

# Deconstructing Debate, Reconstructing Law

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## DECONSTRUCTING DEBATE, RECONSTRUCTING LAW

*Jerry L. Mashaw*<sup>†</sup>

The short title of this Symposium is “Getting Beyond Cynicism.” The very wording suggests both an aspiration and an anxiety. The aspiration is to move beyond a conversation, inspired and informed by public choice scholarship, that many administrative lawyers find confining and unhelpful. The anxiety is that beyond the often cynical conclusions of the public choice literature there may be no identifiable competitor for the hearts and minds of administrative law scholars. There is an old saying in politics that perhaps applies by analogy to legal theory: “You can’t beat somebody with nobody.”

In my summary remarks I want to make two basic points. The first is that (like much of academic legal theory) administrative law scholarship is deeply divided. To put the matter crudely, administrative law scholars can be grouped loosely into two camps, groups that I have elsewhere labeled “idealists” and “realists.” These contending factions have contrasting ideologies of government organization, different understandings of the tasks of institutional design and administrative law reform, and divergent intellectual commitments concerning styles of explanation—indeed, as a matter of positive theory, different understandings of what it is that needs explaining. These groups largely talk past each other. Their separate conversations have few points of tangency, much less common understandings and vocabularies.

Theoretical divergence is, of course, common in many fields and can be generative rather than destructive. But in administrative law scholarship, a productive point-counterpoint, a viable debate that illuminates and informs, does not seem to be developing. The field is threatened with an intellectual balkanization that can easily degenerate into straightforward, and unproductive, political division. Hence, my second aim is to suggest a strategy to move academic administrative law discourse, if not down a single rail line, at least onto a railway system that has some parallel trackage and common switching stations.

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## I TWO CULTURES

When I speak here of ideology I mean simply a coherent set of views about how the world does and should work. As I have said, administrative law scholars seem to me to come in two general ideological stripes: idealists and realists. The idealists understand governmental organization as a process by which public values are converted into legislative norms which are then realized through administrative implementation. Realists understand governmental organization as a competition among private interests that is coordinated through statutory bargains which are then policed by administrative institutions. From the idealist's vantage point, administrative law is concerned with institutional structures and procedures for the pursuit of the public interest. From the realist's perspective, administrative law is a set of control mechanisms to assure that contracts are enforced.

These two positions are not entirely inconsistent with each other. Nevertheless, they press their adherents in different directions with respect to the tasks of legal institutional design and administrative law reform, and they reflect different visions of the role of explanation or positive theory in understanding law.

The idealist, for example, tends to see the tasks of legal institutional design and law reform at the constitutional, legislative, and administrative levels quite differently than the realist. At the constitutional level, the idealist sees the job of legal institutional design as one of maintaining open debate and civic equality. The basic idea is simply to make government responsive to the wishes of the electorate within a legal culture that establishes certain constitutional fundamentals, fundamentals that focus attention on citizenship and the protection of individual liberties. The realist, by contrast, tends to see the domain of constitutional politics as one in which the urgent task is to limit the scope of governmental action through structural arrangements that fragment power and limit jurisdiction.

Given their different ideological visions, these differences between idealists and realists with respect to the task of constitutional design make perfect sense. If governance is essentially about the formation and expression of public values, then responsiveness to a political dialogue based on civic equality is the critical feature of a good constitutional design. If, on the other hand, government operates largely as an imperfect market in which private interests compete to seize monopoly power through government action, then limiting the government's scope of authority is critical to the protection of liberty and the promotion of economic well-being.

These contrasting ideological orientations imply different concerns at the stage of legislative and administrative action as well. For the idealist, legislation captures the outcome of public deliberation, and legislative interpretation should be a dynamic process of understanding and elaborating public purposes. By contrast, the realist sees legislation as a statutory bargain among private interests. Interpretation should give no party more than it was able to bargain for in the political process, and statutes should therefore be interpreted with the critical eye of a banker reviewing the precise terms of a bond indenture.

When designing administrative institutions,<sup>6</sup> the idealist is primarily interested in assuring competence in administrative personnel, transparency in administrative processes, and the accountability of administrative decisionmaking to all who are either benefited or burdened by administrative action. The realist, on the other hand, is concerned with constraining the reach of administrative policymaking to avoid the elaboration of self-interested, legislative deals into ever-broader administrative regulatory jurisdiction. The realist is attracted to institutional arrangements such as the use of the nondelegation doctrine to limit administrative discretion, the adoption of cost-benefit tests for the validity of agency action, and rigorous judicial review for rationality at the behest of regulated entities.

Finally, realists and idealists are divided about the role of administrative law scholarship as a positive or explanatory endeavor. This division is over both what is to be explained and how one goes about providing a satisfactory explanation.

The realist approach attempts to understand how private interests are aggregated to produce discrete legal results. The realist researcher inquires into the material interests and strategic behavior of individuals, firms, and groups, and seeks to understand how interests and decision rules combine to yield administrative decisions. Moreover, the realist ambition is to achieve predictive competence. By that I mean simply to use the rigorous explanation of existing institutions to obtain a capacity to predict how analogous institutions will emerge and behave in the future.

Idealists are much more interested in the question of how public norms are developed and expressed to form a distinctive legal culture. They inquire into questions such as the structure of normative discourse, the force of institutional roles on administrative behavior, and the legal construction of social positions and identities. This enterprise can have a predictive element, but its basic orientation is interpretive. To understand administrative law is not to be able to predict specific actions or outcomes, but to decode the cultural software that gives the law its distinctive shape and meaning.

Idealists tend to see realists as scientific reductionists who miss most of what is important in the life of the law. Realists see idealists as self-deluding dreamers whose babblings about normative appropriateness and collective values fail to connect with the real world of politics and administration.

The public choice approach is, of course, a particular variant of realism. Many idealists may want to get beyond the cynicism of public choice because public choice-style realism seems to have set the agenda for administrative law reform over the past couple of decades. More and more we seem to be imagining government as a dangerous set of institutions, largely captured by special interests and badly in need of control, if not elimination. But, more importantly, because idealists see governmental practice as establishing public norms and cultural understandings, idealists see a cynical approach to administrative law reform as a potentially self-fulfilling prophecy. A government viewed as potentially corrupt and rendered incompetent by resource constraints and institutional restrictions will ultimately replicate the realist vision of persistent government failure.

Appalled by the possible ascendancy of the realist account, idealists are conflicted about whether they should attempt to join issue with realists on their own terms or simply pursue a different agenda offering an alternative vision of public life and public law. Realists, by contrast, often seem quite confident that they are the wave of the future and that they can safely ignore idealist criticisms of their methodology and findings. Theirs is an incremental scientific approach that must triumph in the end, however embattled they may feel when confronting the reality of the size and scope of the modern administrative state. Yet they also seem to recognize that they could win the intellectual battle but lose the political war—overwhelmed by the material interests that they have so pungently described.

## II

### CROSS-CULTURAL DIALOGUE

Can anything be done to bridge this intellectual chasm? I believe that something can, but only if certain scholarly habits of mind can be made attractive. A useful cross-cultural conversation about governance, including the design and operation of administrative institutions, requires at least two dispositions: The first is a disposition to disaggregate and distinguish intellectual tasks. The second is a willingness to join multiple disciplinary conversations in both a sympathetic and a sophisticated, critical spirit. Let me sketch my understanding of these dispositions and their importance.

As I read the papers and listened to the discussion at this Symposium, it seemed clear to me that different authors and speakers were

engaged in quite different enterprises. Yet, in my view, all of these enterprises are necessary and important parts of an academic conversation about administrative governance.

For example, some scholars are primarily interested in the question of how to design governmental institutions to guard against corruption, capture by private interests, incompetence, shirking, and the like. This is an important task but not one that exhausts our interest in institutional design. Other scholars are more concerned with predicting the output of institutional action and shaping institutions, not only to avoid failure, but to improve performance. This entails, among other design considerations, an analysis of institutional capacities to process information; consideration of necessary powers for effective agency information gathering, policy judgment, and enforcement; and attention to the resources needed for hiring and training personnel. Sometimes the prediction of institutional behavior or the design of institutions also requires us to consider the background, professional norms, and personal motivations of institutional actors. After all, only by understanding the behavioral propensities of individuals or institutional subunits are we likely to understand how the institution as a whole might operate.

Beyond these important and necessary design tasks, students of governance are also interested in explaining the bases for legitimate exercises of institutional power. Attention must be given to how institutional behavior fits within the overall political culture and its particular demands for not only useful, but legitimate governmental action. This legitimation task entails further subtasks, such as attempting to explain the overall shape of the institutions and policies that we observe. Only in this way are we likely to understand our civic ideology and the bases for legitimacy that this ideology supports or entails. Nor is civic ideology a fact. Others are crucially concerned with understanding the means by which we can create and maintain a civic ideology that will appropriately support and constrain governmental institutions.

As one looks at this list of interests or intellectual tasks, it seems quite unlikely that any single perspective on the project of explaining, critiquing, or designing governance structures will be adequate to all of them. After all, these different tasks or interests involve different units of observation, ranging from the individual to the agency to the state as a whole. They also entail quite divergent goal orientations, from the instrumental to the predictive to the explanatory to the justificatory to the interpretive.

We may want to join in Professor Macey's cynicism about government when engaged in the specific design task of guarding against

corruption or private-interest capture of governing institutions.<sup>1</sup> We may want to join Professors Farina and Rachlinski in their inquiry into cognitive psychology when we are thinking about institutional capacity for unbiased rational action.<sup>2</sup> And when concerned with explaining the overall shape of the institutions and policies that we observe, we may want to sign on with Professor Rubin for a journey into phenomenology.<sup>3</sup>

To put the point slightly differently, I think we might do well to try to forget about whether our overall dispositions tend to be of a “realistic” or “idealistic” type. We should ask ourselves instead what functional enterprise we are about, and try to employ methodologies that are appropriate to that task. Lawyers and legal academics have a long tradition of methodological eclecticism. We are parasitic on many disciplines, and for good reason. We have multiple tasks to perform, and no single discipline or approach can hold our undivided attention.

But, while I think this methodological eclecticism is a great strength of legal academic work, it can also be a great weakness. Our understanding of the disciplines and approaches that we appropriate is sometimes shallow, and we may fail to hold our work up to the highest standards of the approaches we have chosen. Because we are often talking to an audience even less well versed than we are in public choice theory, phenomenological inquiry, or cognitive psychology, we often get away with substituting enthusiasm for rigor.

This brings me, of course, to my second suggestion. If we are going to join in alternative conversations, as indeed I believe we must, then we should join in both a sympathetic and a critical spirit. We should attempt to hold each intellectual approach to its own internal standards of good scholarship. For if we admit that multiple approaches are relevant and necessary to our work, then we must take on the responsibility of internal as well as external critique. It is not enough to say that “x” is a bad approach. We must attempt to get inside that approach and understand what it offers in its own terms.

Professor Moe, for example, has spent a good bit of his intellectual energies on the internal critique of his colleagues in the public choice fraternity. He has played that role again in his comments on Professor Macey’s Article for this Symposium.<sup>4</sup> But, legal academics

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<sup>1</sup> See Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280 (2002).

<sup>2</sup> See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002).

<sup>3</sup> See 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>4</sup> See Terry M. Moe, *Cynicism and Political Theory*, 87 CORNELL L. REV. 362, 363–68 (2002).

cannot leave all this work to political scientists or economists well versed in public choice theory. We must get inside these disciplines ourselves and ask hard questions about their claims. Our colleagues in related disciplines, after all, are not in ours. They have different interests and commitments and cannot do our job for us. If we are to be intellectual parasites, as it seems we must be, we must be sophisticated and critical ones. For, in my view, one of the greatest weaknesses of legal scholarship is our tendency to join one or another intellectual club and devote ourselves to demonstrating its utility to the legal academic enterprise. We have too many disciplinary enthusiasts and too few who are willing to pay the intellectual dues of club membership and then spend their energies critiquing the club's performance.

I do not want to pick on Professor Macey. His commentators have done plenty of that, in large part because he has had the courage to set out a strong claim. And because he has been willing to climb far out on a limb, the multiple efforts to saw it off have greatly enlivened the conversation at this Symposium. But, his Article employs a rational actor approach and provides me with an opportunity to suggest how fundamental questions about that methodology might begin an interesting cross-cultural conversation.

Public choice scholars talk constantly about self-interested action and the way in which an assumption of self-interested or "economically rational" behavior should guide our approach to the analysis of both institutional and individual conduct. And this rational actor talk slides easily into talk about individual motivation.

The interesting question here is why there is any talk about motivation, or what might be called the "internal rationality" of actors. Economic rationality is not a story about internal motivation or individual psychology. It is instead a story about external selection mechanisms that force actors toward maximizing their own returns. The price of altruism in a well-functioning competitive market is business failure. Actors are not presumed to act out of self-interest because that is a psychological truth about human behavior. Rather they are assumed to act as if they were self-interested, and exclusively so, because of the demands of market competition.

This leads to a potentially interesting question about Professor Macey's claim that his approach—maintaining a cynical stance toward all governmental action<sup>5</sup>—is appropriate in our constitutional system as he describes it. For, it is also Professor Macey's claim that our basic constitutional design is focused precisely on the elimination of private-interest appropriation of governmental power. Our separation

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<sup>5</sup> See Macey, *supra* note 1.

and division of powers, protections of individual liberties, and commitments to regularized process create an environment that selects against self-interested power grabs. But, if this is true, if the Founders have designed a well-functioning governmental market, why should we not predict that the outputs of this constitutional system will be good public policies rather than bad ones? Just as the market demands efficiency as an external constraint, not greediness as a dominant individual motivation, our government might be said to demand beneficial public action, whether or not we believe it to be populated by public-spirited governmental officials.

This question, of course, only begins a conversation. But, it suggests how attention to the basic methodological presuppositions of a discipline can produce an internal critique that allows focused, and perhaps fruitful, debate between somewhat skeptical idealists like myself and reform-oriented realists like Professor Macey.

In a significant sense I think that everyone at this Symposium has demonstrated that he or she is already "beyond cynicism." The ancient Cynics, after all, of whom Diogenes was a principle example, tended toward passive asceticism. But this room is filled with energetic reformers, not passive ascetics or, in the Oxford English Dictionary's secondary meaning of cynic, "sneering fault-finders."<sup>6</sup> To avoid cynicism's temptations we must stay focused on our common enterprise, recognizing that it has discrete functional tasks and demands mastery of multiple disciplinary languages.

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<sup>6</sup> 4 THE OXFORD ENGLISH DICTIONARY 197 (2d ed. 1989).