2006

Farewell to Social Nostalgia. Book Review Of: Beyond Camelot: Rethinking Politics and Law for the Modern State. by Edward L. Rubin.

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Book Reviews

FAREWELL TO SOCIAL NOSTALGIA

BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE. By Edward L. Rubin.[1] Princeton, Princeton University Press, 2005. Pp. 471. $45.00.

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In *Beyond Camelot*, Edward Rubin advances what seems like a pretty radical program. He argues that the advent of the administrative state has fundamentally changed the nature of government. As a result, traditional categories of law and political theory have lost their relevance and descriptive power; indeed these categories now reflect a sort of "social nostalgia" which impairs understanding (pp. 29–36). Among these obsolete categories are such hallowed concepts as branches of government (and the separation of powers), power and discretion, democracy, legitimacy, law, legal rights, human rights, and property.

Should these obsolete terms, therefore, be completely abandoned? Rubin's answer is no. Rather these terms should be "bracketed"—that is, put to one side for the purposes of a thought experiment—and certain alternative concepts should be explored (pp. 8, 336). Rubin believes that these alternative concepts are superior in three essential ways. First, the alternative concepts are superior in expressing our "emotional commitments" to the view that "the government's purpose is to benefit

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its citizens" by effectively furthering their "security, prosperity and liberty" (pp. 14–15). Second, the alternative concepts promote greater clarity in thinking, because they better resist reification—that is, they more adequately reveal or acknowledge that all such terms of political philosophy are actually "metaphors, rather than observable features of the world" (pp. 15–18). And, finally, the alternative concepts encourage a deeper examination of political institutions because they facilitate "microanalysis" of how decisions actually are made in government—that is, they "provide the framework" for our attempts "to trace the actual pathways of individual decision making and related action through an institutional structure" [3] (p. 18).

The old concepts cannot be completely abandoned because that would be confusing and (in the end) impossible. "Instead", according to Rubin, "the idea is to convey a sense of caution to scholars, judges, and policy analysts whose task it is to think systematically about modern government" (pp. 335–36). But is it really worth a volume of over three hundred pages—with a dazzling apparatus of extraordinary learning—merely to "convey a sense of caution to scholars, judges, and policy analysts"?

Perhaps it is. In any case, let us undertake our own brief "microanalysis" of Rubin's impressive work of political and legal theory.

1. "Branches" and "Network"

The first of Rubin's proposals is that the metaphor of three "branches" of government (and of the separation of powers) should be bracketed, and that government should be viewed instead as a "network" (pp. 40–73, 184–85). Certainly the "network" metaphor well captures the complexity and decentralization of aspects of American government, and Rubin elaborates this point in a particularly persuasive discussion (pp. 53–66).

But does this terminology violate the spirit of Article II of the Constitution which, some argue, requires a rigidly centralized executive branch? Article II does vest the executive power in a single "President of the United States," responsible for the faithful execution of the laws.[4] But the argument for a central-

3. For Rubin's previous discussion of "microanalysis"—and an argument that a "microanalysis of institutions" could provide the focus for a new synthesis in legal scholarship—see Edward L. Rubin, *Commentary: The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1424–38 (1996).

4. U.S. CONST. Art. II, §§ 1, 3.

ized hierarchy becomes weaker when we consider the details. First, Congress may allow the "heads of departments" or the "courts of law" to appoint most executive officials.[5] Moreover, the President (unlike Congress) receives no express power to remove any office-holder. Only a massive effort of strenuous interpretation allowed the Court to infer a presidential removal power in the *Myers* case, over eminent dissents. Yet something like the network idea reasserted itself in *Humphrey's Executor*, the decision that validated the independent administrative agencies by finding that Congress could generally insulate commissioners from removal in the absence of good cause.[6]

Indeed, that was what the fighting was all about in the special prosecutor case, *Morrison v. Olson*[7]: is our administration part of a hierarchical executive "branch" or is it more like a "network"? By upholding the independence of the prosecutor, the Court seemed to endorse something like the "network" idea. The *cri de coeur* of Justice Scalia's dissent could be viewed as a nostalgic backward look at what he feared might be the disappearing idea of the "unitary" executive department as a separate "branch". (But, of course, this idea has not disappeared, as the continuing validity of cases like *INS v. Chadha*[8] and *Bowsher v. Synar*[9] makes clear.)

The idea of a "network" may be useful for characterizing foreign administrative systems as well. In Germany, for example, most federal law is administered by the individual states (*Länder*), rather than by a federal bureaucracy.[10] Under this form of decentralized administrative system, federal law may be enforced differently, depending upon the prevailing politics of the enforcing state.[11] But Justice Scalia rejected this sort of

5. U.S. CONST. Art. II, § 2. See Myers v. United States, 272 U.S. 52, 240 (1926) (Brandeis, J., dissenting, quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1544).

6. Humphrey's Executor v. United States, 295 U.S. 602 (1935); see also Wiener v. United States, 357 U.S. 349 (1958).

7. 487 U.S. 654 (1988).

8. 462 U.S. 919 (1983) (striking down the "legislative veto"). Rubin refers to the basis of the Court's opinion in *Chadha* as "merely another emanation of the three-branch metaphor" (p. 71).

9. 478 U.S. 714 (1986) (finding that executive authority may not be exercised by an officer who is responsible to Congress).

On the other hand, *Mistretta v. United States*, 488 U.S. 361 (1989), more easily fits the pattern of government as a "network." In *Mistretta*, the Court found that Congress could permissibly authorize federal judges to exercise a form of rulemaking authority in the United States Sentencing Commission.

10. See Art. 83 GG.

11. The Constitutional Court's first abortion decision in 1975, for example, required

"network" in the *Printz* case when (writing for the Court) he noted that allowing a federal statute to employ the civil service of the states to enforce federal law would be to remove these officials from unified central—that is, presidential—control.[12]

But, however useful it may be in capturing certain realities of the American administrative state, Rubin's proposed network image also raises concerns. There is nothing in the concept of the "network" that replaces the idea—important in the "branches" metaphor and the separation of powers—that the structure of government is designed to protect individual liberty. Thus, in shifting away from the separation of powers, we seem to lose the ideas expressed, in perhaps nostalgic language, by Justice Brandeis who declared that this doctrine was not adopted "to promote efficiency" (i.e., the administrative state) "but to preclude the exercise of arbitrary power"—to create friction in order to "save the people from autocracy."[13]

2. "Democracy" and "Interaction"; "Legitimacy" and "Compliance"

While the image of the network may well yield important benefits, Rubin's next proposals—that we "bracket" the term democracy and speak about "interaction" with government or an "interactive republic" instead (Ch. 4; pp. 110–43), and that we replace talk of "legitimacy" with the concept of "compliance" (Ch. 5; pp. 144–78)—seem considerably more problematic.

The shift from legitimacy to compliance interestingly parallels what could be called a modern shift in legal theory from natural law to positivism: the concept of legitimacy is consistent with a natural law approach because it presupposes an external standard against which the existing legal system may be meas-

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an elastic "social" hardship exception to the general rule that abortion must be criminalized. 39 BVerfGE 1 (1975). States with Social Democratic governments interpreted this exception in a broad manner, thereby expanding the abortion right, while more conservative state governments sought to reduce abortion through a narrow interpretation.

12. Printz v. United States, 521 U.S. 898, 922–23 (1997).

13. *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting).

As a sort of pendant to the idea of "network," Rubin argues that the concept of "power" (as in the wielding of administrative power, or the delegation of power) should be replaced by "authorization"; Rubin notes that this metaphor avoids the misleading implication that power, in this context, is an actual thing that is passed from one person to another, or is applied by one person to, or against, another. Rubin argues that the term "authorization" is more accurate and opens up substantially greater opportunities for microanalysis. For similar reasons, Rubin argues that adoption of the term "supervision" will allow us to dispense with the bracketed concept of "discretion." (pp. 74–109, 185–86).

ured. On the other hand, the great positivists of the 19th and 20th Centuries—Austin, Kelsen, and H.L.A. Hart—base their systems on the idea of compliance. For those writers, there is no fundamental idea of "legitimacy" which determines what the valid legal rules are. Rather the system of law that is in fact "efficacious" is the law.[14]

But can the American government really be adequately described without the twin terms democracy and legitimacy? Indeed, is it not the idea of democracy—that is, the idea that the government rests on some deep if diffuse popular approval—that gives legitimacy to the system? (Incidentally, I am skeptical of Rubin's view that, in contemporary thinking, democracy still carries with it a residue of its meaning in Aristotle—requiring assembly of the citizens in person and choice of officials by lot (pp. 115–16)).

And this is the important point: Rubin's analysis rests on popular compliance, but doesn't *compliance* itself rest to a substantial extent on the people's sense of the *legitimacy* of the government—at least the quality of compliance that is necessary for a vigorous administrative state? Indeed, the fitful and grudging compliance in the former East Bloc countries, which so powerfully contributed to the downfall of the Soviet Union, seems to have resulted in part from a lack of legitimacy—that is, the sense that the structures and personnel of government had little to do with the consent or wishes of the governed.[15]

3. "Law," "Policy" and "Implementation"

Rubin also proposes that the term "law" be bracketed and be replaced with two related terms: "policy" and its "implementation." Rubin points out that this shift leads to advantages in analysis. This is a fair enough goal, but one might question whether this shift is really necessary in light of the fact that for many decades people have thought about law in terms of policy and its implementation. One might well question Rubin's ironic view of law as a concept that "still resonates with assertions that

14. That is not to say that—for the positivists—the existing law is not subject to criticism on religious or moral grounds. Indeed, the positivists are careful to preserve such a possibility, and some even assert that the positivist view makes such criticism entirely more likely. See H.L.A. HART, THE CONCEPT OF LAW 210 (2d ed. 1994).

15. Rubin interprets the decline of the Soviet Union somewhat differently, finding that it was due to the failure of "socialist legitimacy" (p. 176). Indeed, in general, Rubin argues that compliance rests on the goods delivered by the administrative state, rather than on any popular sense of legitimacy (id.).

law constitutes the voice of God Himself, and possesses the same in-built regularities as the physical world" (p. 209). Who really thinks of law that way today?

Indeed, as far back as the great case of *McCulloch v. Maryland*,[16] for example, the concepts of "policy" and "implementation" were drawn in the most vivid way—in Chief Justice Marshall's distinction between the "ends" of federal policy (commerce, taxation, defense) and the "means" for the "implementation" of those policies, the Second Bank of the United States.

Rubin actually acknowledges this point, when he declares that our Constitution is a "[product] of the administrative era," reflecting "the articulation of governmental purpose" (p. 224). But this view leads to Rubin's paradoxical conclusion that the "constraints" imposed on government by the American Constitution—a document that proclaims itself to be "the supreme law of the land"—in fact "do not correspond to our concept of law" (p. 225).

4. Legal Rights

In trying to come to grips with Rubin's challenging discussion of legal rights in the following chapter (pp. 227–59), we could start with Chief Justice Marshall's famous opinion in *Marbury v. Madison*.[17] At the outset of the opinion Marshall first asks whether the applicant Marbury has a *right* to the commission he is seeking; then as a second question, Marshall asks: "If [Marbury] has a right, and that right has been violated, do the laws of his country afford him a remedy?"[18] This is a very clear formulation of what might be considered the pre-modern view in which legal rights are thought to have an existence that is separate from (and prior to) their judicial enforcement.[19] Holmes and the realists seemed to flip this idea by arguing that without a remedy there is no right.[20] Rubin persuasively expands this point by noting that a "right" may be doomed to nonexistence not only if the applicable *legal* doctrine fails to provide a remedy, but

16. 4 Wheat. (17 U.S.) 316 (1819).
17. 1 Cranch (5 U.S.) 137 (1803).
18. *Id.* at 154.
19. Although Marshall goes on to argue that a "government of laws, and not of men" must provide a remedy for a violation of a right—and that to fail to do so would cast "obloquy" on American jurisprudence—it is clear that Marshall considers the two terms to be conceptually quite distinct. *Id.* at 163.
20. See, e.g., O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

also if the remedy provided is unavailable for practical reasons, such as the impecuniousness of the litigant (pp. 235–37).

Rubin also argues that the concept of legal rights is "under-inclusive," because many important goods provided by the administrative state, such as national defense, cannot really be the subject of legal rights or adjudication. "[T]he concept of legal rights," therefore, "underemphasizes governmental actions that are implemented by non-adjudicatory means . . ." (pp. 233–35). Accordingly, Rubin would bracket the concept of legal rights and focus entirely on the remedy—the "cause of action"—a focus that will help us understand that legal process is only one method of reaching policy goals, and that we should also search for other methods of implementation[21] (pp. 236–46).

On the question of "rights," I would like to raise two issues—one technical and the other more fundamental, addressed in section (5) below. First, the technical problem. The phrase "cause of action" may not adequately replace the phrase "legal rights" because "legal rights" are raised not only by plaintiffs (or moving parties) but also by defendants as well: that is, "legal rights" give rise not only to "causes of action" but also to defenses against causes of action—as, for example, when an individual is prosecuted for speech protected by the First Amendment or, in the civil context, when a trespass defendant claims an easement on the property. Accordingly, Rubin may need two terms—not only "cause of action" but also (echoing Hohfeld) "no cause of action" (p. 229).

5. "Human Rights" and "Moral Demands on Government"

In his discussion of "rights" (Chapters 7 and 8) Rubin distinguishes between "legal rights" which arise from rules set down by the government for citizens, and "human rights"—claims arising from "law, or lawlike moral principles," which rule the government itself (p. 227). While, as we have seen, Rubin wishes to substitute the idea of a "cause of action" for "legal rights," he also seeks to "bracket" the concept of "human rights" and substitute a new concept "moral demands on government"

21. In a very thoughtful discussion, Rubin also argues that a focus on "causes of action" instead of "legal rights" would have avoided confusions of the Burger Court in searching for "liberty" or "property" interests in due process cases after the Court's abolition of the right/privilege distinction in Goldberg v. Kelly, 397 U.S. 254 (1970) (pp. 251–56). *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). Rubin indicates that this doctrine is "confused by reified heuristics inherited from the pre-administrative state" (pp. 254–56).

(pp. 268–70). According to Rubin, this new vocabulary will acknowledge the important role of the administrative state in effectuating these guarantees and will tend to equalize the role of "positive" guarantees (welfare, education, housing) and traditional "negative" guarantees (freedom of speech, freedom against unreasonable searches and seizures, etc.) (pp. 274–78). Rubin suggests, moreover, that "moral demands on government" is superior because the vocabulary of human rights may encourage the government "to adopt a deontological position about the essential character of human beings . . . to define humanity or the meaning of human existence" in a manner that may ultimately be oppressive (pp. 278–84).

Whatever merit these arguments may have with respect to human rights in the abstract, it seems to me that this proposal places the idea of actual constitutional rights—which Rubin includes among the "human rights"—in a peculiar and vulnerable position. The whole idea of modern judicial review is that constitutional rights are another form of "hard" law—just as much a form of legal right as the right to recover on a contract, and not to be classified along with somewhat less "law-like" forms. This disquietude is heightened by the phrase "moral demands on government"—which sounds like something that is considerably more malleable and less reliable than constitutional rights: "morality," while often implicit in enforceable rules, also has a certain aspirational tone.

Indeed, the entire shift from a focus on the individual (in the idea of rights) to a primary focus on the structure of government (implicit in "moral demands on government") also seems dangerous (as Rubin apparently acknowledges (p. 294)). Even though Rubin argues that he intends no change in the existing content of the guarantees (p. 298), it is not entirely clear that we know how to determine if these moral demands on government have been met. Could the "moral demands" with respect to freedom of expression be met, for example, by greater government subsidies to the press, coupled with a bit more prosecution of seditious libel? The individualist idea of "rights" at the very least discourages (and probably prohibits) trade-offs of this nature. The focus on government instead of individuals at least opens the door to possibilities of this kind.

6. "Property and "Market-Generating Allocation"

In his final chapter on "property" (pp. 296–329), Rubin—in an exciting discussion that tests the boundaries of our thinking on the subject—expands the insight of the American legal realists that "property" is not a thing in itself, pre-existing society, but rather a creation of the state that requires government for the enforcement mechanisms that make it possible. According to Rubin, the concept of "control," which Rubin finds at the basis of the traditional idea of property, is inconsistent with the presuppositions of contemporary government (pp. 296–309). Accordingly, Rubin proposes that we "bracket" the concept of property completely and replace it with the "market-generating allocations" that the government finds to be most effective for achieving the chosen ends of public policy through the administrative state (pp. 314–15).

This view of the subject supports much of the Supreme Court's doctrine on "regulatory takings," and is also generally consistent with such cases as *Berman v. Parker*[22] and the recent *Kelo*[23] decision, which confirm that governments have great leeway in making general plans that may reallocate individuals' houses, businesses, etc. (with compensation) to further some greater societal good.

Yet the very last couple of pages in the property discussion (pp. 327–29) do give one pause. Rubin acknowledges that the exercise of eminent domain, even with compensation, may lead to governmental oppression. The word "oppression" is used a number of times (in one or another form) and the courts are assigned the task of invalidating the exercise of eminent domain "that is designed to oppress individuals rather than implement a valid public purpose" (p. 329). This discussion seems vague and inconclusive, and I think that is for one basic reason: Rubin has abandoned the vocabulary that could be useful for the protection of individuals. We have no more constitutional or human rights—such as rights of freedom of speech or association, whose exercise might protect against "oppression"—we just have moral demands on government.

In this light, I would like to conclude with a personal recollection. In January 1990, shortly after the Berlin Wall was opened, I visited Berlin and East Germany. It was quite an ex-

22. 348 U.S. 26 (1954).
23. Kelo v. City of New London, 545 U.S. 469 (2005).

traordinary period—"liberal revolution"[24] was in the air. At that early point, German unification still seemed some years away, and East Germany was thought to need a new democratic constitution, at least for an interim period. People were discussing what that new constitution should contain, and groups across the country were already working on proposed drafts.

In these two weeks, I interviewed people across the political spectrum in East Germany about their views of a constitution.[25] It was clear what they wanted. They had of course been the subjects of an administrative state and (for those at least who were content to stay put and keep their mouths shut) that state had had its benefits. But the administrative state—even enriched by the bounty of the capitalist "economic wonderland" which they had seen on TV across the border—was obviously not all that they wanted.

They also wanted the basic features of western constitutionalism as they saw them, and these included concepts that, in Rubin's vocabulary, form the subject of "social nostalgia." They wanted a form of the separation of powers (not a network; the idea of the network would not have carried the same force). They wanted democracy (popular sovereignty, and not just interaction). They wanted legitimacy (compliance without legitimacy was not enough); and—above all—they wanted judicially enforceable human rights that inhered in individuals; they probably would not have been satisfied with moral demands on government.

Maybe these people were filled with illusion about the tangible benefits that "liberal revolution" could bring them—indeed, many were seriously disappointed by the results. But this experience suggested to me—and I think these observations could be multiplied across the East Bloc countries of the period—that these traditional concepts, Rubin's bracketed terms, probably represent very deep human aspirations.

So we should return to Rubin's basic framework: this is a thought experiment, in which we are testing more traditional concepts—perhaps even by exaggerating a bit the omnipresence and importance of the administrative state. The method yields important insights—certainly our view of political theory has been very greatly enriched. But in the end we should remember

24. See BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION (1992).

25. For a contemporary report, see Peter E. Quint, *Building New Institutions in East Germany*, BALTIMORE SUN, Jan. 21, 1990, p.1E.

that, even in Rubin's view, the traditional concepts are only bracketed—they are not gone.