

## REVIEW ESSAY

# BLACK ROBES AND BLACKER BOXES: THE CHANGING FOCUS OF ADMINISTRATIVE LAW

REVIEW OF *Suing Government*, by Peter H. Schuck, Yale University Press. 1983, 262 pages.

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From its inception as a recognized field of study, commentators have tried to chart the past and predict the future course of American administrative law as well as to influence that course.<sup>1</sup> Some writers have shown special concern with the evolution of scholarly writings in this field.<sup>2</sup> Professor Peter Schuck's new book, *Suing Government*, may be of as much value to those who follow administrative law scholarship as to persons interested in suits against government.

His subject, legal actions against governmental authorities, is a matter of increasing interest to both practitioners and academics.<sup>3</sup> Al-

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1. See, e.g., Feller, *Prospectus for the Further Study of Federal Administrative Law*, 47 YALE L.J. 647 (1938); Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927); Pound, *The Administrative Application of Legal Standards*, 44 REP. A.B.A. 445 (1919). More recent efforts in this area include: Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978).

2. See, e.g., Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771 (1975); Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U.L. REV. 120 (1977); cf. Strauss, *Teaching Administrative Law: The Wonder of the Unknown*, 33 J. LEGAL EDUC. 1 (1983) (describing very much the same concerns in the teaching context that others have addressed largely in the context of writing; the two cannot be separated easily).

3. Litigation in this area is a growth industry. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR, table 21, at 62; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR, table 21, at 61; P. SCHUCK, *SUING GOVERNMENT 199-202* (1983); see also Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979). Scholarly commentary on various aspects of this problem is also growing quickly. See, e.g., Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982); Field,

though the book contains many interesting observations on the utility and disutility of such actions, these observations probably have little direct significance for lawyers engaged in or contemplating bringing suits against government.

But readers who are interested in how legal constraints affect government or in knowing what administrative law teachers are thinking about these days will find *Suing Government* instructive. From these perspectives, Schuck's explicit message is informative and so, too, are his implicit statements about what issues are important to administrative law, what considerations should inform their resolution, and what analytical skills are relevant to the task. To a remarkable degree, this book embodies the essential features of current writing about administrative law, at once revealing new trends and reflecting historic concerns.

### I. GOVERNMENT ACTION, RIGHT OR WRONG

*Suing Government* is, on the whole, a well-written book of modest length concerning the advisability of private damage suits and alternative remedies for controlling the behavior of individual government officials. Nonacademic lawyers might hesitate at this juncture. One highly respected practitioner of administrative law expressed surprise to me after glancing through the book—"I thought this was about suing government; it's a book on tort suits against officials!" Indeed, the book's focus is on individual officers.<sup>4</sup> And the bulk of the book either discusses tort actions or compares them with other remedies for official misconduct. Schuck does recognize various alternative remedies in the initial chapter, setting out his "framework for thinking about remedies."<sup>5</sup> These alternatives—including damage awards against governmental bodies, declaratory judgments, and three different types of injunctive relief—are evaluated briefly in terms of "judicial intrusiveness" into the administrative process.<sup>6</sup> But the Introduction and Chap-

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*The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978); Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526 (1977); Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, LAW & CONTEMP. PROBS., Winter 1978, at 8; Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980); Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189 (1981).

4. An earlier article by Schuck, titled *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, provides many of the central themes for this book.

5. P. SCHUCK, *supra* note 3, at 3, 13-20.

6. P. SCHUCK, *supra* note 3, at 14-23.

ter One plainly identify the behavior of individual officials as the central matter to be examined; it is not until Chapter Five, midway through the text, that Schuck turns in earnest to comparison of the alternatives to the tort suit against individual official defendants.

Unlike my practicing friend, Schuck does not talk separately of "government" and individual officers. The latter, of course, are indispensable instruments of government action. But these individuals are not mere instruments—they are the determinants of government action. The significance of Schuck's focus on individual official behavior is not that it underscores the truism that government has no existence apart from human flesh and blood, but that it reflects a newer and less widely accepted premise: that it is misleading to think about most government behavior except as the aggregate of individual conduct.<sup>7</sup> There is a tendency to anthropomorphize governmental units.<sup>8</sup> In Washington, D.C., home to much of the nation's most visible administrative practice, one frequently hears of calls or letters received from "The White House" or "State." Even outside the somewhat rarified air of Washington, references to action by agencies—things done by "the Commission" or by "the police department," for example—are ubiquitous. Those who have become acclimated to this lexicon expect "suing government" to mean taking legal action against a unit of government: a bureau, a department, a municipal corporation, at the least. Although Professor Schuck does not belabor the matter, his message is plain: if one is to understand administrative behavior, one must understand the motives and circumstances affecting the individuals whose acts are governmental.<sup>9</sup>

Drawing heavily on organization theory, Schuck recognizes that every command to government reaches the operational level as a directive to some particular person.<sup>10</sup> The consequences of the initial command depend critically on how it is translated, on the person to whom it is ultimately directed, and on how that person responds.<sup>11</sup> What may seem a proper instruction for institutional purposes may have unfortu-

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7. It is similarly misleading to look at the individual conduct aggregated into "agency action" apart from the institutional, political, and pragmatic concerns that inform and activate it. See generally Gellhorn & Robinson, *supra* note 2; Rabin, *supra* note 2.

8. See, e.g., G. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 10-38 (1971) (discussing the treatment of national governments as if each were a single individual, often called Allison's "rational actor" model).

9. See generally J. GREEN & J. LAFFONT, *INCENTIVES IN PUBLIC DECISION-MAKING* (1979); Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1133-79 (1981); Mashaw, *supra* note 3, at 26-34.

10. See P. SCHUCK, *supra* note 3, at 4-6, 130-31.

11. See *id.* at 60-99; see also Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1392-99 (1976).

nate, even disastrous, results absent clear understanding of the mechanisms by which it is translated or of the forces that shape the behavior of the final recipient.<sup>12</sup> Remedies aimed at deterring police from arresting innocents, for instance, may result in levels of arrest that society deems unacceptably low.<sup>13</sup> Regulations designed to reduce the number of "bad" drugs marketed may unduly delay or prevent marketing of beneficial drugs.<sup>14</sup> Those who would craft rules to control governmental conduct—if they are to stand any chance of producing the desired result—must examine each step between promulgation and ultimate effectuation; must evaluate the characteristics of the persons involved and the circumstances affecting their behavior; and must compare alternatives at each stage.

Schuck attempts this onerous task. His concern is not to articulate substantive rules to guide official behavior. He endeavors, instead, to trace the manner in which departures from such rules occur, and the means by which such departures can be limited or their effects redressed. At the outset, he identifies broadly the problem to be addressed as "official wrongdoing,"<sup>15</sup> by which he apparently means any act by any governmental employee that is not authorized by law. This definition goes well beyond conduct the initiating officer knows to be unlawful. It includes as well acts within the scope of an officer's assignment that are later found to be substantively invalid because they rest on a mistaken reading of his statutory or administrative instructions or because those instructions, fairly construed, would be unconstitutional.<sup>16</sup> Thus sweepingly defined, official wrongdoing is to be expected with considerable frequency, a point Schuck emphasizes. The book, indeed, starts with the assertion: "Lawbreaking is endemic to government."<sup>17</sup> Schuck further argues that more, and more modern, government means more lawbreaking.<sup>18</sup> Numerous programs, ambiguous statutory mandates, ever-multiplying and potentially conflicting administrative directives, greater numbers of employees, and increased levels of control—aspects of what Schuck calls the "activist state"—all contribute to growth in the official wrongdoing with which Schuck is concerned.

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12. See, e.g., Steiner, *Legalization of American Society: Economic Regulation*, 81 MICH. L. REV. 1285, 1291-96 (1983).

13. Cass, *supra* note 9, at 1153-54.

14. Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendment*, 81 J. POL. ECON. 1049, 1089-90 (1973).

15. P. SCHUCK, *supra* note 3, at xi.

16. *Id.* at xiv-xx.

17. *Id.* at xi.

18. See *id.* at xii-xiv.

Casting the net of official "illegality" over so wide an area has important consequences. The very breadth of the illegality concept—encompassing every mistake respecting the scope of legality of an actor's authority—underscores the notion that individual action is at the center of Schuck's inquiry. But it also complicates that inquiry, first, by inflating the number and disparity of actors whose characteristics, incentives, and environments must be examined, and, second, by making any effort to remedy illegality more problematic.

Schuck addresses the first complication in part by limiting his discussion to "street-level" officials such as police patrol officers, school teachers, welfare case workers, and investigators.<sup>19</sup> Even thus restricted, the range of official actions falling within his compass is quite large; and the variety of individual positions, temptations, and institutional and social controls among these official actors is, one would suppose, extraordinary.

Schuck does not explore any set of individual circumstances at length but rather attempts to treat all these officials as a single generic class for most purposes. He uses particular types of officials periodically as illustrations, and occasionally offers relatively abstract distinctions among officials, but he eschews more specific treatment. This approach might be defended on the ground that, however one subdivides the class of officials Schuck discusses, there will be differences within as well as between categories. Schuck's focus on the generic street-level official is thus premised on the belief that important differences in the critical determinants of official behavior cannot readily be made to fit any classifying scheme, separating police officers, say, from school teachers, or patrolmen from detectives. This view seems sensible. But the need for assimilation may prove a less than complete justification for failure to pay greater attention to particular cases, a matter I consider briefly below.

The second complication—the difficulty of devising a remedy suited to a group of official delicts that is so broad, varied, and, in many instances, of only questionable illegality—absorbs most of Schuck's attention. The book is divided into three parts. Schuck devotes much of the first part to the history of American tort litigation against government officials (including both common law and "constitutional" torts).<sup>20</sup> In the second part of the book, Schuck argues that damage suits against individual officers are inadvisable as a general policing mechanism. He discusses the personal "decisional calculus" a street-

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19. *See id.* at xvii. The term derives from M. LIPSKY, *STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* (1980).

20. *See* P. SCHUCK, *supra* note 3, at 35-53.

level government official might perform when confronted with our current system of personal liability, and details the combination of incentives to and opportunities for illegal (or at least undesirable) behavior aimed at avoiding liability. Finding individual liability problematic, Schuck urges instead the increased availability of damage remedies against governmental bodies.<sup>21</sup> Part II concludes with an explanation of what Schuck believes are the appropriate contours of government liability and a statement of the advantages of government over individual liability.

Part III sketches the movement that would take us from the current to the ideal remedial system. Schuck begins by examining the manner in which superiors could use government liability to promote greater official legality. The book's final two chapters take up the role of injunctive remedies and the steps, mainly legislative, that might bring about what Schuck believes to be the optimal remedial system. Schuck argues that the optimal system of damage actions will be unsuccessful at deterring all official wrongdoing. Injunctive relief can plug gaps left by damage remedies for government torts. Courts must be careful, however, in their use of injunctions, especially those Schuck calls "structural injunctions."<sup>22</sup> (I return to this part of Schuck's book later.) Schuck concludes that courts alone cannot bring about the ideal remedial system for governmental wrongs and that legislatures must play an important role in reforming the present system.

## II. RIGHTING WRONGS: PROBLEMS AND PROSPECTS

Putting aside the book's discussion of injunctive relief, *Suing Government* performs fairly well an interesting and difficult task. There is, inevitably, room for criticism, and no review that failed to note a few complaints would be complete. My complaints about Schuck's discussion of damage remedies and their impact on official behavior, however, do not rise much above quibble status.

The most obvious complaint illustrates this point. The discussion of the effect of damage remedies on official behavior is likely to seem terribly abstract to many readers. Despite his attempt to identify the array of considerations shaping the conduct of individual, official actors, Schuck has painted a picture of official behavior that is, at times, insufficiently clear or insufficiently deep to convey fully his message. There are several reasons for this failing, chief among them the nature of the task Schuck has undertaken. As Schuck recognizes, it is far from

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21. *Id.* at 55-121.

22. *See id.* at 150-69.

easy to analyze how individual officers will behave without a considerable body of information that is at this time unavailable.<sup>23</sup> The very difficulty of acquiring this information is one reason for the common practice of discussing bureaus as if each were an individual whose behavior was rational and consistent: the actual preferences and skills of the individual officials whose actions are critical often are unknown. If contact with a bureau is infrequent, or if bureau members behave similarly with respect to issues of interest to practitioners, the less easily acquired information about actual individuals may not be worth its cost. A stereotype, in other words, is fine so long as everyone you encounter from a given category seems to fit it.<sup>24</sup>

Those who would generalize about administrative behavior, however, cannot afford to build universal models on so slim a foundation. Unfortunately, it is difficult to gather much supporting evidence that rises above the anecdotal. (Not long ago, Roger Noll observed before a group of administrative lawyers that in the social sciences the plural of "anecdote" is "data.") Schuck's prescription for abandoning most individual tort actions, largely in favor of broadened enterprise liability, may not appeal to readers whose conceptions of administrative behavior rest on anecdotes different from those that inform Schuck's discussion.<sup>25</sup>

Although others' notions of administrative action may diverge from Schuck's notion, it is hard to fault Schuck's view as unrealistic or, given the scope of his undertaking, as insufficiently supported. Professor Schuck does not try to provide firm, empirical evidence for his conception of official behavior; he does not attempt to survey the manner in which a series of variables affects official action; nor does he intend to offer a case study of how officers at a particular agency, or engaged in a single endeavor, behave. Schuck's goal is to evaluate remedies for official misbehavior in light of the best available evidence respecting official conduct. Although his conception of "street-level" officials

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23. *See id.* at xvii-xviii.

24. *Cf.* J. ELY, *DEMOCRACY & DISTRUST* 155-56 (1980)(discussing the permissible and impermissible use of stereotypes as bases for legislative classifications).

25. *See* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); Freed, *supra* note 3; Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979); Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1965); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978); Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821 (1981); Note, *Holding Governments Strictly Liable for the Release of Dangerous Parolees*, 55 N.Y.U. L. REV. 907 (1980). All these commentators advocate expansion of personal liability for some officials.

draws on a relatively small number of secondary works,<sup>26</sup> these sources seem to provide the best available evidence of the determinants of "street-level" official behavior.

Although the nature of the venture explains most of what might be perceived as shortcomings, Schuck still bears some responsibility. His failure to develop at least some of his anecdotes more fully is not of great import, but it does interfere with understanding both what his message is and how he arrives at it. Fuller development of the references to particular officials would illuminate and guide the reader's understanding of his analysis.

Schuck may be faulted, too, for circumscribing the range of anecdotes open for consideration. The generic class of officials considered by Schuck does include those against whom a large proportion of tort suits has been filed.<sup>27</sup> But broadening his view beyond street-level officers certainly would enhance and possibly would change Schuck's analysis. The contrast between high- and low-level officials, for example, might illuminate the factors that affect individual officers' amenability to control by damage suits.<sup>28</sup> It is at least open to argument that the officers with whom *Suing Government* is exclusively concerned are those whose conduct is most difficult to control by any means.<sup>29</sup> Schuck's success in showing that individual officer damage suits are of doubtful value, therefore, may derive in part from his limited focus.

Consideration of higher-level officers also might weaken Schuck's conclusion that enterprise liability can provide a good, general solution to problems of official legality. In one sense, Schuck focuses on the

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26. Schuck largely relies on eight books and an article for empirical support respecting officials' behavior: E. BARDACH & R. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); P. BLAU, *THE DYNAMICS OF BUREAUCRACY* (2d ed. 1963); H. KAUFMAN, *THE FOREST RANGER* (1960); M. LIPSKY, *supra* note 19; A. NEIDERHOFFER, *BEHIND THE SHIELD* (1969); G. SYKES, *THE SOCIETY OF CAPTIVES* (1958); J.Q. WILSON, *THE INVESTIGATORS: MANAGING THE FBI AND NARCOTICS AGENTS* (1978); J.Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* (1968); Schuck, *The Curious Case of the Indicted Meat Inspectors*, HARPER'S, Sept. 1972, at 245.

27. See P. SCHUCK, *supra* note 3, at xvii; see also Cass, *supra* note 9, at 1151-53 & n.154, 1159; Turner, *supra* note 3, at 611-16.

There is no agreement on what factors influence official action or how closely they might correlate with official position. See, e.g., A. DOWNS, *INSIDE BUREAUCRACY* (1967); W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); Breton & Wintrobe, *The Equilibrium Size of a Budget-Maximizing Bureau: A Note on Niskanen's Theory of Bureaucracy*, 83 J. POL. ECON. 195 (1975); Cass, *supra* note 9; Epstein, *Private-Law Models for Official Immunity*, LAW & CONTEMP. PROBS., Winter 1978, at 53.

28. See Baxter, *Enterprise Liability, Public and Private*, LAW & CONTEMP. PROBS., Winter 1970, at 45, 47; Cass, *supra* note 9, at 1135-48.

29. See Cass, *supra* note 9, at 1169-71.



most difficult cases for proving the value of government liability.<sup>30</sup> Low-level officers are difficult to control, and moving from individual officer to government liability may substitute one set of bad incentives for another. Schuck's conclusion that government liability provides a greater deterrent to official illegality by low-level officials than does officer liability is not easily supported. Although I am sympathetic to this conclusion,<sup>31</sup> one must carefully compare the incentives to legality or illegality given officials under the different liability schemes.

Schuck's treatment of this issue is deficient in two respects. First, although Schuck clearly exposes the deterrence problems that accompany individual officer liability, he does not give similar extended consideration to the manner in which governmental liability is likely to—or not to—translate into incentives to “lawfulness” by specific officers. There is some general discussion of the incentives of higher ranking officials at different levels (from the Secretary of the Treasury at one end of the spectrum to a police officer's squad leader at the other).<sup>32</sup> This discussion catches nicely the difficulty of isolating the appropriate persons and practices for monitoring and affecting subordinate officials' behavior—a prerequisite to translating governmental liability into deterrence of improper individual conduct.<sup>33</sup> Part III begins with an informative exploration of ways to generate better incentives for officers.<sup>34</sup> Schuck's discussion provides insights into impediments generally inhibiting control of subordinate officers' actions and potential means of altering their incentives. But this discussion does not establish the superiority of government liability. He does not truly *compare* the monitoring mechanisms that might check “official illegality” leading to tort suits and illegality aimed at avoiding such suits under the alternative liability regimes. Nor does he describe the *likely* incentives low-level officers face under the recommended liability regime. He certainly does not address the likely impact of government liability for the acts of higher-level officers.

A second difficulty with Schuck's conclusion that government liability should replace officer liability is his ambiguous description of the government's potential liability. Schuck would use as his template for

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30. See P. SCHUCK, *supra* note 3, at 102-11.

31. See Cass, *supra* note 9, at 1174-79. The more accurate statement would be that I believe enterprise liability more likely than officer liability to approach the optimal level of deterrence. See *id.*

32. P. SCHUCK, *supra* note 3, at 106-07.

33. See Baxter, *supra* note 29, at 51-52; Cass, *supra* note 9, at 1116; Epstein, *supra* note 28, at 64-66; Masliaw, *supra* note 3, at 22-26; Slepsle, *Official Errors and Official Liability*, LAW & CONTEMP. PROBS., Winter 1978, at 35, 40-42.

34. See P. SCHUCK, *supra* note 3, at 125-46.

government liability what he calls "the compensation principle": that "government be obliged to compensate for every harmful act or omission by its agents within the scope of their employment that is tortious under applicable law."<sup>35</sup> Serious questions about how one decides whether particular official actions are tortious and exactly what decisions should trigger compensation for causally related harms remain even after Schuck elaborates the principle. As Schuck recognizes, in many instances there is no close, private analogue to governmental activity or to restraints on governmental conduct. Hence, defining what is "tortious" (not the same as "illegal") is difficult. Schuck's discussion illuminates impediments generally inhibiting control of subordinate officers' actions, and potential means of altering their incentives.

Moreover, the determination of where along a causal chain to cut off liability, a problem of not inconsiderable difficulty in "ordinary" tort law,<sup>36</sup> becomes enormously difficult when governmental action is at issue. One might prefer, as does Schuck, that the costs of *all* governmentally caused injuries be shared. No effort to redistribute the burdens that flow from the social decisionmaking process, however, can be implemented without drawing some lines around the occasions for (and amounts of) redistribution. This point would have been especially apparent if Schuck's focus had extended beyond street-level officials. Schuck's "compensation principle" would not, for instance, answer whether an incorrect presidential interpretation of the War Powers Act is a basis for compensating soldiers who are injured. Nor, if the question were answered affirmatively, would the compensation principle resolve whether families of soldiers sent overseas are eligible for compensation for their anxieties. Neither the substance of tortious conduct nor the range and measure of recovery is easily ascertained by reference to this principle. Schuck is aware of the problem but does not offer any real solutions.

One point Schuck makes clearly is that he favors greater compensation to citizens complaining of official wrongdoing. Government liability plainly is preferable on that score. This observation, along with the evidence that officer liability is capable of inducing some, while it

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35. *Id.* at 111.

36. See Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven*, 43 U. CHI. L. REV. 69 (1975); James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43 (1972); Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980); see also Rizzo & Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399 (1980); Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982) (analyzing difficulties with the standard tort concept of causation and the related issue of the degree to which liability should depend on risk creation rather than causation of injury).

deters other, bad conduct, persuades Schuck that movement toward enterprise liability would be beneficial. His broader claim, that "a reformed system of government liability promises substantial gains in all areas of remedial policy,"<sup>37</sup> however, remains unproven.

### III. THE "NEW" ADMINISTRATIVE LAW

Despite these criticisms, the first six chapters contain many interesting observations and much useful information. In large measure these seem to be linked to two aspects of Schuck's work that identify him with an emerging group of administrative law writers. The first such aspect is his concern for the particular determinants of *individual* officials' conduct. Schuck focuses on the individual as the relevant actor and on factors that might distinguish among the contexts in which administrators act. The second aspect of "new" administrative law writing is assimilation of learning from other disciplines.

In identifying the features of the bureaucratic and the external environments that he believes paradigmatic for the officials he has in mind—looking inside the "black box" that administrative agencies are to so many laymen and lawyers—Professor Schuck emphasizes an increasingly prominent facet of administrative law writing.<sup>38</sup> While the importance of "context" has always been recognized by sophisticated administrative lawyers,<sup>39</sup> it was downplayed by administrative law scholars for forty years. The early writings of Ernst Freund and Felix Frankfurter, for example, emphasized the functions performed by various administrators.<sup>40</sup> The first widely used casebook in administrative law, by Frankfurter and Forrester Davison, divided administrative action by function, looking separately, for instance, at trade regulation, administration of worker's compensation schemes, postal regulation, and control of public lands.<sup>41</sup> Between 1932, when this casebook was published, and 1974, when Glen Robinson and Ernest Gellhorn's *The*

37. P. SCHUCK, *supra* note 3, at 123; *see also id.* at 56.

38. *See, e.g.,* Gellhorn & Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201 (1981); Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973); Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 1981 DUKE L.J. 181, 195-201; Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169 (1978); Stewart, *supra* note 1.

39. *E.g.,* Frankfurter, *supra* note 1; Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976); Jaffe, *supra* note 38.

40. *See* E. FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* 104-210, 303-577 (1928); Frankfurter, *supra* note 1, at 619-20.

41. F. FRANKFURTER & J. DAVISON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* vii-viii, 685-1147 (1932). This approach was carried forward into the second, considerably shorter edition, F. FRANKFURTER & J. DAVISON, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* 409-636 (2d ed. 1935).

*Administrative Process*<sup>42</sup> appeared, no new casebook adopted a functional approach.<sup>43</sup>

Beginning in 1940 with the publication of the first edition of Walter Gellhorn's casebook,<sup>44</sup> administrative law has been taught and written about from a "general process" perspective, emphasizing the development of procedures that can be applied to all administrative decisionmaking, by and large without special attention to the substance of the agency's mission, the source of its mandate, or the nature of its personnel.<sup>45</sup> The general process school gave administrative law its own argot and identity, separate from the sub-fields of banking, taxation, labor, and so on; this school still dominates the field (Walter Gellhorn's book, now Gellhorn, Byse, and Strauss, is in its seventh edition and remains the best-seller in its field).<sup>46</sup>

The dominance, however, is not so pronounced as it was only a decade ago. Two of the last four casebooks on the subject rebelled against the general process approach,<sup>47</sup> and much recent commentary reveals dissatisfaction with it.<sup>48</sup> The increasing rejection of the general process viewpoint is connected to, but not synonymous with, careful attention to individual administrators' behavior. At times, writers who might be characterized as "functionalists" are content simply to sepa-

42. See G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* (1974).

43. See generally Gellhorn & Robinson, *supra* note 2, at 771-73 (discussing intervening history of administrative law writing); Rabin, *supra* note 2, at 121-27. During this period, notable casebooks were produced by Walter Gellhorn, later joined by Clark Byse; the sixth edition was in print in 1974: W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (6th ed. 1974); by Kenneth Culp Davis, beginning in 1951 and into its fifth edition in 1973, K.C. DAVIS, *ADMINISTRATIVE LAW: CASES, TEXT, PROBLEMS* (5th ed. 1973); K.C. DAVIS, *CASES ON ADMINISTRATIVE LAW* (1951); and by Louis Jaffe and Nat Nathanson, who had their third edition in print before Robinson and Gellhorn appeared and a fourth edition soon thereafter. See L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW: CASES AND MATERIALS* (3d ed. 1968), (4th ed. 1976).

44. W. GELLHORN, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (1940).

45. See generally Gellhorn & Robinson, *supra* note 2; Rabin, *supra* note 2; Verkuil, *supra* note 1.

46. Gellhorn & Robinson, *supra* note 2, at 771-74, 783-86; Rabin, *supra* note 2, at 121-27; Verkuil, *supra* note 1, at 261-93.

47. S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* (1978); G. ROBINSON & E. GELLHORN, *supra* note 42 [now G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* (2d ed. 1980)]. In addition, a third casebook sets out in its preface many of the concerns with the more traditional general process approach that informed other efforts to move away from that perspective. See J. MASHAW & R. MERRILL, *AN INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM xvii-xxii* (1975).

48. See, e.g., Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981); Gellhorn & Robinson, *supra* note 2; Mashaw, *Administrative Due Process as Social-Cost Accounting*, 9 HOFSTRA L. REV. 1423 (1981); Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980); Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305 (1972); Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976).

rate agencies one from another, rather than to scrutinize the circumstances that affect particular officials' actions.<sup>49</sup> But any increased attention to context moves one in the direction of inquiring about the forces affecting the particular decision at issue.

A second body of literature, integrating social science with law, gives additional impetus to the focus on individual actors. Writings in the "law and economics" genre are especially noteworthy for their insistent "micro" focus.<sup>50</sup> Macroeconomics notwithstanding, for nearly all economists the individual seems the natural unit of measure.<sup>51</sup> Practitioners of the other social sciences as well—political science, philosophy, sociology, psychology—examine individual activity more than has been administrative lawyers' wont.<sup>52</sup>

Increasingly, however, administrative law writings reflect the influence of the social sciences, even as individuals trained in these fields pay greater attention to matters lawyers may believe lie peculiarly within their ken.<sup>53</sup> It is no longer uncommon to see administrative lawyers citing economists or political scientists, structuring arguments in similar fashion,<sup>54</sup> or even (heaven forbid) writing pieces *with* these practitioners of black arts.<sup>55</sup> All of this has the salutary effect of expanding the range of analyses and anecdotes that inform administrative law. Although law-and-social science in gross has had a cyclic life,<sup>56</sup> administrative law-and-social science seems more vital now than at any other time.

49. See, e.g., Gellhorn & Robinson, *supra* note 2, at 783-87.

50. This seems to be a point of agreement among advocates and opponents alike. See, e.g., Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics,"* 33 J. LEGAL EDUC. 274, 276-77 (1983); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

51. See, e.g., Amacher, Tollison & Willett, *The Economic Approach to Social Policy Questions: Some Methodological Perspectives*, in *THE ECONOMIC APPROACH TO PUBLIC POLICY* 18, 19 (B. Amacher, R. Tollison & T. Willett eds. 1976).

52. See, e.g., S. BRAMS & P. FISHBURN, *APPROVAL VOTING* (1983); R. LUCE, *INDIVIDUAL CHOICE BEHAVIOR: A THEORETICAL ANALYSIS* (1959).

53. See, e.g., E. BARDACH & R. KAGAN, *supra* note 26; M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981); Fiorina & Noll, *Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector*, 68 AMER. ECON. REV., May 1978, at 256 (Papers & Proceedings); Fiorina & Noll, *Voters, Bureaucrats and Legislators: A Rational Choice Perspective on the Growth of Bureaucracy*, 9 J. PUB. ECON. 239 (1978).

54. See, e.g., Cass, *supra* note 9, at 1133-59; Diver, *supra* note 48, at 395-401; Mashaw, *supra* note 9, at 1430-51; Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC and the Courts*, 88 YALE L.J. 717, 717-26 (1979).

55. See, e.g., Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Levine & Plott, *Agenda Influence and its Implications*, 63 VA. L. REV. 561 (1977).

56. See, e.g., Dawson, *Legal Realism and Legal Scholarship*, 33 J. LEGAL EDUC. 406, 411 (1983); Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195, 198 (1981); Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 458, 462 (1980).

In this regard Peter Schuck's book reflects current trends in writing about administrative law. Schuck's analysis plainly is influenced by writings in tort law that draw principally upon concepts associated with economics (the seminal works for this body are by Ronald Coase, an economist, and Guido Calabresi, a lawyer trained in economics).<sup>57</sup> Schuck discusses concepts such as risk-aversion and bounded rationality that originated with economists and psychologists;<sup>58</sup> he cites extensively to writers identified with the fields of public administration and business administration, whose works now have received the title "organization theory."<sup>59</sup>

The impact of these allied fields is, in some respects, more easily discerned in an author's patois than in his principles. So it is here. Whether one talks in terms of an official's "decisional calculus," as Schuck does, or of his "reasoning," as an earlier generation of scholars did, makes little difference. Similar is Schuck's call for courts, before issuing injunctions, to engage in "implementation analysis"—an inquiry into "the fiscal, bureaucratic, political, informational, and other barriers that the proposed decree would have to overcome; the steps that would be necessary to surmount them; the magnitude and distribution of the costs of doing so; and the effects of alternative, less intrusive remedies."<sup>60</sup> It is difficult to believe that courts following Schuck's advice in this regard would act any differently. The inquiries, beyond substantive legality, are now "how will it work?" and "what measures will be useful in place of or in addition to the contemplated remedy?"<sup>61</sup> As in the current flirtation with "cost-benefit" analysis, the change in language to "implementation analysis" does not alter the nature of the balancing process, remove the difficulties of valuation and comparison, or facilitate agreement on underlying goals.<sup>62</sup> Such lexical choices may

57. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); see P. SCHUCK, *supra* note 3, at 16-20, 82-99.

58. See, e.g., P. SCHUCK, *supra* note 3, at 59-81. A useful synthesis of this literature is contained in Marchi, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, 9 BELL J. ECON. 587 (1978).

59. See P. SCHUCK, *supra* note 3, at 56-69, 125-46. These works are discussed more fully in Schuck, *Organization Theory and the Teaching of Administrative Law*, 33 J. LEGAL EDUC. 13 (1983).

60. P. SCHUCK, *supra* note 3, at 188.

61. See, e.g., *Watt v. Stickney*, 325 F. Supp. 781, 785-86 (M.D. Ala. 1971), *aff'd in part sub nom. Watt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Holt v. Sarver*, 300 F. Supp. 825, 833-34 (E.D. Ark. 1969), *aff'd*, 442 F.2d 304, 309 (8th Cir. 1971); see also Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 472-73 (1980).

62. See, e.g., Kennedy, *Cost-Benefit Analysis of Entitlement Programs: A Critique*, 33 STAN. L. REV. 387 (1981); Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFFAIRS 66

in some circumstances affect the selection of decisionmakers<sup>63</sup> or serve as shorthand for a change in the goals pursued. Some argots are, after all, identified with particular viewpoints, as much of the controversy over "economic analysis" (as though that were a unitary instrument of a monolithic discipline) illustrates.<sup>64</sup> But semantics rarely control substance in these matters.

It is not clear whether Schuck would indeed change the manner in which courts decide what remedy to adopt. Any change would come not from the switch to "implementation analysis" but from the process that Schuck urges accompany it. He recommends that courts employ independent analysts to prepare such analyses and then "subject the analyses to adversary proceedings."<sup>65</sup> Who these analysts would be, what data they would produce, how the data would be tested by adversary proceedings, and what role judges would play in this process are left to the reader's conjecture.

If Schuck is guilty of substituting new language for old, rather than the more heinous crime of using loose phrases in place of tight thoughts, he should not be taken to task severely. The infusion of social science into law does seem principally to have resulted in just such changes of language. It is unfortunate that the substitution makes academic writing less accessible to practitioners. This obvious cost, however, is easily overstated and a correlative benefit often overlooked. Insofar as it is possible to express thoughts in social science terms, in terms familiar to lawyers, or in lay language, legal academics conversant with these languages can tailor their expression to their intended audience. In writing to a specialized audience, the initiated can use a specialized dialect that often saves time and energy explaining concepts that already are captured in a term of art.<sup>66</sup>

More important, the semantic change is *not* social science's sole contribution to legal scholarship. While other terms might convey Professor Schuck's meaning, and while familiarity with social science writ-

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(1972); Wildavsky, *The Political Economy of Efficiency: Cost-Benefit Analysis, Systems Analysis, and Program Budgeting*, 26 PUB. AD. REV. 292 (1966).

63. In a 1978 article, former FCC Commissioner Glen Robinson detailed the FCC's aversion to quantitative analysis or even careful comparison of costs and benefits and noted the, not coincidental, composition of the agency's staff, then overwhelmingly trained in law with almost no staff trained in economics. See Robinson, *supra* note 39, at 218-19, 223-24, 236-43. The FCC did later secure more economics-trained staff and also engaged in explicit cost-benefit analysis. See, e.g., *Cable Television Syndicated Exclusivity Rules*, 79 F.C.C.2d 663 (1980).

64. See, e.g., Hansmann, *The Current State of Law-and-Economics Scholarship*, 33 J. LEGAL EDUC. 217 (1983); Williamson, *Intellectual Foundations: The Need for a Broader View*, 33 J. LEGAL EDUC. 210 (1983).

65. P. SCHUCK, *supra* note 3, at 188.

66. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 20-21 (2d ed. 1970).

ings is not a prerequisite to the insights he offers, I do not want to understate the contribution social science has made to *Suing Government* or to other academic works. The book's sensitivity to ways in which members of an organization can affect one another's behavior, to the mechanisms and difficulties of control within organizations, and to the capacities of influence to flow up (or sideways) as well as down an organizational hierarchy is undoubtedly a product of Schuck's exposure to writings on organization, bureaucracy, and theories of the firm that remain largely outside mainstream legal thinking, writing, and teaching.<sup>67</sup> The deficiencies of judicial decisionmaking Schuck describes may result from judges' inattention to just these matters.<sup>68</sup> One can, of course, overestimate the contribution of organization theory<sup>69</sup> or economics, but much of what seems to me the most cogent analysis in administrative law has been informed by these disciplines. If law is after all a battle between competing analogies, it cannot hurt to have a greater stock of analogies at hand.

#### IV. RETAINED LEARNINGS: JUDICIAL PROCESS AND LEGAL PROCESS

*Suing Government*, with its concern for individual incentives and its social science connection, can be classified easily as part of the "new" administrative law. But it also reveals the degree to which old concepts and concerns continue to affect this field. Two essential attributes of this older tradition—one a matter of focus, the other a matter of method—can be discerned in Schuck's work. First, despite the effort to look inside the black box of agency operation, the judiciary provides the prism through which he views the field. The book is not primarily about control mechanisms within the government, but about law suits. Much of the text is devoted to explaining past judicial action, evaluating the role and limits of judicial intervention, and prescribing the appropriate method of judicial decisionmaking.<sup>70</sup>

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67. See generally A. DOWNS, *INSIDE BUREAUCRACY* (1965); H. SIMON, *ADMINISTRATIVE BEHAVIOR* (3d ed. 1976); Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Lindblom, *The Science of "Muddling Through,"* 19 PUB. AD. REV. 79 (1959).

68. See P. SCHUCK, *supra* note 3, at 82-99; see also Cass, *supra* note 9, at 1151-74; Mashaw, *supra* note 3, at 24-25.

69. Despite the occasional encomium of organization theory, see, e.g., Schuck, *supra* note 59, at 13, this field may have more Downs than it has ups. See Mashaw, *Mirrored Ambivalence: A Sometimes Curmudgeonly Comment on the Relationship between Organization Theory and Administrative Law*, 33 J. LEGAL EDUC. 24 (1983).

70. See especially P. SCHUCK, *supra* note 3, at 29-53, 157-81 (focusing almost exclusively on judicial role).



Administrative law scholars and teachers have been chided for their overly judicial orientation.<sup>71</sup> Professors Robinson and Gellhorn capture the essential objection in their declaration that "experienced observers of the bureaucratic scene will agree that the work of administrative agencies is only randomly, and for the most part ephemerally, touched by judicial decisions."<sup>72</sup> Yet we who have been professionally weaned on judicial opinions cannot freely abandon our concern with courts. Even those who recognize the danger of seeing the world of administrative action with judicial blinders have had difficulty escaping the gravitational pull of courts.<sup>73</sup>

The second attribute of older scholarship in Schuck's work, far more significant than the mere fact of his concern with courts, is reflected in the way Schuck addresses judicial control. Part III of the book is devoted largely to a discussion of what judicially administered remedies for official misconduct are appropriate. This discussion in part addresses the issue as a problem of optimizing substantive social goals; the difficulty of harmonizing the goal of full deterrence of official misconduct with other social goals is one of Schuck's themes in this portion of the book. But these are not Schuck's only concerns. He places the issue in a more traditional framework: analyzing what respective roles legitimately may be assigned to courts, agencies, and legislatures.

One indication of the evolution of administrative law courses is the dramatic reduction of the time professors spend evaluating the constitutionality of broad delegations of authority to administrators and of insulating at least some facets of administrators' decisions from judicial review.<sup>74</sup> This change reflects the fact that "black letter" law in these areas has become fairly well settled.<sup>75</sup> The evolution also represents an increasing commitment to focusing on issues peculiar to administrative

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71. See J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 1-11 (1983)(making choice of "internal" over "external" law); Rabin, *supra* note 2, at 127-28; Strauss, *supra* note 2, at 8.

72. Gellhorn & Robinson, *supra* note 2, at 780 (footnote omitted)(observing, more piquantly, that "the rules governing judicial review have no more substance at the core than a seedless grape," providing another reason why non-oenophiles might eschew the judicial orientation to administrative law).

73. See, e.g., Gellhorn & Robinson, *supra* note 38, at 201-15 (debating, in large measure, the merits of three opinions from the United States Court of Appeals for the District of Columbia Circuit); see also Mashaw, *supra* note 38, at 202-10.

74. See Rabin, *supra* note 2, at 123-26.

75. Notwithstanding the efforts of Justice Rehnquist to resurrect the doctrine, see *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980)(Rehnquist, J., concurring), no federal statute has been invalidated on delegation grounds since 1935, and "jurisdictional fact" cases also have long since disappeared. See, e.g., Rabin, *supra* note 2, at 133.

agencies, leaving to other courses (constitutional law and federal courts in particular) extensive exploration of these issues. The overlap has not been wholly eliminated: in the areas of due process and justiciability, administrative law continues to duplicate the efforts of these other fields.<sup>76</sup> But the divergence of administrative law from the inquiries and analyses one encounters in other areas has increased considerably since the days when *Crowell v. Benson*<sup>77</sup> and *Ben Avon Borough*<sup>78</sup> were thought central to administrative law.<sup>79</sup>

While administrative lawyers generally have deemphasized the issues explored in the now-discarded constitutional-jurisdictional cases—the “legitimacy” of agency action in a democratic system and (the other side of the same jurisprudential coin) of judicial controls over the other branches of government—these concerns have continued to be a focal point for writers in the “legal process” school. The hallmark of this group of scholars has been a philosophical, contrapuntal approach, perpetually refining the tension between personal moral values and acceptance of democratic decisional processes.<sup>80</sup> Although predominantly associated with constitutional law, legal process scholars’ writings have influenced and continue to influence those of administrative law. In part, their influence derives from the relevance of the broader issues the legal process writers address; their concerns are important to the uneasy relationship between courts and agencies, still a central, if diminished, element of administrative law. In part, the elegance of some of the legal process writers gives their work extraterritorial reach. The legal process approach does not, however, fit easily with the more practical and individual-oriented approach of newer administrative law.

*Suing Government* attempts to graft the delicate legal process flower onto the rough stock of factual inquiry into individual behavior.<sup>81</sup> Schuck is unusual in combining so clear an acceptance of the legal process approach with an equally plain desire to incorporate the critical aspects of newer administrative law scholarship.

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76. See, e.g., Strauss, *supra* note 2, at 7 (discussing Henry Monaghan’s critique, from the vantage point of a constitutional lawyer, of an administrative lawyer’s approach to due process).

77. 285 U.S. 22 (1932).

78. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

79. Compare Symposium, *Administrative Law*, 47 *YALE L.J.* 515 (1938) (emphasizing limitations on administrative discretion) with Symposium, *Administrative Law in the ‘80’s*, 33 *J. LEGAL EDUC.* 1 (1983) (emphasizing the application of organization theory to structure the nearly limitless discretion administrative agencies exercise).

80. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); see also Vetter, *Postwar Legal Scholarship on Judicial Decisionmaking*, 33 *J. LEGAL EDUC.* 412 (1983); Weisberg, *The Calabresian Judicial Artist: Statutes in the New Legal Process*, 35 *STAN. L. REV.* 213 (1983).

81. See P. SCHUCK, *supra* note 3, at 29-34, 133-34, 163-86.

The effort to make this marriage work is heroic, but ultimately detracts from the stronger portion of Schuck's book. Although Schuck displays awareness of the complex problems of internal control critical to bureaucratic functioning, his discussion of the legitimacy problem reflects a more abstract view of judicial and administrative decision-making. His concern is more with courts than administrators—and in the main this discussion refers to *courts*, not *judges*; indeed, it is ironic that Schuck often treats courts as institutional "black boxes."<sup>82</sup> Moreover, the portions of the book that address the judicial role most explicitly are written (and, one feels, reasoned) at a level of abstraction that obscures the message Schuck wants to convey, and this abstraction omits from consideration the critical *individual* determinants that shape the interplay of official and judicial decisionmaking.

Although Schuck's views on the relationship of courts and agencies are not easily discerned, the opening paragraph of Part I of *Suing Government* appears to establish the framework for his later discussion of the judicial role: "If the rule of law means anything, it means that in our political household, public servants are bound by the constitutional, statutory, and other rules that citizen masters have adopted to guide their affairs. . . . Courts should enforce these obligations."<sup>83</sup> This passage incorporates two notions that run throughout the book. One is that certain standards governing official conduct exist independent of remedies for their violation. The second is that courts are the natural guardians of these standards. To his credit, Schuck quickly announces, and periodically reiterates, that these two notions need considerable qualification. He recognizes that the standards governing official conduct may be uncertain and that their definition may prove onerous. He acknowledges that the problems of rights definition and remedial implementation are related.<sup>84</sup> And he admits candidly that there are barriers to judicial enforcement of standards against administrative officers. Yet, despite these caveats, Schuck seems comfortable with these two basic notions. Each reappears in his discussion at regular intervals.

The separation of rights from remedies, although admittedly problematic, is a recurrent theme:

[T]he truth of the matter is that rights and remedies are utterly different legal phenomena—products of distinct reasoning processes em-

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82. Schuck does observe that "a remedy can shape *official* behavior only by first affecting *judicial* behavior," *id.* at 14 (emphasis in original), but he does not look at what motivates judges or at how they make decisions.

83. P. SCHUCK, *supra* note 3, at 1.

84. *Id.* at 186-88.

ploying distinct sources, methodologies, and decision criteria. Conceptions of justice that deny this disjunction are likely to be deeply flawed . . . .

Although certain theories of law sometimes conceive of rights as nothing more than the contingent balancing of utilities in the pursuit of economic efficiency, it is doubtful that many courts or citizens think of them that way. Most public law rights are instead conceived in abstract aspiration; they are expressed in the uncompromising, unconditional language of absolute entitlement, a visionary vocabulary purified of limiting, qualifying, or prudential impurities. . . . Rights preoccupy a Don Quixote; remedies are the work of a Sancho Panza.<sup>85</sup>

Schuck says that “[i]n an ideal world, the distinction between right and remedy would have no significance.”<sup>86</sup> He does not explain why this distinction has analytical significance in the present, imperfect world, especially for discussion of official delicts.<sup>87</sup> A division between rights and remedies may be useful in other contexts, as where our federal system allows one sovereign’s remedies to determine implementation of another sovereign’s rights.<sup>88</sup> But in the context of a unitary legal system that articulates remedy and right alike, which in general describes actions against officials, the utility of this distinction is dubious. It may aid discussion of some matters, but these matters do not seem at issue in Schuck’s book.

Rather than justifying the division of rights and remedies, Schuck attempts to show that this is the common view, that rights and remedies are distinct matters. For support he points to the fact that many social and commercial transactions occur in the absence of a legal remedy that seems suitably inexpensive in relation to the matter at issue.<sup>89</sup> This example does not support the point that legal rights are creations independent of legal remedies. Plainly a variety of considerations

85. *Id.* at 26-27 (footnote omitted).

86. *Id.* at 25.

87. There is a lively debate in academia respecting the appropriate normative basis for discussion of legal rules. Some commentators espouse utilitarian premises, while others argue that rules must be derived from norms exogenous to summed individual utilities. An ample representation of these views can be gleaned from NOMOS XXIV, ETHICS, ECONOMICS, AND THE LAW (J. Pennock & J. Chapman eds. 1982); Symposium, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980). Schuck may wish to align himself with a diverse group of advocates of nonutilitarian perspectives, collectively referred to as “rights theorists,” who generally adopt the view that one must conceive of “rights” independent of trade-offs among individual, self-interested preferences. The rights-based approach to law, however, does not require a separation of rights from remedies; it seeks to articulate a coherent approach to both the articulation and application of legal rules. See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

88. See, e.g., P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 691-755 (2d ed. 1973).

89. P. SCHUCK, *supra* note 3, at 25-26.

outside the formal legal system influence behavior.<sup>90</sup> But it is misleading to think of them as extra-legal remedies to effectuate legal rights. They are de facto remedies for de facto rights that may or may not resemble legal rights. Insofar as the rights defined in our legal system affect "consensual" social and commercial intercourse, that effect cannot sensibly be attributed wholly to the *declaration* of rights by legal rulemakers. Indeed, one may question whether the existence and level of that effect can be ascertained with any confidence.<sup>91</sup>

One senses that Schuck's division of rights from remedies follows simply from his concept of right, although he nowhere states clearly what he intends by that term. He does not seem to have the Hohfeldian definition in mind, but rather some looser definition of "right." It is common to speak of rights in terms broader than we are willing to put into effect. The problem with such speech, of course, is that it is misleading: the "right" is not what it seems to be but rather something less, and we choose to make it less because the cost to us in infringement of other "rights" or in tangible resources is in the end deemed greater than the benefit to be derived from according the right at issue its fully inflated due.<sup>92</sup>

The impression that the division of rights from remedies simply reflects hyperbole in the definition of rights is bolstered by Schuck's description of constitutional guarantees. He observes that "[s]ubjecting an interest to constitutional protection sometimes is a way of saying that it ought to be treated as if it were priceless—that we do not wish to allow government to take it, or compel citizens to relinquish it, at *any* price."<sup>93</sup> He supports the latter point by referring to an argument that there is a cost to putting explicit prices on certain rights.<sup>94</sup> True as this is, the effectuation of a right requires a price of some sort to be put on it—the remedy determines that price and, in turn, defines the right. Schuck, within one page of declaring them priceless, recommends a liquidated damage penalty for the violation of these "nonmonetizable" rights.<sup>95</sup>

Schuck's second basic notion, that courts are natural guardians of rights, accords with his view that rights and remedies are different. The

90. See, e.g., Coase, *supra* note 57, at 2 (pricing system).

91. See, e.g., Cass & Henderson, Legal Choice and Social Change (Nov. 1983 unpublished)(copy on file with author); Epstein, *Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982).

92. Cf. Hansmann, *supra* note 64, at 220-21 (discussion of transaction costs of suits).

93. P. SCHUCK, *supra* note 3, at 116 (emphasis in original).

94. *Id.* at 116-17; see G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 32 (1978); see also Kennedy, *supra* note 62, at 415-19.

95. P. SCHUCK, *supra* note 3, at 117.

combination allows Schuck to accept the legal process learning that courts have a special role to play in legitimating public policies<sup>96</sup> but are able to do so only within a circumscribed compass. Recapitulating the Bickelian argument, Schuck notes that judicial ability to remedy derelictions depends ultimately on courts' moral suasion, a resource that needs husbanding.<sup>97</sup> Damage remedies are crude instruments for effecting changes in bureaucratic behavior, and supplementary measures often may be necessary if the desired level of official legality is to be achieved. But other remedies deplete the courts' stature as moral legitimators of social choice.

Although early in the book Schuck identifies four discrete, alternative, judicial remedies that might be used as complements to or substitutes for damage awards, his discussion of the judicial role is almost exclusively concerned with one alternative, the "structural injunction." (This choice, explained in summary fashion, derives from the "prominence and significance" of the remedy.<sup>98</sup> Without explanation, Schuck also seems to shift his focus of the wrongs to be remedied, from mostly nonconstitutional official torts to constitutional delicts.) Schuck convincingly makes the case that structural injunctions—"broad order[s] seeking to transform the behavior of public bureaucracies"<sup>99</sup>—place a special strain on this judicial resource, particularly in areas where government plays an ongoing, managerial role, such as in maintenance of schools, prisons, or mental institutions.<sup>100</sup> The structural injunction, moreover, is difficult to make effective.<sup>101</sup>

Yet, finding both damage remedies and their alternative imperfect does not convince Schuck that courts should be put to one side as ineffective and imprudent enforcers of certain (unspecified) rights. Like the proponents of requisite judicial review on matters of "constitutional fact" or "jurisdictional fact" in an earlier era, Schuck believes that the special legitimacy of judicial pronouncements precludes commitment of decisions about official illegality wholly to the political branches. Unlike lawyers who argued for *de novo* judicial review of matters that set the bounds of administrative authority, Schuck's concerns for legitimacy are not easily accommodated by any procedural device. His understanding of the difficulty of altering bureaucratic behavior, and his view of the need to conserve the courts' moral stature, make it harder

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96. *Id.* at 156.

97. *See id.* at 164-69.

98. *See id.* at 151.

99. *Id.* at 147.

100. *See id.* at 154-69.

101. *See Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 99-103 (1979).

for him to separate judicial from administrative control over official action.

Unable to articulate any simple solution to the tension between what he wishes courts could do and what he perceives courts can do, Schuck ultimately advocates not a process but a perspective. He suggests that we should see courts, along with the other branches of government, as players in what might be termed a "marketplace of ideals."<sup>102</sup> Courts should be the principal, but not exclusive, promoters of ideals (remember, this is the stuff rights are made of). Congress also can play a role in rights creation, but it is especially well-situated, Schuck says, to help implement remedies. Moreover, it is important for Congress to encourage official legality so that courts will not be unduly burdened.<sup>103</sup>

Schuck's discomfort in assigning specific, discrete jobs to courts, legislatures, and agencies in identifying and inducing appropriate bureaucratic behavior is reflected in the language he employs. Addressing the appropriateness of injunctive relief directing agency compliance with judicially identified constitutional mandates, Schuck tells readers:

The truest measure of constitutional meaning lies in the magnitude of the gap that we are prepared to tolerate between our ideals and our reality. The former are mediated, articulated, and legitimated principally by courts, and the latter chiefly by our political agents. When principle and practice, conscience and consensus, aspiration and actuality clash, then and only then is our willingness to act upon our ideals fully tested and our collective morality made truly manifest.<sup>104</sup>

The tone of Schuck's essay on the legitimate roles of courts and agencies contrasts with the crispness of his description and dissection of the courts' decisions on official liability and the richness of his discussion of bureaucratic behavior. Here, in his reliance on constitutional law, far more than in passages that lean on social science, there seems to be a language barrier that readers may find difficult to surmount. One can conclude either that Schuck is more adept at the practical issues on which he focuses in the first six chapters, or that the newer directions in administrative law facilitate clear thinking and writing more than older administrative law concerns. My guess is that both explanations are correct.

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102. See P. SCHUCK, *supra* note 3, at 178-81.

103. See *id.* at 197-98.

104. *Id.* at 176.

## V. CONCLUSION

There are many reasons to recommend *Suing Government*. Schuck's discussion of the problem of official illegality does more than highlight a matter of current interest to practitioners and academics. It contains important insights and adopts an approach to administrative law that is promising. Identifying individual officials' incentives as critical determinants of government action and attempting to examine the sources and structures of those incentives in a single (generically defined) context are significant advances over most administrative law writing. The book's arguments are not always so fully developed or carefully constructed as one might hope, but Schuck elaborates a remarkable array of concerns and displays an uncommon sensitivity to the difficulties of harmonizing them. Although its tone and language indicate that much of the book is intended more for consumption by academics than by lay audiences, most of its suggestions seem eminently sensible. The judicial legitimacy-legal process discourse departs and detracts from the book's main focus. This is unfortunate, but it does not impair the value of the greater part of Schuck's undertaking.

Finally, *Suing Government* gives evidence of both the continuity and the change in thinking and writing about administrative law. The work is animated by belief that the agencies of government, which regulate so much of modern life, "must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain." Those words are not from Peter Schuck's 1983 book but from Senator Elihu Root's 1916 address to the American Bar Association.<sup>105</sup> Schuck's instinct for control over government seems as strong as Senator Root's. Schuck, however, tempers this historic instinct with the less intuitive but equally valuable understanding of the difficulty of effecting that control. This difficulty seems obvious, yet the message is not easily accepted nor its import readily grasped. Schuck is at once an uneasy and effective messenger. For both reasons, he should be heard.

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105. *Presidential Address*, REP. A.B.A. 355, 369 (1916).



