

## Theory to Practice

### Response to Commentators

#### Article

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### Reinventing Administrative Prescriptions: The Case for Democratic-Constitutional Impact Statements and Scorecards

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**M**essrs. John Kamensky, David Ammons, and Carl Stenberg are unenthusiastic about the democratic-constitutional impact statements and scorecards proposed in my article, "Reinventing Administrative Prescriptions." This is disappointing, though predictable, because contemporary public administration and reform movements rest on utilitarian (benefit-cost) and instrumental (cost-effectiveness) reasoning and values, whereas U.S. constitutionalism is informed by contractarian theory. The two approaches differ radically and often clash.

Contractarianism—the basis of my case for democratic-constitutional impact statements and scorecards—places much more importance on individual rights, constitutional integrity, transparency, the rule of law, and similar values than it does on traditional administrative concerns with efficiency, economy, and organizational effectiveness. My position is that because the Constitution

is the "supreme Law of the Land" (Article VI, clause 2), its contractarian theoretical base generally trumps utilitarian/instrumental values proffered by contemporary public administration. Before addressing several of the commentators' major arguments, I frame the difference in perspectives within a larger theoretical context. I will conclude by submitting that the commentaries make the urgency of my call for democratic-constitutional impact statements and scorecards all the more apparent.

#### **Constitutional Contractarianism versus Public Administrative Utilitarianism and Instrumentalism**

Constitutional law abounds with judicial decisions admonishing public administrators and elected officials to adhere to contractarianism even though it requires sacrificing efficiency, economy, and administrative effectiveness. The passage from *Immigration and Naturalization Service v. Chadha* (462 U.S. 919, 959 [1983]) quoted in my article makes

the point. The Supreme Court's language in *Stanley v. Illinois* (405 U.S. 645, 656 [1972]) is even more pertinent: "The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Hamilton v. Love* (328 F. Supp. 1182, 1194 [1971]) is probably the slam dunk of contractarian judicial reasoning: "Inadequate resources can *never* be an adequate justification for the state's depriving *any* person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons" (emphases added). The Fifth Amendment's "takings clause" provides property rights with similar contractarian constitutional protection. If government cannot pay just compensation for someone's land, then it cannot take it regardless of how great the public benefit might be.

In practice, contractarianism is not absolutist. Individual rights can be abridged when government meets specific constitutional tests such as pursuing compelling governmental interests by means that restrict those rights least or are narrowly tailored to avoid excessive infringement on them. Procedural due process takes account of the additional costs government might incur by increasing procedural safeguards to reduce erroneous deprivations of an individual's liberty or property. The Fourth Amendment protects only against "unreasonable" searches and seizures. Constitutional integrity regarding the separation of powers is compromised by

Congress's and the federal courts' failure to adhere to the "intelligible principle" doctrine regarding delegations of legislative authority to administrative agencies (*J.W. Hampton Jr. & Co. v. U.S.*, 276 U.S. 394 [1928]). Consider, to date, that the affront to the rule of law presented by President George W. Bush's signing statements remains unchecked. Similarly, transparency suffers from nonenforcement of the receipts and expenditures clause in the realm of national security (see *U.S. v. Richardson*, 418 U.S. 166 [1974]). Overall, however, contractarianism downgrades—and sometimes even dismisses—typical public administrative values such as efficiency, cost-effectiveness, and convenience.

Federal administrative law advances democratic-constitutionalism by mandating administrative procedures for transparency, fairness, protecting the rule of law, and promoting public participation and stakeholder representation in administrative rulemaking and policy agenda setting. It is also contractarian in some respects. Senator Pat McCarran (D-NV) explained that the Administrative Procedure Act of 1946, which he sponsored, is "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government" (U.S. Congress 1946, 2190). He also noted the legislative sentiment that the act "must reasonably protect private parties even at the risk of some incidental or possible inconvenience to, or change in, present administrative operations" (U.S. Congress 1946, 2150).

The utilitarian and instrumental concerns expressed by Kamensky, as well as Ammons and Stenberg, are largely beside the point from a contractarian perspective. The purpose of the proposed democratic-constitutional impact statements and scorecards

is to protect individual rights, constitutional integrity, transparency, and the rule of law. Criticisms that these impact statements and scorecards will be cumbersome, costly, and difficult to implement are as irrelevant to their potential desirability as similar complaints would be regarding the First, Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution. All one has to do is read the *Chadha* decision to recognize that arguments based on utilitarian/instrumental values and those based on contractarian ones do not engage each other. With this theoretical framework in mind, I turn to some specifics in the commentaries on my article.

### **Prospective or Retrospective Protection of Democratic-Constitutional Values?**

Ammons and Stenberg contend that democratic-constitutional impact statements and scorecards are unnecessary because "the constitutional system of checks and balances is working," as evidenced by the fact (if it is one) that "time after time, the cases cited by [me] led to federal court declarations or other interventions halting abuses." That the system is working does not mean improvement is impossible or undesirable. It would be better if fewer abuses occurred in the first place. My contention, elaborated in the article, is that the proposed impact statements could alert us to obvious threats to individual rights, constitutional integrity, transparency, and the rule of law contained in prescriptions for significant administrative reforms. Scorecards would provide warnings when agencies neglect these components of democratic-constitutionalism in the administration of their programs. If they come at all, retroactive fixes are often incomplete, too late for the abused, and expensive. Moreover, they are unable to compensate fully for the damage done to U.S. democratic-constitutionalism (see Rosenbloom and O'Leary 1997 for a variety of examples).

### **Democratic-Constitutional Impact Statements and Scorecards: A Concept, Not a Template**

The commentators also suggest that democratic-constitutionalism is too broad and amorphous to be operationalized. Kamensky claims that "anyone wanting to support such a proposal [for democratic-constitutional impact statements and scorecards] could read anything into it," apparently because "these terms are not clearly defined, nor are they sourced or grounded in academic, legal, or other citations." I fear he is projecting his own bewilderment with democratic-constitutionalism onto the field as a whole. I assumed—and continue to assume—that most *PAR* readers are familiar enough with the substantial literature on public administration and U.S. democratic-constitutionalism<sup>1</sup> to know what constitutional rights and integrity, transparency, and the rule of law are and are not. I invite those who want to learn more about democratic-constitutionalism to do an Internet search to find pertinent works by me, Julia Beckett, James Carroll, Philip Cooper, Robert Gilmour, Richard Green, Heidi Koenig, Yong Lee, Ronald Moe, Stephanie Newbold, Rosemary O'Leary, John Rohr, Michael Spicer, Larry Terry, Kenneth Warren, and Charles Wise, among others, in the "constitutional school of public administration" (Spicer and Terry 1993).

It would be good to begin with my coauthored *Constitutional Competence for Public Managers* or chapter on "Public Administration and Democratic Constitutionalism" in *Public Administration: Understanding Management, Politics, and Law in the Public Sector* (6th ed.). Both books are widely used in Masters of Public Administration (MPA) courses in the U.S. and are hardly obscure.<sup>2</sup> They are even available in Chinese in the People's Republic of China.<sup>3</sup> It is unsettling to think that Chinese public admini-

stration scholars and MPA students, even as talented as they are, may know more about U.S. democratic-constitutionalism than some of our homegrown public management consultants and administrative reformers.

Ammons and Stenberg, who are less troubled than Kamensky by the subject of democratic-constitutionalism, aver that writing environmental impact statements (EISs) is probably more "straightforward than the task of assessing the effects of administrative changes on democratic-constitutional values." Maybe, though their brief mention of compliance costs and consequences, which are not a mandatory feature of EISs, does not inspire confidence that they understand the complexity of these statements. EISs can run several hundred or even over a thousand pages long (e.g., the three-volume Bureau of Land Management Northeast National Petroleum Reserve—Alaska Environmental Impact Statement 2005).

As suggested above and in my article, one can develop expertise that brings concreteness to the structure of constitutional rights, the requisites of constitutional integrity, transparency to law and policy, and the conditions favorable to maintenance of the rule of law. I see no reason why democratic-constitutional impact statements would be inherently more difficult to fashion than the impact statements and assessments that have been required in federal administration, not only for the environment, but also for federalism, families, and environmental justice, among other concerns. The statutes and executive orders calling for these analyses provide outlines, not detailed templates along the lines Ammons and Stenberg would apparently prefer. For instance, the National Environmental Policy Act of 1969 only guides agencies to consider: "(i) the environmental impact of the proposed action, (ii)

any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented" (section 102).

### **Problems of Argumentation**

At several points, the commentators mischaracterize or misunderstand my points, and at others, they strain logic. For example:

- Ammons and Stenberg apparently think public administrators' roles in government should be confined to what they can *uniquely* contribute, and they mistakenly suggest that my proposal "assume[s] that constitutionally established offices are incapable of ensuring that constitutional protections are honored and that this function *must fall largely to administrators*" (emphasis added). Of course I view democratic-constitutional impact statements as augmenting, not replacing or eclipsing, the roles of "constitutionally established offices" in promoting and protecting democratic-constitutionalism. The impact statements I suggest are envisioned as improving overall governmental performance in this realm. I see no reason why public administrators should be excluded from improving democratic-constitutionalism or other nonpartisan governmental activities that are not unique to them. After all, public administrators engage in executive, legislative (e.g., rulemaking), and adjudicatory functions. We should welcome opportunities for them to bring their expertise in governance to bear on matters of public policy, including the protection of democratic-constitutional values.

- Remarkably, Ammons and Stenberg suggest that somehow it would be reasonable or necessary to provide public employees with "guaranteed lifetime employment" in order to protect their constitutional rights to freedom of speech, free exercise of religion, privacy, procedural and substantive due process, and equal protection of the laws. There is obviously a vast difference between preventing the dismissal of public employees for reasons that violate their constitutional rights and prohibiting their dismissal altogether. The constitutional law of public employment already protects their constitutional rights without guaranteeing them anything approaching lifetime employment. As a concept, "lifetime employment" is a non-starter: the only public employees in the United States who have lifetime employment are those who die while holding their government jobs. Federal judges hold their offices "during good Behaviour" (Article III, section 1). Impeachment and conviction are not particularly arduous (see *Nixon v. United States*, 506 U.S. 224 (1993)).

- Also in this vein, Kamensky, perhaps facetiously, but certainly unhelpfully, asks whether "everybody [should] be a government employee" in order to extend the application of constitutional rights throughout the nation's workplaces. Of course, the appropriate question is: What value, if any, should be placed on the constitutional rights that will be lost when public employees' jobs are outsourced? The federal government's chief outsourcing guideline, the Office of Management and Budget's Circular A-76, places absolutely no value on these rights (see Rosenbloom and Piotrowski 2005). Is that appropriate from democratic-constitutional perspectives? Are the constitutional rights enjoyed by public employees of no value whatsoever to the polity? Should the

rights deficit incurred through outsourcing government jobs be countered by statutorily or otherwise guaranteeing contract employees, paid with government funds, rights that parallel those of public employees? As bizarre as it may sound to Kamensky and as baffling to Ammons and Stenberg as it may be, the Supreme Court has ruled that contractors and individuals engaged in non-contractual, pre-existing commercial relationships with government have essentially the same constitutional free speech rights as public employees (*Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668 [1996]; *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 [1996]). The justices are not alone in thinking rights are important. The Federal Acquisition Regulation, written by federal administrators, requires federal government contractors to protect whistleblower and Privacy Act rights (Rosenbloom and Piotrowski 2005).

- Ammons and Stenberg seem troubled, and Kamensky "wowed," by my statement that "from a legal perspective, discretion is generally viewed as antithetical to the rule of law," associated with "tyranny," and even considered an "evil." Notwithstanding Kamensky's *ad absurdum* suggestion that therefore every discretionary act is inherently evil, I refer them to an engraving at the U.S. Department of Justice headquarters, which reads, "Where Law Ends Tyranny Begins" (Warren 2004, 345), and to the Supreme Court's ruling in *Delaware v. Prouse* (440 U.S. 648, 661 [1979]). In that decision, the Court emphasized that "standardless and unconstrained discretion is the evil the Court has discerned when, in previous cases, it has insisted that the discretion of the official in the field be circumscribed, at least to some extent."

## Conclusion: "The Neglected Foundation of Public Law"

Overall, the commentaries strongly suggest that a decade after the appearance of Ronald Moe and Robert Gilmour's classic article, "Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law," the constitutional and administrative law of public administration in the United States is still a neglected dimension of administrative reform. The heavy emphasis placed on utilitarian and instrumental values by the reinventing government and new public management movements—the "flavor[s] of the day," as Kamensky puts it—overshadows democratic-constitutional values and contractarian reasoning in designing public administrative reforms. Kamensky even contends that democratic-constitutional impact statements and scorecards should be considered as merely another flavor; that is, a set of stakeholder interests requiring yet another "political champion" before they can be taken seriously. Unfortunately, Kamensky may be correct—and that comes as close as anything I can imagine to stamping a "Q.E.D." on the case for democratic-constitutional impact statements and scorecards.

## Notes

1. A Google search of "democratic constitutionalism and public administration" yields over 300,000 results.
2. *Constitutional Competence for Public Managers: Cases and Commentary*, coauthored with James Carroll and Jonathan Carroll, was first published by F. E. Peacock in 2000. Peacock was subsequently bought by Wadsworth, which was part of Thomson Learning. The book is currently available from Thomson Custom Publishing, 5191 Natorp Boulevard, Mason, OH 45040; 800-543-0487. Contact me for cumulative electronic updates in the form of additional excerpts of relevant cases (rbloom@american.edu). An earlier version of the book, *Toward Constitutional Competence: A Casebook for Public Administrators*, coauthored with James Carroll, was published by Prentice Hall in 1990. *Public Administration: Understanding Management, Politics, and Law in the Public Sector* is published by

McGraw Hill. Editions one through five are with the assistance of Deborah D. Goldman. Editions five and six are coauthored by Robert S. Kravchuk.

3. Chinese editions of *Public Administration: Understanding Management, Politics, and Law in the Public Sector* are published by Renmin University Press of China, Beijing, People's Republic of China, and by ProEd/McGraw-Hill Education for use in Taiwan. *Constitutional Competence for Public Managers: Cases and Commentary* is published by Renmin University Press of China, Beijing, People's Republic of China.

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