitimacy of interstate water allocation policymaking institutions; these prescriptions give instructions for designing an ACF basin commission that has the potential to enhance popular sovereignty as defined by Deliberative Democracy. In sum, this chapter offers a resounding "yes" to my research question. Adaptive Governance's institutional agenda does deserve more political support in the ACF basin.

The bulk of the chapter attends to that argument. Along the way, it also notes a couple of places where AG prescriptions need to be specified more thoroughly to improve their democratic potential and remove risks to popular sovereignty. The chapter and dissertation conclude with a brief discussion of research trajectories resulting from this study.

Evaluating the Democratic Legitimacy of Adaptive Governance

Summary of Adaptive Governance

By way of reminder, AG theory's *raison d'être* is to identify the institutional arrangements necessary for policymakers to undertake Adaptive Management of ecosystems. Adaptive Management "promotes flexible decision making that can be adjusted in the face of uncertainties as outcomes from management actions and other events become better [though never finally or fully] understood."[524] It accomplishes this goal by "learning through doing."[525] The AM cycle involves: gathering stakeholders; policy objective setting; social-ecosystem modeling; gathering, assessing and selecting a policy option; policy implementation and outcome monitoring; and incorporating learning into subsequent management decisions.[526] As I have argued in Chapter Two, these practices enable (though do not require) policymakers to exercise environmental prudence. Adaptive Governance theory probes the institutional arrangements necessary to support AM. Adaptive Governance offers three institutional prescriptions of particular importance to the reform of formal policymaking institutions, recapped below.

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[524] National Research Council, *Adaptive Management for Water Resources Project Planning*, 1-2.

[525] Ibid., 1-2.

[526] Ibid., 24-27.

Problemshed

Adaptive Governance's first institutional prescription is to seek a geographical fit

between an environmental policymaking procedure's authority and its "problemshed."[527]

In the ACF case, the problemshed is the river basin since water allocation and land use

choices anywhere upstream in the basin can cause water management problems

downstream in the basin. Often, though not always, finding a good fit between a

problemshed and policymaking authority requires the creation of a new policymaking

institution. In the ACF case, such an institution would straddle the territorial boundaries

of three states. The ACFS published a report describing four regional problems a

"transboundary water management institution" should work to address:

- Acting as a data clearinghouse and facilitator of common data standards (collection, management, etc.);
- Encouraging and facilitating coordination and consensus building and providing conflict resolution services;
- Supporting development of basin level water management plans, specifically related to conservation and returns, supply augmentation and drought management; and
- Educating the general public and specific stakeholders about the need for transboundary management and particular opportunities and strategies for doing so.[528]

Stakeholder participation

AG's second institutional prescription is to involve diverse stakeholders in

policymaking procedures. In the ACF case, stakeholders include not only state and

federal governments but also environmental groups, industry groups, homeowners

associations, businesses, municipalities, farmers, power and water utilities, and others.

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[527] Chaffin et al., "A decade of adaptive governance scholarship: synthesis and future directions."

[528] Fowler, "Options for Transboundary Governance to Promote Sustainable and Adaptive Water Management in the Apalachicola-Chattahoochee-Flint Basin," 6.

This prescription does not require that all stakeholders play the same role or exercise the same kind of authority. [529] The ACF Stakeholders' report delineates three roles members might play in their proposed transboundary water management institution: voting members; vetoing members; and advisory members. The report recommended that the states exercise voting power and that the USACE exercise (at least) veto power. The report left open the role non-governmental stakeholders might play. They too might acquire policymaking authority through popular election or political appointment.[530] Adaptive Governance does not stipulate precisely how much or what kind of political power various stakeholders should hold, only that they should be included in environmental policymaking processes.[531]

Polycentric systems

Adaptive Governance's third institutional prescription—that governance systems should be polycentric—defines how policymaking institutions at various places and scales should relate to each other. Polycentricity entails that multiple decision making centers exercise policymaking authority over the same geographic area. Some of these centers' jurisdictions nest within each other, as local, state and federal legislatures do. However, some decision making centers' jurisdictions overlap, as would be the case with an ACF water management institution. Its authority would overlap three states but would

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[529] Huitema et al., "Adaptive water governance: assessing the institutional prescriptions of adaptive (co-)management from a governance perspective and defining a research agenda."

[530] Fowler, "Options for Transboundary Governance to Promote Sustainable and Adaptive Water Management in the Apalachicola-Chattahoochee-Flint Basin," 20-21.

[531] Stringer et al., "Unpacking 'Participation' in the Adaptive Management of Social–ecological Systems: A Critical Review."

not entirely cover any of them.[532] The ACF Stakeholders' proposed transboundary water management institution would have increased the polycentricity of the US's overarching federalist system.

Coordination among institutions can be a challenge in polycentric governance systems. To address this problem, recent AG scholarship advocates for a style of policymaking called "reflexive law." Reflexive law involves higher scale policymaking institutions setting the parameters within which institutions at lower scales—whether general purpose or special purpose—may operate. When creating reflexive laws, higher scale institutions set minimum policy "floors" and maximum policy "ceilings."[533] In water policy, an important policy floor is the lowest water quality standard allowable under federal law. States may set their water quality standards anywhere above the national minimum. Real examples of policy ceilings are a little difficult to come by in water quality or water allocation policies, though they are evident in other environmental policy issues. For instance, the federal government limits the stringency of state's automobile exhaust regulations. Policymaking institutions at higher scales also coordinate institutions at lower scales by setting the guiding principles of their work. For instance, the EPA dictates that local regulations should aim at air quality standards that protect public health.[534] Organizations at lower scales of the hierarchy work with these policy goals and within these policy limits to craft policies suited to their situations. The Tri-

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[532] Huitema et al., "Adaptive water governance: assessing the institutional prescriptions of adaptive (co-)management from a governance perspective and defining a research agenda."; DeCaro et al., "Legal and institutional foundations of adaptive environmental governance"; Koontz, "Adaptive institutions in social-ecological systems governance: A synthesis framework."

[533] Craig et al., "Balancing stability and flexibility in adaptive governance: an analysis of tools available in U.S. environmental law."

[534] Ibid.

State governments could have exercised reflexive law by using an interstate compact to designate broad goals and policy floors and ceilings within which an ACF river basin commission could operate.

However, coordinating influence is not only supposed to flow from top to bottom in polycentric governance systems. Ideally, these systems differ from normal hierarchies in that lower scale organizations send data and best practices up, down, and across the hierarchy. Lessons learned from AM policy experiments in one place can thereby expand the range of policy strategies with which other governance institutions can work. "Bridging structures" facilitate this information flow in a number of ways: convening actors at different scales; facilitating the co-production of "maps, reports, and forecasts" that can be the basis of coordinated activity; translating agency and local jargon; recruiting experts to fill information gaps; and/ or providing conflict resolution services.[535] Universities, professional organizations, and interstate collaboratives may all serve these functions.[536]

The ACF Stakeholders group functioned as one such bridging structure among local stakeholders, state policymakers (governors and state departments of natural resources), and federal policymakers (USACE). The transboundary water management institution that the ACFS proposed creating would have served this function also. Bridging organizations may exercise hard, coercive power (as the proposed transboundary water management institution would have done) or soft, advisory power

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[535] David W. Cash, W. Neil Adger, Fikret Berkes, Po Garden, Louis Lebel, Per Olsson, Lowell Pritchard, and Oran Young, "Scale and Cross-Scale Dynamics: Governance and Information in a Multilevel World," *Ecology and Society* 11, no. 2 (2006).

[536] DeCaro et al., "Legal and institutional foundations of adaptive environmental governance."

(as the ACF Stakeholders themselves did). In either case, they ideally function to enhance communication and coordination across and between institutions in a polycentric system of government.

AG Institutional Prescriptions' Impacts on Popular Sovereignty

Chapter Two showed how these institutional prescriptions support AM practices, and thereby support policymakers' capacity to exercise environmental prudence. It remains to be demonstrated that AG institutional prescriptions support more democratically legitimate policymaking; it remains to be shown that following AG's recommendations for the design of a river basin commission would enhance the popular sovereignty of those governed by it.

The following paragraphs undertake that work. They assess whether AG institutional prescriptions could enhance popular sovereignty. This assessment will be based on AG's impacts on the four structural/functional conditions of an effective deliberative system: public space deliberations; transmission of political opinions from the public space to empowered space; empowered space deliberations; and accountability of empowered space actors to public space actors. This section also assesses AG institutional prescriptions' impacts on meta-deliberations regarding the legitimacy of policymaking institutions. (This section does not discuss AG prescriptions' impact on individual rights, as AG theory does not formally address that topic to my knowledge. Rather, AG institutional prescriptions presume an intact set of individual, constitutionally guaranteed rights to political participation, association, freedom of conscience, and free speech.)

Public space

Deliberative Democracy posits that the first step towards popular sovereignty is the formation of governed actors' political wills through engagement in public space conversations. Constitutional rights protect this engagement, by protecting freedom of speech, freedom of the press, and freedom of association.[537] These rights—coupled with various forms of communication technology—protect an "interlocking net of…associations, networks, and organizations [through which] an anonymous 'public conversation'…of deliberation, contestation, and argumentation…results."[538]

To improve the exchange of ideas within this diffuse network, to encourage its various conversations to inform each other, recent democratic experiments inspired by Deliberative Democracy have utilized a new tool: "mini-publics."[539] Mini-publics are groups of persons gathered to represent the range of perspectives and interests of those governed by a particular policy decision. Mini-public conversations differ from public space conversations primarily in that mini-public conversations transpire in a gathered forum rather than in partially overlapping networks.[540]

Adaptive Governance's institutional prescription that stakeholders be included in policymaking often involves the formation of stakeholder advisory committees that function similarly to mini-publics.[541] For instance, ACFS served as an advisory group to

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[537] Habermas, *Between Facts and Norms,* 93-94.

[538] Benahabib, "Toward a Deliberative Model of Democratic Legitimacy," 74.

[539] Dryzek, *Foundations and Frontiers of Deliberative Governance,* 155-56.

[540] Ibid.

[541] A key difference between mini-publics and the larger public sphere, and also between mini-publics and AG stakeholder groups, is their membership. Mini-publics generally consist entirely of individual persons, rather than representatives of businesses, organizations, and other corporate actors. An

their respective state governments (although admittedly their advice was unsolicited). The river basin commission ACFS called on their states to create also would have included a stakeholder advisory committee. These advisory committees resemble mini-publics in that: they represented (or would have represented) a wide range of interests and perspectives of those affected by a particular policy (though, at least in the ACFS's example, poorer or non-organized stakeholders were likely unrepresented); and their conversations transpired in a unified, structured forum rather than in an unregulated overlapping network of public conversations.

Mini-publics—including AG stakeholder advisory committees—can improve the rational quality of public conversations both within and without the mini-public. Within a mini-public, rationality is improved by prompting participants to engage perspectives to which they might not otherwise be exposed or which they might be inclined to ignore. Media polarization, social segregation, industry jargon, and any number of other factors present barriers to those governed from engaging political perspectives that might expand their existing worldviews. Mini-publics aim to remove some of these obstacles by convening representatives face to face, setting fair ground rules for dialogue, and

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AG stakeholder group's membership structure resembles that of a "collaborative governance" group more than a mini-public (Dryzek and Neimeyer, *Foundations and Frontiers of Deliberative Governance*, 156). Collaborative governance groups consist of personal and corporate stakeholders who make binding rules regulating their behavior. For instance, mining companies, insurers, and banks might develop industry standards regarding transparency or community engagement, and set consequences for members of their industry failing to meet those standards. On a more local level, farmers might develop a community policy of pesticide use. In either case, the collaborative governance group exercises rule-making authority. So too, AG stakeholder groups function as collaborative governance groups when they exercise rule-making authority. However, not all AG stakeholder groups exercise this power. Many AG stakeholder groups function more like mini-republics, even if their membership resembles a collaborative governance group's membership. The ACFS and other AG stakeholders groups (Stringer et al., "Unpacking participation in adaptive governance") function as advisors to empowered space institutions, rather than as rule-makers themselves. As advisors, AG stakeholder groups participate in public opinion formation and transmission, the work of mini-publics (Dryzek and Neimeyer, *Foundations and Frontiers of Deliberative Governance*, 168-69). Hence, I describe the ACFS as a mini-public rather than a collaborative governance group despite their membership patterns.

providing a neutral facilitator.[542] These structural features succeed minimally when they produce new, shared understandings of the stakes of the policy decision among participants. These structural features succeed maximally when they produce a policy consensus grounded in shared reasons. Even if mini-public conversations cannot produce consensus, they may succeed in identifying acceptable working agreements or compromises.[543] These outcomes may be useful to policymakers in empowered space.

Mini-publics—including AG stakeholder advisory groups—can also kickstart public conversations; mini publics may improve the rational quality of public space conversations by infusing them with content and energy. Mini-publics can spur public conversations by providing a point of focus for mass media attention.[544] In a soundbite world, mass media seldom conveys all the ins and outs of arguments held in a mini-public.[545] But mass media can direct attention to longer sources which do present the mini-public's deliberative work more fully. The ACFS's website provides an excellent example of such a source.[546]

Transmission

Public conversations serve popular sovereignty only insofar as their outcomes are successfully transmitted to and become influential in empowered spaces, where laws, policies, ordinances, rules, and regulations are made. Mini-publics certainly have

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[542] Dryzek and Neimeyer, *Foundations and Frontiers of Deliberative Governance*, 156.

[543] Ibid., 101-106.

[544] Parkinson, *Deliberating in the Real World,* 114-15.

[545] Ibid., 103-106.

[546] "ACF Stakeholders," *ACF Stakeholders*, accessed July 10, 2017, http://acfstakeholders.org/.

potential to increase the flow of political opinions toward empowered spaces.[547] For

instance, the ACF Stakeholders delivered their *Sustainable Water Management Plan*

directly to the Tri-State governors.[548] Mini-publics may also prompt other governed

actors to send emails and letter, call, or otherwise communicate with their

representatives.

Empowered space

Deliberative Democracy tasks empowered spaces with a tremendously complex

endeavor: absorbing political opinions from public space conversations, ascertaining

public resources that can be used to satisfy political opinions, identifying pre-existing

legal commitments that must be upheld, and deliberating over various policy options with

other policymakers, making compromises and bargains, before finally voting on a

policy.[549] A complex task if ever there was one.

Polycentric governance could simplify this task. Policymaking institutions within

a polycentric governance system often specialize in one policy subject, for instance water

allocation policy in one river basin. This focus allows policymakers to specialize also;

they need not jump from transportation to education to tech regulation policies in a

legislative session. Instead, they are likely to be quite familiar with the policy floors and

ceilings within which they must operate, and they are likely to be familiar with social and

ecological conditions that impact their overarching policy goals.

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[547] Dryzek and Neimeyer, *Foundations and Frontiers of Deliberative Governance*, 168.

[548] Margie Menzel, "Tri-State Group Unanimously Backs Plan for River System," *Tallahassee Democrat*, May 15, 2015, http://www.tallahassee.com/story/news/local/state/2015/05/13/tri-state-group-unanimously-backs-plan-river-system/27272165/.

[549] Habermas, *Between Facts and Norms*, 180-82.

Adaptive Management styles of policymaking would also encourage policymakers' familiarity with their subject matter. Adaptive Management routinely refreshes and expands policymakers' understanding of the ecosystem in their charge. It does this by involving policymaking institutions in the work of environmental data generation, interpretation and dissemination, as the ACFS's proposed transboundary water management institution would have done. These practices infuse environmental, hydrogeological, engineering, and other kinds of expertise into policy deliberations without turning the deliberative democratic process, (which discusses both ends and means preferred by the people) into a technocratic exercise, (which ideally focuses on means alone).

Accountability

Policymakers' motivation to pay attention to the political opinions generated in the public space depends, in large part, on their sense of accountability to those governed. Popular elections institute and end accountable relationships of representation between elected officials and those governed. In between elections, these relationships are discursively maintained through "[o]fficial means of accountability…[such as] civic review boards, implementation studies, and period official participatory hearings" and informally through public space conversations that that question, praise, criticize or judge the policymakers' decisions.[550]

Democratic dysfunction occurs when policymakers have distorted or no representative relationships to those their decisions govern. Democratic dysfunction occurs when, for instance, policymakers are motivated to listen to some governed actors

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[550] Young, *Inclusion and Democracy,* 132.

but not others, to some pertinent public conversations but not others. At the risk of beating a dead horse, the ACF conflict presents a classic example of this possibility. Georgia lawmakers' decisions functionally govern Alabama's and Florida's water use. However, Georgia lawmakers have little motivation to stay receptive to public opinions from Alabama's and Florida's residents, as these citizens will never cast a ballot for or against them, and Georgia policymakers need not attend town halls or read letters from downstream parts of the basin. Deliberative Democracy demands that such electoral and discursive accountability gaps be corrected, in order to restore popular sovereignty and democratic legitimacy.

Taken together, two AG institutional prescriptions—scaling policymaking procedures to a problemshed and incorporating stakeholders in policymaking procedures—would correct that accountability gap. These prescriptions imply that a policymaking institution's authority should both *extend across* and also arise *arise from* stakeholders in the problemshed. Otherwise, AG's commitment to involving all stakeholders in management decisions makes little sense.

Adaptive Governance institutional prescriptions do not solve all problems regarding accountability between policymakers and stakeholders. In concert with Deliberative Democracy, AG expects the exact form of stakeholders' representation to be worked out through the political process.[551] The ACFS's proposal for a river basin commission outlines several possible models of stakeholder membership: voting members could be appointed by the governor or the legislature of each state; voting members could be popularly elected; voting members could be appointed by

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[551] Craig et al., "Balancing Stability and Flexibility in Adaptive Governance: An Analysis of Tools Available in U.S. Environmental Law."

representatives of water utilities, conservation organizations, homeowners associations, etc.; or some combination of these membership models could be utilized. These models vary regarding the degree of accountability they motivate between stakeholders and policymakers. Elected officials are likely to feel more responsibility toward voters and campaign contributors, while appointed officials are likely to feel more responsibility to the governor's or the legislature's political agenda. Furthermore, should representatives of businesses, conservation organizations or major water utilities be given voting authority, they would no doubt feel accountable primarily to the organizations paying their salaries. Each of these models has its problems and possibilities in terms of motivating policymakers' sense of accountability to those governed.

Nonetheless, adopting these two institutional prescriptions—problemshed organization and stakeholder participation—in the ACF basin would constitute a significant improvement over our current governance system in terms of accountable representation. Regardless of how a transboundary water management institution constituted its voting and advisory membership, policymakers would still be more accountable to stakeholders in Florida and Alabama than they are at present. Proposed models of voting power all presume that Georgia should stop exercising de facto water allocation policymaking power over the whole region. Institutionalizing this presumption would indeed improve the accountability of policymakers to Floridian and Alabamian stakeholders. It would do so by giving them a representative agent where none currently exists. Now Floridians and Alabamians, like Georgians, would still face the challenge of motivating their representatives to attend to their concerns. However, these

representatives would, almost by default, have to be more accountable to them than Georgia's policymakers currently are.

Impacts on meta-deliberation

Deliberative Democracy expects that a religious, culturally, and ethnically diverse population will often disagree regarding the content of particular laws. So rather than hanging legitimacy on the content of policies, Deliberative Democracy hangs legitimacy primarily on the procedures by which policies are made. Deliberative Democracy considers a law legitimate so long as policymaking procedures, and by extension the institutions which undertake those policymaking procedures, are deemed fair by those governed, through a process of free and open public discussion about those procedures.[552] Meta-deliberation—conversations about the legitimacy of policymaking procedures and institutions—is therefore critical to the ongoing reform of democratic institutions and the maintenance of their democratic legitimacy.[553]

The field of AG is one extended meta-deliberation; its whole purpose is to identify institutional reforms and innovations that could support AM. Furthermore, AG scholarship has recently worked to theorize explicitly how institutional reforms and innovations could better support democratic legitimacy. A 2017 special issue of *Ecology and Society* constitutes a major step forward in this effort. [554] Among its numerous insights, this issue highlights existing opportunities within the US's legal system to encourage AM, and demonstrates the need for balance between institutional flexibility—

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[552] Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," 73, 86-87.

[553] Stevenson and Dryzek, *Democratizing Global Climate Governance*, 29.

[554] *Practicing Panarchy: Assessing Legal Flexibility, Ecological Resilience and Adaptive Governance in U.S. Regional Water Systems Experiencing Climate Change*, *Ecology and Society* 22 (2017).

which prevents political rigidity—and institutional stability—which prevents political

arbitrariness. Furthermore, AG scholarship's intention to contribute to meta-deliberation

is demonstrable in several ways: first, in where its scholars tend to publish, i.e. open

source journals; second, in the many disciplines from which these scholars come, i.e.

environmental science, institutional theory, law, public affairs, psychology, and

economics; and, three, in the kinds of organizations for which AG scholars work, i.e.

advocacy organizations, think tanks, universities, and state and federal regulatory

agencies. [555] This combination of publishing forums, professional disciplines, and

employing organizations makes little sense if AG scholars are motivated purely by

academic curiosity or economic gain. Yet this combination makes a great deal of sense if

AG scholars want to influence public policymaking procedures and institutions. Both the

field of AG and its individual members are oriented toward meta-deliberation about the

appropriateness of environmental policymaking procedures and institutions.

Far more important than the intent of AG scholars is the impact that AG

institutional prescriptions actually have on society's capacity for meta-deliberation.

Stakeholder participation, polycentricity, and organization around a problemshed all

stimulate meta-deliberation, either by providing functional support or motivation for

meta-deliberation. Stakeholder participation could stokes meta-deliberation by

familiarizing more stakeholders with policymaking procedures. This familiarity seems

likely to prompt more stakeholders to express an opinion on the nature of those

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[555] "Authors Page, 'Balancing Stability and Flexibility in Adaptive Governance: An Analysis of Tools Available in U.S. Environmental Law,'" *Ecology and Society*, accessed July 10, 2017, https://www.ecologyandsociety.org/issues/article.php/8983; "Authors Page, 'Regime Shifts and Panarchies in Regional Scale Social-Ecological Water Systems,'" *Ecology and Society*, accessed July 10, 2017, https://www.ecologyandsociety.org/issues/article.php/8879.

procedures, not only with other engaged stakeholders, but also throughout their professional, civil, political, and personal networks. Within a polycentric governance system, these stakeholders would have a great deal to talk about. They would need to discuss both how their own policymaking institution should be structured and how their institution should relate to other policymaking institutions. Also, as new environmental problems and problemsheds arose, stakeholders and policymakers would need to identify how to design new policymaking procedures and institutions that fit the nature and geographic scope of those challenges. Either by functionally enhancing meta-deliberation or by supplying meta-deliberations with topical foci, all three AG institutional prescriptions encourage it. Furthermore, without meta-deliberation, policymaking institutions are apt to become not only less democratically legitimate but less adaptive to changing environmental conditions.

Two democratic weaknesses of AG

Having just discussed AG institutional prescriptions' positive impacts on popular sovereignty as defined by Deliberative Democracy, it is also important to note two democratically weak spots in AG theory. The first weakness regards the role of private actors—businesses, non-profits, regulated utilities—in public policymaking institutions. Adaptive Governance posits these actors should be involved in policy-making processes, but it does not state precisely *how* they should be involved. This vagueness leaves the door open to the idea that private actors could themselves exercise voting power in policymaking institutions, that businesses and non-profits could craft binding law.[556] The

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[556] Craig et al., "Balancing Stability and Flexibility in Adaptive Governance: An Analysis of Tools Available in U.S. Environmental Law."

ACFS's proposal for a transboundary water management institution entertained this possibility.

This possibility threatens democratic accountability. Representatives of private interests can be expected to feel more accountable to organizations that employ them than to the public at large; the political opinions of their bosses are likely to trump anyone else's political opinions. Resulting representation gaps could undermine democratic legitimacy.

But while Deliberative Democracy would strongly caution against empowering private actors thus, it does not absolutely forbid it. There might be good reasons to give private actors policymaking authority (though none come immediately to mind in the ACF case). *If* those reasons could be validated through public deliberation to an overwhelming majority of those governed, and *if* the systemic conditions necessary to effective meta-deliberation and institutional reform remained in place (perhaps by setting a "sunset" date on the river basin commission's membership policies), then private actors could legitimately be given policymaking authority.[557] That outcome seems unlikely, but not impossible. For a potential ACF basin commission, it certainly seems better to give private actors only advisory roles.

Adaptive Governance's second weakness is that it leaves the concept of "stakeholders" somewhat underdefined. Adaptive Governance scholars regularly express concern that all persons and groups—including marginalized persons and groups—have a voice in environmental policy-making decisions.[558] However, in practice of the ACF

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[557] Regarding sunset dates and reflexive law, see Craig et al., "Balancing Stability and Flexibility in Adaptive Governance: An Analysis of Tools Available in U.S. Environmental Law."

case, it seems stakeholders means something more like legal persons (corporate or individual) with the time, money, and wherewithal to formally organize themselves. The ACFS demonstrated that possibility. While its membership was in principle open to all persons or entities with an interest in the basin, in practice annual dues, travel costs, and time commitments probably prevented poorer persons and organizations from participating. This is not to detract from ACFS's important work. It was far more representative of downstream interests than actual governance institutions, i.e. Georgia's governor and legislature and the USACE. Furthermore, all governance institutions exclude some of those they govern from relationships of representation and accountability. My point is not that democratic exclusion in an AG institution completely nullifies its democratic legitimacy, only that any democratic exclusion flags the need for democratic improvement. My position follows that of Nancy Fraser, who defines "good enough" policymaking procedures as those which expand the scope of representation over time, through iterative institutional reform.[559] Democratic iterations, in which those who enjoy accountable representation advocate for the inclusion of those who do not, provide a means to correct this problem in AG institutions. The ACFS has already pursued democratic iteration on behalf of stakeholders in Florida and Alabama. Groups following in their footsteps would do well—democratically speaking—to pursue democratic iteration on behalf of poorer persons and organizations in the basin.

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[558] See for instance, Kofi Akamani, "Adaptive Water Governance: Integrating the Human Dimensions into Water Resource Governance," *Journal of Water Research and Education* 158, no. 1 (August 31, 2016); Barbara Cosens, Lance Gunderson, and Brian Chaffin, "The Adaptive Water Governance Project: Assessing Law, Resilience and Governance in Regional Socio-Ecological Water Systems Facing Climate Change," *Idaho Law Review* 51, no. 1 (2014); Cynthia McDougall et al., "Engaging Women and the Poor: Adaptive Collaborative Governance of Community Forest in Nepal," *Agriculture and Human Values* 30, no. 4 (2013): 569–585.

[559] Benhabib, *Dignity in Adversity*, 164.

Adaptive Governance's Democratic Promise in the ACF Basin

Despite these weaknesses, AG's institutional design agenda does hold great promise as a guide to improving the democratic legitimacy of interstate water allocation policymaking. That potential is five-fold. First, stakeholder participation in policymaking could improve the rational quality of public conversations regarding interstate water allocation, both within a mini-public/advisory commission and in larger public spaces. Second, improving these public space conversations could also improve transmission of political opinions to empowered spaces. Mini-publics provide an additional channel of communication between public and empowered spaces, and increased public discussion could motivate more communication between those governed and their representatives regarding interstate water allocation policies. Third, organizing a policymaking institution around a problemshed could simplify policymakers' work in empowered spaces, by limiting their topical focus. Reflexive laws that define policy floors and ceilings for water allocation could further simplify policymakers' task. This narrower focus could enhance the rational quality of empowered space deliberations by allowing policymakers to pay sufficient attention to hydrological, geological, ecological, economic, and other forms of expertise that aid prudent environmental policymaking. Fourth, organizing a policymaking institution around a problemshed could improve accountability between empowered spaces and those governed. It could do so by removing the representation deficit suffered by downstream stakeholders, i.e. actors in Florida and Alabama. Fifth, these institutional prescriptions could both facilitate and provide content for meta-deliberations regarding environmental policymaking procedures and institutions. In sum, AG prescriptions could on principle support the four

structural/functional conditions of a deliberative system, and they could on principle encourage meta-deliberation regarding the appropriateness of interstate water allocation policymaking procedures. In so doing, AG prescriptions could support popular sovereignty. Therefore, I am now ready to answer this dissertation's research question in the affirmative: *Adaptive Governance's institutional design agenda certainly deserves further political support in the ACF basin.*

Let me state succinctly here what implementing AG's agenda could look like in the ACF basin. The Tri-State governors and legislatures could use the legal mechanism of an interstate compact to authorize and fund a river basin commission. To design the river basin commission's jurisdiction, membership, and relationship to other policymaking institutions, state lawmakers could draw on the ACFS's proposal for creating an interstate water management institution. The ACFS proposal reflects the main three AG institutional prescriptions: jurisdiction at the scale of the problemshed, i.e. a river basin; inclusion of stakeholders in the institution's policymaking procedures either as advisory or voting members; and polycentric relationships to federalist governments. In addition to these basic prescriptions, and to achieve democratic legitimacy as defined by Deliberative Democracy, lawmakers should stipulate that private entities should have only advisory, not voting, powers within the commission. Also, they should ensure that stakeholders of limited economic means have the same opportunities as wealthier stakeholders to participate in policymaking procedures.

So much for the structural features of the river basin commission. The purpose of the river basin commission should be to adaptively manage the ACF basin. Towards this

end, the river basin commission should undertake four tasks prescribed by the ACFS

proposal:

- Acting as a data clearinghouse and facilitator of common data standards (collection, management, etc.);
- Encouraging and facilitating coordination and consensus building and providing conflict resolution services;
- Supporting development of basin level water management plans, specifically related to conservation and returns, supply augmentation and drought management; and
- Educating the general public and specific stakeholders about the need for transboundary management and particular opportunities and strategies for doing so.[560]

Each of these tasks supports one or more elements of the AM policymaking cycle:

stakeholder recruitment; objective setting; ecosystem modeling; policy option design and

selection; monitoring and evaluating outcomes; and incorporating learning into future

decisions. A river basin commission like this one, which undertook the work of AM and

exhibited the design features of AG, would have great potential to achieve

environmentally prudent and democratically legitimate interstate water allocation

policymaking.

New Questions and Next Steps

This dissertation utilized Deliberative Democracy to evaluate AG's institutional

design agenda. While Deliberative Democracy gives valuable insights on navigating

contentious political challenges (especially environmental challenges) in diverse modern

societies, it is not a perfect model. It relies heavily on persons' and policymakers'

rationality, i.e. their capacity to hear each other out, to admit when they are wrong, to

learn to see the world differently. As our present political climate suggests and social

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[560] Fowler et al., "Options for Transboundary Governance to Promote Sustainable and Adaptive Water Management in the Apalachicola-Chattahoochee-Flint Basin," 6.

science increasingly tells us, people's capacity for rationality in politics is severely limited. Humans are reasoning creatures, but only secondarily. First and foremost, we are feeling creatures.[561] So when and where is it possible for humans to reason through their conflicts? What circumstances enhance our capacities in this regard? Deliberative Democracy does not give detailed answers to those questions. Rather, it shows us how badly modern societies need reason, and what reason can do for us should we use it properly.

Therefore, the question remains: Under what circumstances can we reason well together? Answering that question is critical to effective democratic procedural and institutional reform; it is an important topic of meta-deliberation. John Dryzek has begun to probe that topic by examining how rhetoric, used appropriately, can improve transmission from public to empowered spaces.[562] Jonathan Haidt and other social psychologists of morality are generating fruitful scholarship on dealing with polarization. One way to build upon this dissertation's work would be to apply their insights to AG institutional prescriptions. This research trajectory would enrich the account given here of procedurally legitimate environmental policy making.

Another path forward would be to investigate democratic standards of environmental policy implementation and enforcement. Political philosophy tends to pay more attention to questions of policymaking than questions of policy implementation (Habermas is an exception to this rule).[563] Most political philosophies simply advocate

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[561] Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Vintage, 2013), 3-51.

[562] Dryzek and Niemeyer, *Foundations and Frontiers of Deliberative Democracy,* 66-84.

[563] Habermas, *Between Facts and Norms,* 238-87.

upholding the rule of law, especially due process requirements, as the procedural standard of democratically legitimate policy implementation and enforcement. Important as this commitment is, I suspect significantly more could be said about how the administrative state should exercise its considerable discretion. John Braithwaite's theory of "responsive regulation" provides a rare and promising resource in this regard.[564] It is promising in part because it probes how deliberation could be utilized in the implementation of policies, thereby reducing the apparent arbitrariness of policy enforcement and reducing the workload of the judicial system, which has to deal with disputes between regulatory agencies and regulated bodies. Responsive Regulation theory is also promising because it offers an account of non-personal, corporate agency—the kind of agency exhibited by businesses, non-profits and so forth. Corporate actors' behavior is precisely what many environmental laws attempt to regulate, but most political philosophies—including the one I have employed—leave the nature of corporate agency utterly undefined. For that reason alone, Responsive Regulation theory deserves attention. Better conceptualizations of corporate agency could be used to categorize various kind of stakeholders and further define their respective roles in interstate water allocation policymaking.

However, Responsive Regulation theory relies on a different democratic philosophy than I have relied on here. Namely, Philip Pettit's Republicanism, which utilizes the concept of "freedom as non-domination" as its organizing value.[565] To apply Braithwaite's theory of democratically legitimate regulation to my argument about AG,

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[564] Braithwaite, "The Essence of Responsive Regulation," *University of British Columbia Law Review* 44, no. 3 (2011), 1-3.

[565] Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: W.W. Norton & Company, 2014), xvi.

or to modify Braithwaite's theory appropriately, I need to tease out the relationship between Republicanism and Deliberative Democracy. I suspect that Republicanism, with its abhorrence of arbitrary exercises of power, comports well with Deliberative Democracy's commitment to the social justification of power through public conversation. Perhaps these theories are each other's consequentialist and deontological complements.

In any case, these questions will need to wait for another book and another day. For now, a brief summary of research findings and a word about next political steps will suffice. This dissertation has argued that Adaptive Governance theory gives much-needed guidance for designing an Apalachicola-Chattahoochee-Flint basin commission with the potential to support environmentally prudent and democratically legitimate water allocation policymaking. Building such a river basin commission lies within the realm of legal possibility. Tri-State legislators and governors could authorize the creation of a river basin commission in their next legislative sessions if they so wished, through use of an interstate compact. Congress has already expressed its willingness to ratify such a document if the states could agree to one. Doing so is simply a matter of political will. So now, it seems, more democratic engagement in public space is needed. The ACFS made a tremendous effort that should not be wasted, but rather learned from and repeated. More democratic iterations are needed to motivate Georgia's empowered actors to give up some of their authority, share it with representatives of stakeholders downstream, and build a transboundary water management institution capable of democratically legitimate and environmentally prudent policy-making.

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