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# Getting Beyond Cynicism: New Theories of the Regulatory State. Foreword: Post-Public Choice?

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SYMPOSIUM  
GETTING BEYOND CYNICISM: NEW  
THEORIES OF THE REGULATORY STATE

*As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence.*

—Federalist No. 55<sup>1</sup>

FOREWORD: POST-PUBLIC CHOICE?

*Cynthia R. Farina & Jeffrey J. Rachlinski*

*Few problems facing the scholar concerned with issues of government structure are more important or difficult than . . . finding a way past the grim political accounts of government offered by the right and the left to a statement that leaves room for genuinely public ends of action.<sup>2</sup>*

Cynicism dominates contemporary discussion of American government. Politicians and public interest groups alike decry the political system as being awash with money, giving massive influence to a privileged few. The media run endless stories of wasteful government programs, which are commonly tied to the undue influence of one or another political insider. Well-publicized claims that important social legislation on health care, tobacco, and handguns has been derailed by narrow interest groups further exacerbate public distrust of government. Voters periodically express their outrage at the system by electing outsiders such as Jesse “the Governor” Ventura, and by supporting quirky would-be reformers such as John McCain, Steve Forbes, and Ross Perot. Pollsters report bleakly that citizen respect for and trust in the institutions of government is at an historic low.

In this sea of popular disillusionment, it should perhaps be no surprise that the same currents animate academic discussion of government. Indeed, scholarly distrust of the regulatory state predates the current wave of public suspicion and is, in many ways, deeper and more entrenched. With the emergence of public choice theory in the

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<sup>1</sup> THE FEDERALIST NO. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961).

<sup>2</sup> Peter L. Strauss, *Sunstein, Statutes, and the Common Law—Reconciling Markets, the Communal Impulse, and the Mammoth State*, 89 MICH. L. REV. 907, 908 (1991) (reviewing CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990)).

mid-1980s, academic analyses of public policy found both vehicle for and justification of a profound skepticism about the capacity of government to advance the public interest effectively.

Public choice theory—at least as conventionally deployed in legal scholarship—refers to a set of premises and hypotheses having, as its core, the conviction that well-organized groups, seeking to advance their members' self-interest at someone else's cost, tend to win out in the public policy market. Derived from rational choice models of human behavior, it posits the legislator seeking to maximize his chances of reelection, who behaves most solicitously towards those interest groups that give him most support. Similarly, it presumes that interest groups (composed of rational individual members) do not expend their resources seeking legislation that benefits others. If all interests competed equally in the political marketplace for legislative favor, the result might look like the pluralist model of democratic decisionmaking. However, public choice adds the observation that organizing is costly—and the consequent prediction that effective lobbying groups will form only when the benefits the individual can expect from collective political activity outweigh the costs of organizing. This cost-benefit calculus tends to work in favor of interests shared by a small number of citizens, in a homogenous fashion, with relatively large and obvious individual effects. It tends to work against interests shared by many citizens, in diverse ways, with relatively small or non-obvious individual effects. Thus, the phenomena of self-serving lobbying and legislative capture, which are the natural products of rational behavior by citizens and elected officials, will produce public policy systematically skewed towards narrow interests at the expense of overall social welfare.

This model of democratic government has dominated academic discussion of the regulatory state for nearly two decades; even legal scholars who do not consider themselves public choice practitioners work in its shadow. Current debates about the validity and best practices of regulation—including the appropriate role of Congress, agencies, the President, and the courts—build on the foundation laid down by public choice theory. Because this foundation itself rests on an account of human behavior as clear-eyed, single-minded egocentricity, it is small wonder that the resulting theoretical edifices offer precious little “room for genuinely public ends of action.”<sup>3</sup>

Increasingly, however, the scholar concerned with the structure and performance of civic institutions has a choice about how to model the human subjects who actuate those institutions. Work in the behavioral sciences has produced accounts of human behavior that bear

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<sup>3</sup> *Id.* at 908.

little resemblance to the classic homo economicus. Whereas the conventional public choice story features the individual as relentlessly effective promoter of self-interest, newer social-science models portray people as both less inexorably self-centered in what they want, and more reliably fallible in how they try to get it. Put somewhat differently, public choice posits limits on human motivation but not human intelligence, whereas behavioral research suggests exactly the opposite. Social scientists are discovering, for example, how group norms function to induce other-regarding action even at the expense of self-interest. More broadly, research into human judgment has revealed that the success with which human decisionmakers pursue *any* goal will be significantly tempered by the finite nature of cognitive resources. In short, the model of single-minded, self-centered, avaricious “Chicago man” is slowly being replaced in the behavioral sciences by conflicted, gregarious, generous “Berkeley man.”

This new learning about human behavior will inevitably filter into models of government. Indeed, its impact can be discerned in Vice President Gore’s “Reinventing Government” initiative: Part of that initiative encourages the use of voluntary compliance measures that put some faith in corporate managers’ willingness to do “the right thing,” even at the expense of their bottom line. Likewise, the public law literature is beginning to turn from a monolithic view of government—in which the prime directive is to control the self-interest of both private and public actors—to one of governance, in which the regulated and the regulators work together towards ends that promote a common good.

This Symposium explores the world of theorizing about government that lies beyond cynicism. The papers discuss the strengths and weaknesses of new models for understanding and designing institutions of public policymaking. They review how emerging accounts of human behavior might affect our assessment of such administrative and structural constitutional issues as the proper role for judicial review of administrative agency action, the nondelegation doctrine, the role of executive oversight of administrative agencies, and the prospects for partnership and cooperation between regulators and regulatees.

Like good scientists, however, we begin the Symposium with a paper that questions our underlying assumptions. Our esteemed colleague Jonathan Macey challenges the premise that cynicism is undesirable.<sup>4</sup> He asserts that, rather than being a corrosive agent that enervates democratic processes, cynicism is crucial to preserving self-governance. Professor Macey observes that many of the worst societal

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<sup>4</sup> Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280 (2002).

abuses arise when the citizenry blindly places its faith in public officials. Elected leaders, he argues, have an interest in convincing the public of their good intentions, regardless of their true motivations. Taking up the challenge to integrate new accounts of human behavior into models of government, Professor Macey insists that Berkeley man is even more susceptible to the chicanery of public officials than is Chicago man. He worries that politicians in fact depend upon deficiencies of human judgment in the populace to further their own, self-serving ends. Without a healthy skepticism of those in power, Professor Macey concludes, citizens are all the more vulnerable to predation conducted in the name of good government. For this reason, he argues that scholars should always adopt the *most* cynical explanation of government behavior, an analytical presumption he dubs "Macey's razor."

No two contributions to the Symposium contrast more clearly than this argument and the Article that follows by Edward Rubin.<sup>5</sup> In the Macey worldview, government is an independent, even alien, entity to be constrained by its citizenry's beliefs. In the Rubin worldview, government is a *product* of citizens' beliefs. Answering the call to investigate the consequences of displacing rational self-interest as the mainspring of civic behavior, Professor Rubin proposes that the principal motivation underlying human action is a quest for meaning. With the intellectual breadth and elegance that have marked all his writing on public law theory, he argues that people struggle to create meaningful purpose and direction in both their public and private lives. Consequently, the modern administrative state is "not the result of inadvertence, or a mysterious cabal, or the perversion of government by special interest groups, but a structure of meaning which citizens share."<sup>6</sup> Professor Rubin contends that, in post-industrial democratic societies, people construct government to remove impediments to the social and economic life they wish to realize. Although he admits that the quest for meaning does not always provide stable predictions of human behavior, it nevertheless accounts for many of the behaviors that public choice theorists find problematic, such as voting and the empirically demonstrated role of ideology in the decisions of public officials. Professor Rubin thus provides us with a portrait of the administrative state drawn not as public coercion harnessed by private greed, but rather as one of many "problem-solving instrumentalities" through which people seek to realize their material and moral commitments.<sup>7</sup>

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<sup>5</sup> Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309 (2002).

<sup>6</sup> *Id.* at 361.

<sup>7</sup> *See id.* at 313–28.

Throughout this volume, the commentators keep the analysis honest with constructive assessments of the theme; this is particularly true in the three Comments on the Macey and Rubin Articles.

Terry Moe, with his signature focus on methodological integrity, argues for the fundamental importance of empirical verification.<sup>8</sup> He asserts that a theory of government, whether it relies on rational self-interest or otherwise, has little claim to social science attention unless it is capable of being tested for its capacity to explain and predict real-world political behavior. Because “the basic thrust [of social science] is always toward choosing theories with greater truth value,”<sup>9</sup> all theories “have to win a competition based on truth.”<sup>10</sup> Professor Moe lauds both Articles as “interesting and provocative”<sup>11</sup> but questions whether democracy, citizens, or social scientists would be better off adopting either the Macey or the Rubin worldview.

Saul Levmore would not have the volume proceed without a friendly reminder of the valuable contributions public choice theory has made.<sup>12</sup> Public choice, he contends, is not so much a cynical account of government as it is a “study of how we do the best we can” with our public institutions.<sup>13</sup> With his distinctive blend of unstinting critical candor and fundamental optimism, Professor Levmore insists that public choice has proven its worth—particularly in analyzing majority and other voting rules—and he urges those who believe in the potential of government institutions to embrace its insights into minimizing “[d]estructive strategic behavior.”<sup>14</sup> Ultimately, he advocates a stance of pragmatic eclecticism: Public choice (or, one gathers, any other theory) should be understood as one tool in the intellectual toolbox—to be used where it gives purchase on the particular problem, and to be set aside when a different analytical instrument is more apt.

Yvette Barksdale eloquently reminds us that the true purpose of government is furthering the welfare of its citizens but observes, with concern, that conflicting democratic values make it “so easy to trash government,” if one chooses to.<sup>15</sup> She points out that it matters little to ordinary people whether they are sufficiently cynical about their government if it is failing to meet their basic human needs. Likewise,

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<sup>8</sup> Terry M. Moe, *Cynicism and Political Theory*, 87 CORNELL L. REV. 362 (2002).

<sup>9</sup> *Id.* at 365.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 374.

<sup>12</sup> Saul Levmore, *From Cynicism to Positive Theory in Public Choice*, 87 CORNELL L. REV. 375 (2002).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 378.

<sup>15</sup> Yvette M. Barksdale, *Cynicism, Phenomenology, and the Problem of Paradox: Dilemmas of Public Law Discourse*, 87 CORNELL L. REV. 384, 387 (2002).

people who look to the government to provide economic security are not searching for meaning, but for food and rent. Professor Barksdale's Comment uncovers the normative tensions that make optimistic theorizing about government so difficult, while at the same time keeping the Symposium grounded in the needs of real citizens for social and economic security.

Like Professor Macey, principal-paper author David Spence challenges a basic premise of the Symposium—although he would be among the first to reject the strategy of Macey's razor. Professor Spence acknowledges that cynical forms of public choice theorizing have dominated legal scholarship but insists that public choice methods need not inevitably produce darkly anti-government conclusions.<sup>16</sup> Tracing the evolution of public choice as practiced by political scientists, he argues that the theory has become more nuanced and flexible; in particular, it has moved beyond the motivational assumption of universal self-interest to “the subtler question of whether human beings can act rationally in the broader sense.”<sup>17</sup> Professor Spence demonstrates the operation of this “neo-Progressive” public choice by reassessing the problem of congressional delegation to administrative agencies. In the conventional public choice account familiar to legal scholars, delegation allows concentrated groups to capture an agency and use it to further their private interests at the public's expense. In a previous article, Professor Spence used economic modeling to demonstrate that, to the contrary, administrative decisionmakers are likely to select the public policy the median voter would prefer if she had full information and the opportunity to deliberate.<sup>18</sup> In his Symposium Article, he supplements this argument by exploring why, even under identical assumptions about the motives of bureaucrats and legislators, legislatures are more likely than agencies to produce policy that strays from the well-informed median voter's preferences—at least with respect to the kind of lower-salience issues that are the bulk of regulatory policymaking. In so doing, Professor Spence advances his groundbreaking work of providing an economically based case for trust that the regulatory state can serve the public interest.

Our colleague Gregory Alexander, a distinguished contributor to the literature on republicanism in American political theory,<sup>19</sup> applauds this “heroic” effort to “appropriate” public choice theory to the

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<sup>16</sup> David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397 (2002).

<sup>17</sup> *Id.* at 414.

<sup>18</sup> David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEORGETOWN L.J. 97 (2000).

<sup>19</sup> See, e.g., GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970* (1997).

service of a progressive, pro-regulatory agenda.<sup>20</sup> However, his Comment worries that, daring and well-executed as Professor Spence's strategy is, it is ultimately not bold enough. Professor Alexander identifies a number of risks that progressives run in trying to turn public choice analysis from the dark side of its "resoundingly antigovernment and pro-market" orientation.<sup>21</sup> He challenges administrative law scholars who seek a less impoverished conception of government to look to theories of democratic politics—particularly, the work of Jürgen Habermas—that have currency in other academic disciplines.

Lisa Schultz Bressman, like Professor Spence, also tackles the difficult problem of delegation, extending her previous, insightful analysis of the subject.<sup>22</sup> Although her Article approaches the subject from the vantage point of the lawyer rather than the political scientist, the portrait she paints of agencies has much in common with that of Professor Spence.<sup>23</sup> She agrees that agencies can, and often do, serve public ends, and she would have administrative law reflect this optimism. At the same time, however, she worries that legal doctrine has left regulatory policy makers largely free of the checks and balances that attend important decisions in the rest of the American government. Nondelegation doctrine poses virtually no limit on Congress's ability to assign policymaking responsibility to agencies and, in a post-*Chevron* world, agencies may experience only minimal judicial constraint on their ability to interpret their statutory prerogatives. With neither Congress nor the courts reliably checking the scope of agency policy discretion, Professor Bressman sees the logical remaining source of limits as agency *self-restraint*. Noting that the Court recently rejected the idea that nondelegation doctrine could require agencies to adopt self-limiting interpretations,<sup>24</sup> Professor Bressman argues that ordinary administrative law can perform this function even if constitutional law will not. She reads the Court as implicitly endorsing the idea that the Administrative Procedure Act, among other sources, requires agencies to develop decisional standards and employ decisional protocols that will effectively cabin the exercise of their policymaking discretion. Insisting that the real determinant of whether regulation serves democracy is *how we discipline*, rather than *whether we allow*, delegation of power, Professor Bressman's analysis fits well with a less cynical stance of cautious trust in the administrative state.

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<sup>20</sup> Gregory S. Alexander, *Playing With Fire*, 87 CORNELL L. REV. 449 (2002).

<sup>21</sup> *Id.*

<sup>22</sup> Lisa Schultz Bressman, *Schechter Poultry at the Millenium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000).

<sup>23</sup> Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'ns*, 87 CORNELL L. REV. 452 (2002).

<sup>24</sup> See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

Mark Seidenfeld also focuses on the relationship between agency decisionmakers and the courts, but from the perspective of the substantive quality of regulatory policy.<sup>25</sup> His ambitious paper does nothing less than provide a new conceptual foundation for judicial review. In contrast to the conventional public choice justification for judicial review—i.e., checking, to some extent, agency capture by private interests—Professor Seidenfeld provides a basis for concluding that judicial review can accomplish precisely what courts say they are doing—i.e., improving the quality of agency decisionmaking. Because regulators are so much more experienced with the subject matter of their decisions than judges, it is intuitively hard to see how review could yield better regulation. Professor Seidenfeld, however, makes the counterintuitive case by marshalling insights from cognitive psychological research. Psychologists have discovered that people, even experts, sometimes rely on inappropriately simplistic decision rules (“heuristics”) to make even the most important choices. However, studies show, when people are told in advance that they will be expected to explain their decisionmaking process, reliance on error-inducing heuristics declines. Thus, Professor Seidenfeld argues, it is not so much that judicial review itself provides quality control, as that regulators’ *knowledge* of the probable need to justify their judgments alters the nature of their decisional process in ways that minimize cognitive errors. For this reason, “hard look” review can indeed increase the rationality of the regulatory process. Professor Seidenfeld goes on to explain how various decisional practices used by agencies can be understood, from the cognitive psychological perspective, as adaptations to produce better (i.e., less error-prone) choices. In so doing, he implies a vision of administrative law in which the prime objective of process is reducing human fallibility rather than checking human cupidity, a vision in which courts and agencies could indeed imagine themselves as partners rather than adversaries.

In our own Article,<sup>26</sup> we share Professor Seidenfeld’s conclusions about the capacity of judicial review to enhance regulatory decisionmaking. Our inquiry, however, paints with a broader brush. Like Professor Seidenfeld, we adopt a cognitive psychological perspective to explore the idea that regulatory processes should be designed around reducing human error rather than (as in the public choice perspective) defeating human greed. But, while he develops this idea with richly detailed thoroughness in the particular area of judicial review, we engage in a more preliminarily exploration across the range of

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<sup>25</sup> Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002).

<sup>26</sup> Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002).

government institutions involved in regulatory policymaking. We propose that cognitive psychology can not only provide insights into the causes of regulatory failure, but also can guide the institutional designer seeking structures and processes to minimize poor public policy choices. We examine the ways in which existing arrangements in American government—including constitutional allocations of power, statutory provisions for administrative process, and evolved practices of institutional decisionmaking—map well onto a cognitive psychological model, and we offer suggestions for enhancing the capacity of administrative government to generate good policy. Finally, we offer several reasons why regulatory decisionmaking in a democracy would likely improve—both in functionality and in perceived legitimacy—if the dominant model of civic behavior were to feature the well-intentioned but fallible actor, rather than the unfailingly effective self-interest maximizer.

Displaying their customary intellectual synergy, William Eskridge and John Ferejohn have provided Professor Seidenfeld and us with an insightful analysis and extension of our work.<sup>27</sup> To be sure, they have reservations and criticisms of the applications of cognitive psychology to public law. They worry that cognitive theory founders in legal scholarship because it lacks a normative foundation and provides no definitive account of human motivation (a point that has troubled one of our other commentators, Sam Issacharoff, as well). Moreover, echoing Terry Moe's emphasis on verifiability, they suggest that cognitive biases have sprouted "like weeds in an vacant lot," such that an array of biases can be assembled to support virtually any position.<sup>28</sup> Nevertheless, Dean Eskridge and Professor Ferejohn effectively deploy cognitive psychology to offer new insights into American government institutions. For example, they note that the protection for minority interests inherent in the Constitution might be seen as counteracting the egocentricity bias of lawmakers—i.e., the tendency for the majority of the legislature to assume that their interests map well onto the interests of the minority.<sup>29</sup> They also observe that a bicameral legislative system, with distinct election cycles for each house, is well suited to counteract a number of cognitive biases that may produce unwise, snap judgments by lawmakers. Interestingly, when it comes to the ju-

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<sup>27</sup> William N. Eskridge, Jr., & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616 (2002).

<sup>28</sup> *Id.* at 633. Readers interested in these (and other) concerns can find them debated in a recent volume of the *Cornell Law Review*. See Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717 (2000); Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000).

<sup>29</sup> This is a form of egocentricism that psychologists have taken to calling "naive realism." See Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, 27 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 255, 278-84 (1995).

dicial branch, they are far less persuaded than Professor Seidenfeld or we that courts add value to the social regulatory enterprise. In particular, they point to a number of cognitive errors that have been demonstrated to plague the decisionmaking process of juries and even judges.<sup>30</sup> Despite (or perhaps because of) their sensible cautions, Dean Eskridge and Professor Ferejohn significantly advance the introduction of cognitive analysis into public law.

In their Comment, Lisa Heinzerling and Frank Ackerman challenge a premise of much current administrative law scholarship including, perhaps, the papers in this Symposium—i.e., that there is something seriously wrong with regulation.<sup>31</sup> Continuing Professor Heinzerling's previous pathbreaking work,<sup>32</sup> the Comment argues that many claims of regulatory failure themselves fail to survive careful scrutiny. It notes that some notorious examples of astronomically costly and foolish regulations were in fact never adopted, while other regulatory horror stories depend on incomplete assessment of targeted risks or employ misleading discounting of future lives. This Comment reveals how easy it is to sell American administrative government short, and warns that even allegedly less cynical accounts of government too readily buy into the myths of regulatory failure.

Samuel Issacharoff's Comment notes a strong convergence in our Article and in that of Professor Seidenfeld with other uses of cognitive psychology in legal scholarship.<sup>33</sup> He places these papers within an emerging line of scholarship that demonstrates that courts sometimes have a sensible, intuitive grasp of psychological principles. Ever the cautious consumer of social science however,<sup>34</sup> Professor Issacharoff is wary of transporting cognitive analysis from the individualistic domain of private law into the institution-dominated world of public law. He points out that behavioral studies have focused almost exclusively on the individual decisionmaker; to apply their insights to decisionmaking in complex institutional environments might be an unsupportable leap. Predicting that psychologically based models will be most robust in buttressing "the need for procedural order and accountability," Professor Issacharoff urges that those who would displace conven-

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<sup>30</sup> Eskridge & Ferejohn, *supra* note 27; see also Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (documenting the effect of cognitive biases in judges).

<sup>31</sup> Lisa Heinzerling & Frank Ackerman, *The Humbugs of the Anti-Regulatory Movement*, 87 CORNELL L. REV. 648 (2002).

<sup>32</sup> Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981 (1998).

<sup>33</sup> Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Law*, 87 CORNELL L. REV. 671 (2002).

<sup>34</sup> See, e.g., Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729 (1998).

tional analysis take small steps and (echoing Professor Levmore) incorporate the valuable insights that have come before.

The two brief Essays that close this volume are reflections on the Symposium's theme by two of the most perceptive and influential thinkers in contemporary administrative law scholarship.

Bringing to bear his exceptional capacity for creative synthesis, Jerry Mashaw discerns a deep, dichotomous pattern in administrative law theory and scholarship.<sup>35</sup> Scholars in the field, he suggests, tend to belong to one of two cultures: realist or idealist. The realists view government as "a competition among private interests" that produces bargains that must be policed; the idealists view government as "a process by which public values are converted into legislative norms which are then realized through administrative implementation."<sup>36</sup> Each culture has its own set of objectives, its own methodological orientation, and its own *bêtes noires*. Observing that these two ideological camps often talk past each other, Professor Mashaw identifies the challenge for contemporary administrative law scholars as learning to "bridge this intellectual chasm."<sup>37</sup> He suggests that very particular types of intellectual flexibility must be cultivated to meet this challenge. First, scholars must be willing to "disaggregate and distinguish intellectual tasks."<sup>38</sup> Because it is incredible that "any single perspective on the project of explaining, critiquing, or desiguing governance structures" could successfully accomplish the several essential tasks of combating corruption, enhancing performance, integrating regulatory institutions into our civic ideology, and creating a civic ideology that sustains regulatory institutions, scholars must deliberately seek out the methodological tool best suited for the particular task. Here he joins Saul Levmore's call for more overt theoretical eclecticism. The search for the best tool, however, requires us to cultivate a second type of intellectual flexibility: the willingness to do the work needed to get inside various methodologies and engage them with "both a sympathetic and a critical spirit."<sup>39</sup> "If we are to be intellectual parasites, as it seems we must be, we must be sophisticated and critical ones."<sup>40</sup> By committing ourselves to intellectual practices that allow meaningful dialogue across the divide, Professor Mashaw counsels, we truly begin to get beyond cynicism.

To many young administrative law scholars, Peter Strauss has been an extraordinarily effective and generous mentor, managing to

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<sup>35</sup> Jerry L. Mashaw, *Deconstructing Debate, Reconstructing Law*, 87 CORNELL L. REV. 682 (2002).

<sup>36</sup> *Id.* at 683.

<sup>37</sup> *Id.* at 685.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 687.

<sup>40</sup> *Id.* at 688.

convey a deep faith in their ability while delivering a set of trenchant suggestions for improvement. It seems fitting, then, that his Essay addresses the responsibilities of “rearing and educating the young.”<sup>41</sup> Rejecting in particular Macey’s razor, Professor Strauss deplores the formalized dissemination of cynicism to law students, who tend to become less idealistic over the course of their legal education. This, of course, enters perilous territory. It was not too many years ago that Paul Carrington’s essay condemning the nihilism of critical legal studies set off explosions across the intellectual community.<sup>42</sup> But Professor Strauss is not unmindful of the sensitivity of his topic. In an allusion rich with irony, he summons up the shade of Socrates —(ostensible) progenitor of the distinctively legal pedagogy, to whom an ungrateful community gave hemlock for corrupting its young. Obviously, human judgment on these things can be all too fallible. Still, he challenges administrative law scholars to be mindful that their students may practice what they preach. And, respecting the call to empiricism made by Terry Moe and others, he points to an instructive demonstration (conducted at Cornell University) that economics majors display less public-regarding behavior in interactive games than do students of history, astronomy, or sociology.<sup>43</sup> He closes the Symposium with the theme (developed in our Article as well) that scholars should not delude themselves by thinking that, in academic theorizing, no one gets hurt.<sup>44</sup> If academics claim the right to propound models of how government works, they should accept the responsibility for shaping the citizens who will go forth and govern.

Although we have identified some themes that emerged during the Symposium, we do not purport to be able to distill an agreed-upon group of next questions—let alone a set of determinate answers—in the challenge of developing a robust non-cynical theory of the regulatory state. Indeed, reasonable minds could (and did) disagree on whether getting beyond cynicism is a desirable goal. Several participants remarked, in varying ways, that the papers often seem like the proverbial ships, passing in the night, but this strikes us as a confirmation rather than a concern. Where public law theorizing will go after the first generation of legal public choice analyses is a wide open question. In the end, the next generation of theory will almost surely be heavily determined by public choice—in the same way that post-struc-

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<sup>41</sup> Peter L. Strauss, *Educating Citizens*, 87 CORNELL L. REV. 690, 690 (2002).

<sup>42</sup> See Paul D. Carrington, “*Of Law and the River,*” and of *Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 9–12 (1985).

<sup>43</sup> See Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, J. ECON. PERSP., Spring 1993, at 159.

<sup>44</sup> See *Nomination of Robert Bork to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Comm. on the Judiciary*, 100 Cong. 129, 130-31, 464-65 (1987) (testimony of Judge Robert H. Bork).

turalism rejected and built on the insights of structuralism, and post-modernism rejected and built on the insights of modernism. Perhaps theory, like other forms of energy, can be neither created nor destroyed, but only transformed. The nature and direction of the transformation, however, is still very much up for grabs.

In light of this, one aspect of the Symposium seems especially noteworthy. The participants trained in political science repeatedly complained that their legal colleagues tend to treat public choice theory in a misleadingly reductionist way—to engage, as Terry Moe puts it, in “stereotyp[ing] a very diverse body of work.”<sup>45</sup> This may be one of the most intriguing and useful observations for public law scholars trying to develop post-public choice theory.

To be sure, Jerry Mashaw, Dan Farber, Phil Frickey and other legal scholars who really know the political science literature have tried to spread the word that public choice is a family of concepts and approaches, some more distantly related than others.<sup>46</sup> But it has remained the case that the public choice analysis deployed in legal discussions of the regulatory state is almost universally true to (stereo)type. To insist—as our colleagues trained in the social sciences do—that public choice theory need not involve *either* the strong motivational assumption of self-interest *or* the reductionary premise of perfect information and rationality, is to open up a range of questions that have not thus far seriously engaged legal scholarship about regulatory government. For example, in what circumstances is it appropriate to use a variant of public choice theory designed to snuff out corruption and rent-seeking rather than a variant that facilitates a neo-progressive search for good government? When the motivational assumption of material self-interest is relaxed, to what extent does the remaining theoretical construct have predictive power or epistemological integrity?<sup>47</sup> If, as Terry Moe and Saul Levmore insist, informed practitioners know that public choice is not a universally apt theoretical tool, what are the parameters of its usefulness?

Once public choice theory is de-essentialized (to appropriate a concept from a very different part of the intellectual spectrum), then space is created for the kind of work that Jerry Mashaw urges administrative law scholars to undertake. The methodological decision to use public choice analysis, as well as the selection among possible public choice premises, will be recognized for precisely what they are: *choices* that demand discussion and justification.

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<sup>45</sup> Moe, *supra* note 8, at 369.

<sup>46</sup> *E.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997).

<sup>47</sup> See Cynthia R. Farina, *Faith, Hope and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 116 (2000); Rubin, *supra* note 5.