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Political Economy, Administrative Law: A Comment

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In the last generation, writings on the regulatory state have taken three principal forms. The first, coming mostly from academic lawyers, consists of efforts to discern the logic of judge-made public law and to make recommendations to federal courts reviewing administrative action. The second, coming mostly from economists, consists of efforts to explain regulatory law by reference to the self-interest of participants in the legislative process. The third, coming from a quite eclectic group, consists of efforts to compare the current administrative state with approaches that show a better appreciation of the appropriate nature of government intervention and, especially, of the proper relationships among democratic self-government, bureaucracy, and private rights.

Jerry Mashaw's paper on the different "stories" of legal development attempts to mediate among what he sees as the rival claims of these three different kinds of work. Mashaw suggests that the three schools generate different explanations or predictions about the administrative process; he wants to compare and test their claims. His conclusion is that none of the predictions ultimately holds up.

I agree with a large number of Mashaw's particular arguments, and I find many of his criticisms of the three approaches both valuable and entirely persuasive. What I want to ask here is whether the task of mediation, as

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Mashaw understands it, might not be misguided. If it is, there is a simple reason: only one of the different efforts amounts to an effort at explanation or prediction at all. There are no competing hypotheses here. For this reason, the task of mediation comes at a high price. It converts a large amount of work on the regulatory state into positive social science, when in fact it is something quite different.

I also want to suggest, however, that Mashaw has provided an important service in bringing the three forms of work into contact with one another and in suggesting some of their tensions and interrelations. In Section 2 of this comment, I make some observations about what participants in the three enterprises might be able to learn from one another. In the process, I hope to join Mashaw in suggesting some of the ingredients of a unified political economy for the regulatory state.

1. REGULATORY STORIES

Let me begin by attempting to characterize the three "stories" around which Mashaw's efforts revolve. I will stay with his basic categories, but, as we shall soon see, in some ways my descriptions will depart from his.

What Mashaw describes as the work of the "legal idealist" might be seen as the ordinary, day-to-day, mid-level enterprise of the legal academic operating largely within the existing legal culture. For the internal expositor or critic of administrative law, the central task is to discern the logic of judge-made doctrines, to unpack their assumptions, and to evaluate them. In this category one can find a large number of claims, amounting to the staple of academic work in administrative law. Herewith a sample, taken randomly from recent writing on judge-made public law: the courts' hostility to ex parte contacts in notice-and-comment rule-making reflects on emerging, quasi-adjudicative model of administration; the courts have been far more hospitable to administrative decisions that comport with traditional principles of compensatory justice than with decisions that reject those principles; post-1980 doctrines of standing and reviewability embody pre-New-Deal assumptions and indeed reflect hostility to government regulation; judicial deference to administrative interpretations of law reflects an understanding that the resolution of statutory ambiguities is actually a decision of policy; judicial requirements of elaborate explanations from administrators bring about substantial delays in the rule-making process or (alternatively) serve to decrease the risk of factionalism in government.

These sorts of claims do have serious limitations, for reasons suggested by Mashaw and taken up further below. But do they even attempt to "explain" administrative processes? To the extent that the evaluations they offer are favorable, some of this work indeed tends to describe administrative law doctrines as if they were "designed" to accomplish some desirable social end. But these claims should not, I think, be taken as explanatory ones in the

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sense indicated by Mashaw. They are more on the order of the claim that *Brown v. Board of Education* was "designed" to impose a general principle of color blindness. In other words, they are interpretive rather than positive claims. They attempt to make the best possible sense out of a line of judicial decisions. They are falsifiable in the sense that they attempt to fit their claims with the data (i.e., with existing judicial decisions). Among the various possible accounts that have a plausible claim to fit, however, the choice is made on value-laden grounds. In this respect, interpretive claims are not positive in the sense that Mashaw understands the term.

When doctrinal analysts describe what a doctrine is "intended" to do, they should not be thought to be making a claim about the subjective motivations of the judges or, much less, about what really accounts for that doctrine as a matter of social science. They are not making the functionalist error of explaining a result by reference to its consequences. Instead, they are attempting to bring out the logic of legal doctrine by positing the sorts of claims that might be invoked in its favor. This is a time-honored approach to law. It should hardly be disparaged, but it is not positive social science.

If this is right, Mashaw goes wrong in treating efforts of this sort as an effort to provide a predictive or positive guide at all. More fundamentally, I think that Mashaw is mistaken in suggesting that what he calls the idealist conception would predict a range of judicial (rather than legislative and bureaucratic) controls on the administrative process. For the most part, the academic lawyers are not engaged in that enterprise at all.[1]

What Mashaw describes as the "CLS description of administrative law" I prefer to see as a far broader effort, from a range of starting points, to evaluate regulatory substance and process by reference to first principles with respect to (a) democratic theory and (b) substantive ideas about the proper extent and form of regulatory controls. In this category fall a number of claims about the democratic or antidemocratic character of the modern regulatory state and about the ways in which that state does more or less than it ought to do. Thus, for example, it might be said that the category of public-interest justifications for legislation is very large, including not simply responses to market failures but also a recognition of the endogenous character of certain preferences; an endorsement, through law, of social aspirations; a powerful antidiscrimination principle; and certain forms of redistribution. In one version, coming from the far left, the administrative state is said to have been defended on the basis of a number of ultimately unsuccessful strategies of legitimation.[2] On this account, administrative

1. Of course, it would be possible to recast some such claims in those terms and then to test them: for example, do the courts consistently defer to political choices? Do they systematically disfavor regulatory beneficiaries? I do not deny that some claims of academic lawyers take the form of falsifiable predictions.

2. In fact, there is no developed work from the critical legal studies movement on administrative law. Mashaw relies on Frug.

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dominance and discretion are concealed by arguments that attempt, unsuccessfully, to discern a pedigree for modern administration in the form of democratic self-governance or neutral legal constraint.

Mashaw attempts to translate this latter sort of claim into an argument "predicting" that administrative law doctrine will "maintain the relatively unconstrained power of bureaucratic officials to exercise state power." I doubt, however, that the critics have made any such predictive argument. Normative arguments about failed efforts at legitimation should not be taken as positive claims about what it is that administrative law doctrines will do. It would be perfectly plausible to say that efforts at the legitimation of bureaucratic authority fail, while at the same time taking no position on the question whether administrative law will, in general or in particular, maximize, minimize, or take some middle course on the question of bureaucratic discretion. Much depends, of course, on what the notion to "relatively unconstrained power" is intended to comprehend. But unless any amount of discretionary authority at all is thought to fall in this category—and perhaps Frug and others can be read to make this puzzling suggestion—the predictive claim is difficult to find in the literature.

Indeed, it would be extremely surprising if the critics attempted to make a positive claim to the effect that administrative law will maintain unconstrained bureaucratic discretion. That claim would be hard to sustain. There are multiple actors in the administrative state, and, even if failed legitimation is the ultimate point of one's story, it would be peculiar indeed if all of those other actors—courts, Congress, the president—were simultaneously embarking on the pursuit of unconstrained bureaucratic power.

All this suggests that the critics, taken as a broad group or as participants in something more narrow like CLS, are not making a claim with any powerful positive implications about the structure of bureaucratic decision-making. As in the case of the legal idealist, Mashaw seems to me to be mistaking a set of essentially normative claims for predictive or explanatory judgments.[3]

With respect to positive political theory, Mashaw is, of course, on firm ground. Here the task is indeed to explain why administrative process takes the form that it does. Moreover, a number of Mashaw's criticisms of positive work on administration seem to me correct. I think, however, that Mashaw may be mischaracterizing the relevant work when he suggests that it posits "legislative control" as the overarching theme of positive political science in this area. Any positive theory of the regulatory state will acknowledge that there are other actors, with other agendas, in the process. And, as several positive analysts have argued, legislative control may be something that

3. Of course, these sorts of normative claims do involve some views about the data, including the decided cases.

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legislators themselves will work against—in favor of, for example, bureaucratic or state authority, which in some contexts will be in the interest of legislators focused on reelection. It would be a mistake to think that all positive political science in this area is designed to prove that administrative processes can be explained as if they were an effort to increase legislative control of the administrative process.

If I am correct on this, the three enterprises with which we are dealing are in fact incommensurable, not because they have different methodologies, but because they set for themselves different tasks. Only one of them amounts to an "explanation" in the positive sense at all. Both the idealist and the critical approaches are largely normative. To the extent that they offer explanations, it is with an eye toward describing, respectively, the logic around which some of the cases might be organized and evaluated, and the foundations from which one might understand the correspondence or noncorrespondence between the administrative state and ideals of democratic self-governance. These are explanations in a sense, but of a quite different order from those involved in positive social science. They do not predict judicial or administrative control at all.

2. NOTES TOWARD A UNIFIED POLITICAL ECONOMY OF ADMINISTRATIVE LAW

The considerations treated thus far do not suggest that the three enterprises might not learn something from one another, nor do I deny that all of them might be making serious mistakes that an engagement with the others might help to remedy. In this section, I want to say a few words about some of the limitations of each of these enterprises, and to speculate on how work in each of them might be enriched through an understanding of the others.

2.1. The Myopia of Academic Administrative Law

Administrative law in the law schools remains largely in the grip of the tradition set by Kenneth Culp Davis and Louis Jaffe. Focused on judicial control of administrative behavior, it sees the purposes of administrative law as embracing a constellation of related concerns: to guarantee legality; to promote procedural regularity; and to ensure against irrationality and injustice, defined by reference to common-sense intuitions.

These ideas are far too vague to provide a full sense of the appropriate nature of judicial controls on the regulatory state. An understanding of positive political science might provide significant help. Some regulatory statutes should, for example, be seen as "deals" among self-interested private groups; they are not public-regarding at all. Moreover, regulatory stat-

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utes have a variety of malfunctions, some of them counterintuitive.[4] Statutes are often poorly coordinated with one another. Sometimes they become obsolete. They also have complex systemic effects. Overregulation produces underregulation; concentration on new risks perpetuate old risks; redistributive regulation often hurts those at the bottom of the economic ladder; legal requirements of the "best available technology" can, ironically, retard technological development.

An understanding of these various phenomena could prove most helpful to doctrinal analysis in administrative law. It might show, for example, that the consequences of regulatory statutes are quite different from what is anticipated, and an understanding of the consequences might well bear on statutory interpretation and on the decision about what courses of action are "arbitrary" within the meaning of the Administrative Procedure Act. For example, an understanding of the ways in which regulatory controls on new risks perpetuate old risks might well affect judicial analysis.[5] The fact that statutes are sometimes "deals" among private actors might also bear on statutory construction, although here the implications are uncertain. Furthermore, if problems in aggregating multiple views in the legislature produce irrationality or incoherence, perhaps there is much to be gained by ensuring regulation via the president rather than the Congress.

To the extent that criticisms of administrative legitimacy have weight, those criticisms, too, might play a role in judge-made doctrines. For example, attacks on policy-making by bureaucrats (again, if they are persuasive) might lead to a reinvigoration of the nondelegation doctrine or at least to "clear statement" principles, forbidding administrators to engage in certain activity unless Congress has expressly authorized it. In such cases, administrative doctrines always depend on understandings about political legitimacy, even if such understandings are tacit; and an engagement with theories about legitimacy and legitimation will inevitably enrich such understandings. This is true even if judge-made doctrines are highly unlikely to respond in a serious way to the most extreme versions of the "legitimation" complaint.

2.2. The Narrowness of Positive Political Science

A considerable amount of positive political science on the subject of regulation is organized around the notion of "rent-seeking." The notion is not always clearly explicated; at least in some hands, it seems to refer to the wasteful expenditure of funds on the redistribution of resources through politics rather than the healthy production of resources through markets. Thus, for example, efforts to obtain environmental controls, or to obtain a

4. See Sunstein (1990a,b).
5. See Sunstein (1990b:407–41).

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"fairness" doctrine to control broadcasting, are thought to represent the diversion of resources into an unproductive place.

So described, the notion of rent-seeking rejects most of the basic workings of politics. It treats citizenship itself as an evil. And while it is intended as a tool of positive analysis, in fact it is based on a set of premises that are rarely disentangled and that amount to tacit, and exceedingly peculiar, understandings of democratic theory. It assumes that the status quo—existing distributions—are not themselves a product of politics or in need of defense. It treats politics as a system for the transfer of wealth rather than for deliberation about values. Indeed, it assimilates the second to the first, and thus renders it invisible.

More generally, the notion of rent-seeking represents a peculiar reversal of the liberal tradition, which has seen political behavior not as an evil, but as an important arena for education, for deliberation and discussion about the nation's direction, for the development of the faculties, and for the cultivation of feelings of altruism. On all of these scores, the liberal tradition remains reasonably vibrant in the United States; and it continues to describe a wide range of individual and collective behavior. It would, of course, be foolish to deny that much political conduct is an effort to use governmental power to serve selfish ends. But to collapse all political behavior into the category of "rent-seeking" is grotesquely to devalue the activities of citizenship. An effort by those who practice positive political science to engage with the literature of democratic theory would be most helpful here.

As Mashaw properly points out, moreover, much of positive political science represents a crude form of functionalism. Prominent in such diverse areas as Marxism, economics, and sociology, work of this sort deduces a cause of a phenomenon from its effects. But this is bad social science. It amounts to the telling of plausible stories, but it is really no more than that. The fact that a regulatory system has the effect of, for example, helping Eastern industry does not demonstrate that the system was enacted because of that effect.

2.3. Critical Work and Politics

Some work in the critical tradition seems naive about a range of issues including the consequences of governmental intervention in the marketplace. Such intervention does not create simple ex post winners and losers. It has a range of distributive consequences, some of them unanticipated and perverse. An understanding of the complex systemic effects of regulatory enactments—inevitable in a market (or nonmarket) economy—would be extremely helpful here.

Moreover, positive political science helps to produce a healthy skepticism about the possibilities of democratic politics, at least in any polity that we are likely to have. Social choice theory has revealed a number of difficulties in

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describing any outcome in a multimember body as reflecting a unitary "public will." An understanding of collective action problems, cycling, strategic behavior, agenda manipulation, and economies of scale should at least weaken the enthusiasm of some critical theorists for small-scale systems of participatory democracy.

To say this is not at all to suggest that an engagement with positive work on the regulatory state leads directly to any particular set of ideas on the appropriate relationship between bureaucracy and democracy. But it does suggest that critical approaches to that question would be much improved if they took account of that work.

3. CONCLUSION

It is a mistake, I think, to translate either the work of the doctrinal analyst or the various critiques of the democratic theorist into a set of positive claims about how administrative processes actually come about. At most, the doctrinal analyst is arguing, for example, that there is a discernible logic behind otherwise mysterious developments in the case law; and the democratic theorist is arguing that, for example, participants in modern liberal states make unsuccessful claims by which they attempt to legitimate the exercise of discretionary power by bureaucrats. But neither of these arguments is a prediction or explanation at all.

To say this is not to say that the three perspectives on administrative law have nothing to learn from each other. On the contrary, there is a pressing need for a more unified political economy of administrative law. Such a political economy would reflect an understanding of the principles and pathologies of the regulatory state; of the forces that have brought it about; of the devices by which various actors have attempted to discipline it; and of the failures and successes of regulation, assessed by reference both to its real-world performance and to democratic theory. A unified political economy would indeed attempt to mediate among different perspectives on the regulatory state. It would do so not by seeing which one is more sound than the others, but instead by appreciating that each of them attempts important (although quite different) tasks, and by taking advantage of the work that performs each of those tasks well rather than poorly.

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