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To public managers who strive for constitutional competence.
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Preface

Now in a third edition, *Public Administration and Law* has been unique since it first appeared in 1983. It is the only book in the field of public administration that analyzes how constitutional law regulates the main contexts in which individuals actually encounter administrators. The earlier editions covered individuals’ interaction with administrators as clients and customers, public employees, prisoners, public mental health patients, antagonists litigating against administrative action or protesting it through other means, and in encounters with “street-level” administrators such as police, health inspectors, and social workers. In response to the “reinventing government” and new public management movements, this edition adds government contractors to the types of encounters analyzed. Using nontechnical language, our analysis explains the development and application of individuals’ First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights as they pertain to these encounters. Unlike other administrative law and constitutional law texts, the book explains the structure of the various constitutional rights in the context of how public administrators must do their jobs and administrative systems must operate. Unlike most—maybe all—law texts, it analyzes judicial involvement in public administration from the inside out, rather than the outside in. In other words, it explains how constitutional and administrative law must be integrated into public administrative decision making, operations, and practices as opposed to focusing on how to sue government agencies.

In framing the discussion around encounters, the book also shows how the U.S. federal courts—and the Supreme Court in particular—added an extensive legal dimension to public administrative practice by taking four historic steps. First, the courts declared (or created) new (or previously undeclared) constitutional rights for individuals in every type of encounter. For instance, as of 1950, clients and customers effectively had little or no free speech, procedural due process, and equal protection rights in their interactions with public administrators. By and large, neither could public employees successfully assert such rights within the context of their governmental employment. Today, these rights are extensive and dramatically affect the administration of so-called safety-net entitlement programs and public
personnel administration. Until the late 1960s, prisoners could not successfully challenge the conditions of their confinement through the Eighth Amendment’s cruel and unusual punishments clause. In the 1970s, that clause became the basis for very widespread administrative reforms of prisons and jails affecting governments at all levels throughout the nation. In the mid-1970s, patients involuntarily confined to public mental health facilities received a constitutional right to treatment or habilitation. At about the same time, street-level encounters became subject to Fourth Amendment concerns.

Second, the courts took three steps to promote enforcement of the newly declared rights. In the 1970s, they made it far easier to litigate by loosening the requirements of standing to sue government. They also created a new form of lawsuit, called “remedial law,” which enables the courts to mandate and oversee reforms of entire administrative systems, as in cases dealing with public school desegregation, prisons, and public personnel administration. Finally, as the capstone of judicial involvement in establishing the constitutional rights and values that now inform public administrative practice, the courts made the vast majority of public administrators potentially personally liable for money damages in civil suits arising from their official actions violating clearly established constitutional rights of which a reasonable person would know. In essence, the courts created new rights, made it easier for individuals to vindicate those rights, and gave public administrators a direct personal incentive to avoid violating the constitutional rights of their clients, customers, fellow public employees, and persons with whom they engage in street-level encounters, as well as the prisoners and mental health patients in their care. Today, the equal protection and free speech rights of government contractors parallel those of public employees. This framework for understanding judicial involvement in public administration has endured through widespread changes in the membership of the Supreme Court and federal judiciary generally. Although liberal justices and judges may be more inclined to strengthen First Amendment rights in the various encounters and more conservative jurists may focus on protecting individual property rights, the basic structure of judicial intervention in public administration remains intact. By the late 1970s, the federal courts were said to be “partners” in public administration, and they remain so.

For the sake of completeness, the book includes chapters on the tensions between U.S. public administration and democratic-constitutionalism and the bodies of statutory administrative and environmental law that broadly regulate administrative action. These constitute Part One of the book; Part Two is comprised of the analysis of the individual type of encounters and an overall conclusion.

This third edition thoroughly updates the second, published in 1997. This edition, like the earlier ones, is intended for courses in Master of Public Administration (MPA) and Ph.D. programs in public administration and political science, as well as for research by individual faculty members and graduate students. Although
the book has been substantially revised, its framework and analysis will remain familiar to readers of the first and second editions. Coauthors Rosenbloom and O’Leary greatly appreciate being joined by coauthor Joshua Chanin, who brings fresh insights and energy to the project.

David H. Rosenbloom
Rosemary O’Leary
Joshua Chanin
Acknowledgments

A project of this magnitude generates many debts. David Rosenbloom thanks the School of Public Affairs at American University and the Department of Public and Social Administration at City University of Hong Kong for providing highly supportive research and work environments. Rosemary O’Leary thanks the Phanstiel family for their generous support, and Caitlin Connelly for her editorial assistance. Joshua Chanin thanks the American University School of Public Affairs for generous institutional and intellectual support, and his coauthors for their persistent efforts to ensure that the law is never too far from the minds of public administration practitioners, academics, and students.
About the Authors

David H. Rosenbloom is distinguished professor of public administration in the School of Public Affairs at American University in Washington, DC, and chair professor of Public Management at City University of Hong Kong. He earned his PhD in political science from the University of Chicago (1969) and holds a BA in political science and an honorary doctor of laws degree from Marietta College (1964, 1994). He served as editor in chief of Public Administration Review (1991–1996) and a coeditor-in-chief of the Policy Studies Journal (1985–1990). Rosenbloom was the 2001 recipient of the American Political Science Association’s John Gaus Award “to honor the recipient’s lifetime of exemplary scholarship in the joint tradition of political science and public administration.” Other awards include the 1999 Dwight Waldo Award for Outstanding Contributions to the Literature and Leadership of Public Administration through an Extended Career; Charles Levine Memorial Award for Excellence in Public Administration (1993); Distinguished Research Award (1992); and the Syracuse University Chancellor’s Citation for Academic Excellence (1986). Rosenbloom was elected to the U.S. National Academy of Public Administration in 1986. In 1992 he was appointed to the Clinton-Gore Presidential Transition Team for the U.S. Office of Personnel Management. His book, Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946–1999, received the 2001 National Academy of Public Administration Louis Brownlow Award for Excellence in public administration literature. Rosenbloom’s work on the First Amendment rights of federal employees was cited as authority by the U.S. Supreme Court in Elrod v. Burns (1976) and Branti v. Finkel (1980).

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THE
ADMINISTRATIVE
STATE, DEMOCRATIC
CONSTITUTIONALISM,
AND THE RULE OF LAW
Chapter 1

The Problem: Retrofitting the American Administrative State into the Constitutional Scheme

Contemporary American public administration has its roots in management. During the second half of the twentieth century, however, law became increasingly central to public administrative practice and gained more attention in theory and pedagogy. Today, public administration has a substantial legal dimension consisting of statutes that generically regulate administrative activity, such as the federal Administrative Procedure Act (APA) of 1946, and judicial decisions that infuse public administration with constitutional values and requirements, including, for instance, procedural due process and equal protection. The immediate effect of the legal dimension is to subordinate public administration further to the rule of law. More generally, though, it contributes to the integration of large-scale administration into the nation’s system of constitutional government.

The chief claims of this book are as follows: (1) Much of the legal dimension was developed by the federal courts as they applied statutory and constitutional law to numerous cases. In these cases, public administration seemed arbitrary
and/or failed to comport with constitutional principles and values as understood and strongly supported by many judges and justices. (2) As constructed by the judiciary, the legal dimension enables the courts to play a large, ongoing role in supervising and instructing public administrators. (3) Consequently, any vision of public administration that ignores the contemporary legal dimension is seriously inadequate. These claims are not to suggest that the legal dimension is fixed and unchanging. Like much else in government, it is subject to continuing adjustment and, potentially, even to partial reversal. For the past 35–40 years, however, the legal dimension has been tangible, powerful, and central to American public administration.

1.1 Public Administration and American Constitutionalism

The legal dimension of public administration developed as part of a century-long struggle to retrofit large-scale administrative operations effectively into the nation’s constitutional system of government. The task has been difficult. Some countries have found it easier to rewrite constitutions and to reconfigure governments in order to accommodate their dependency on modern, technocratic public administration. The U.S. effort at retrofitting is complicated immensely by a received public administrative theory and practice that in many respects is at odds with its constitutionalism. American public administration was consciously founded on the dictates of management rather than on those of governance. It was originally rooted in political ideology and designed to serve political goals, but it continues to embrace values and structural arrangements that are in tension with those embedded in the Constitution. Ultimately, the contemporary legal dimension seeks to bring constitutional values into public administration.

In order to appreciate the scope and potential consequences of the legal dimension, those engaged in the enterprise of American public administration need a firm grasp of how the field’s theories, values, and prescriptions often fundamentally challenge those of U.S. constitutionalism. Otherwise, they may consider the legal dimension as simply judicial interference and legislative meddling with good public management, and consequently may fail to understand why it developed and what it can achieve. For the legal dimension to be evaluated and internalized rather than rejected out of hand by students and practitioners of public administration, its logic must be appreciated. Such an appreciation begins with an understanding of the historical development of American public administrative thought.
1.2 The American Public Administrative “Orthodoxy”

The American administrative state began to develop in earnest in the 1880s. It was largely in place by the end of the New Deal in the 1930s, although President Lyndon B. Johnson’s Great Society programs of the 1960s and other measures have extended it. There was a certain inevitability to the rise of large-scale public administration, which is now a worldwide phenomenon (Jacoby 1973). But there was nothing necessary about the doctrines, beliefs, and values that would inform the American version. The development of “orthodox” American public administrative thought was a self-conscious enterprise intended to serve political, administrative, and social ends. It was informed by the objectives of three major movements: civil service reform (1870s–1890s), progressivism (1890s–1920s), and scientific management (1900s–1930s). The system of administrative belief that emerged from these movements had the following defining characteristics.

1. *There is a dichotomy between politics and administration.* This proposition was critical to the civil service reformers’ overall political objectives. They believed that divorcing the civil service from politics would bring about a fundamental change in the nation’s political leadership. In their view, eliminating the “spoils system” of large-scale political appointment to and dismissal from government jobs would deprive political bosses and machines of their chief resource. The reformers believed that once patronage was no longer available, the bosses and machines would fall and a higher class of political leaders would emerge. Dorman Eaton, who wrote most of the Civil Service (Pendleton) Act of 1883, made this unmistakable: “we have seen a class of politicians become powerful in high places, who have not taken (and who by nature are not qualified to take) any large part in the social and educational life of the people. Politics have tended more and more to become a trade or separate occupation. High character and capacity have become disassociated from public life in the popular mind” (Eaton 1880:392). Another leading reformer, Carl Schurz, contended that in order “to restore ability, high character, and true public spirit once more to their legitimate spheres in our public life, and to make active politics once more attractive to men of self-respect and high patriotic aspirations,” it was necessary to “rescue our political parties, and to a great measure the management of our public affairs, from the control of men whose whole statesmanship consists in the low arts of office mongering” (Schurz 1893). Hence the reformers’ insistence that of the great number of “places [in civil service] very few are political. Political offices are those which are concerned with devising and enforcing a policy which the people have approved at the polls” (Civil Service Reform Association, no date [circa 1880]:1; see Rosenbloom 1971:75). In time, the politics-administration dichotomy was partly institutionalized by the merit system and by regulations barring public employees from taking an active part in partisan political activities.
2. Public administration is a field of management or business rather than of law. This claim was forcefully made by Woodrow Wilson, a Progressive, in his famous essay, “The Study of Administration” (1887). His clarion call to develop an American science of public administration states flatly that “[t]he field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study” (Wilson 1887:18). Later, in 1926, the first American textbook on public administration, Leonard White’s *Introduction to the Study of Public Administration*, asserted that “the study of administration should start from the base of management rather than the foundation of law, and is therefore more absorbed in the affairs of the American Management Association than in the decisions of the courts” (White 1926:vii–viii). A managerial focus brings with it managerial values. Hear Woodrow Wilson (1887:10): “It is the object of administrative study to discover, first, what government can properly and successfully do, and, secondly, how it can do these proper things with the utmost possible efficiency and at the least possible cost either of money or of energy.”

The consequences of defining public administration as management cannot be overstated. It gives primacy to the values of efficiency, economy, and effectiveness as combined in making cost-effectiveness a key measure of “good” public administration. Political responsiveness, representativeness, and accountability become subordinate concerns. Interest in individual legal and constitutional rights is also secondary. From a managerial perspective, a legislature’s effort to make public administrators responsive or accountable is often pejoratively labeled “micromanagement” or “red tape” (Mayer 1993; Kaufman 1977). Constitutional procedural due process is not necessarily efficient, economical process. Wilson cited “friction”—the antithesis of efficiency—as his rationale for introducing widespread racial segregation into the federal service (see Rosenbloom 1977:54). Whereas the reformers fashioned the politics-administration dichotomy to shield the civil service from politicians, the managerial emphasis logically demands that it also be insulated from legislative and judicial supervision. By 1916, the model city charter of the National Municipal League called for urban government administered by a city manager, selected without regard to politics “solely on the basis of his executive and administrative qualifications” (Mosher 1976:83). The charter contained a clear prescription for administrative autonomy: “Except for the purpose of inquiry the council and its members shall deal with the administrative service solely through the city manager, and neither the council nor any member thereof shall give orders to any of the subordinates of the city manager, either publicly or privately” (Mosher 1976:82–83). Any “interference” by members of the council with administration would be subject to criminal punishment!
3. Public administration can be scientific. Although Wilson (1887:11) referred to “the science of administration,” it was not until the advent of Frederick Taylor’s scientific management movement in the early 1900s that the notion of a scientific way to organize work gained widespread, enthusiastic acceptance. Taylor (1911) was primarily interested in restructuring authority and work methods in the industrial sector in the name of enhancing employee motivation, productivity, and efficiency (Schachter 1989). However, his ideas and methods were relevant to the public sector as well. The Progressives wanted to create stronger public administration as a tool for social and economic reform. Scientific methods of organizing and managing personnel and accomplishing work generally would be a great boon to them. By 1937, Luther Gulick and Lyndall Urwick were able to publish a highly influential book called *Papers on the Science of Administration*. It served as background material for the effort by the U.S. President’s Committee on Administrative Management to redesign the presidency and to reorganize much of the burgeoning New Deal federal bureaucracy. The belief that public administration was scientific put pressure on the courts to be deferential to administrative expertise—even in such matters as defining the public interest.

Taken on its merits, there is much to contest in the view that public administration necessarily is or can be an apolitical managerial science. However, the dominant Progressive movement installed the main tenets of the orthodoxy, as outlined above, in governments at all levels. Adherents to progressivism included Presidents Theodore Roosevelt (1901–1909) and Woodrow Wilson (1913–1921). The extent of reform varied from place to place, but it encompassed the growth of civil service systems, position classification, political neutrality, city management, the “rationalization” of public budgeting, efforts to organize based on scientific principles, and the growth of independent, politically insulated organizations called “public authorities” to manage water systems, ports, bridges, parks, and other infrastructure.

There is no doubt that the orthodoxy improved government, but for many of its leading advocates that was not the main goal. The reformers and Progressives were sometimes quite candid about the secondary importance of better administration. Carl Schurz (1895:4) noted that “the question whether the Departments at Washington are managed well or badly is, in proportion to the whole problem, an insignificant question.” The significant question, as the reformers noted over and over again, was, who will America’s political leaders be and what will they value? Wilson and other Progressives realized that creating a powerful, politically insulated public administration to intervene in the society and economy was not particularly democratic; however, it was a tool that could blunt the impact of massive immigration on the nation’s political culture and leadership. Wilson firmly supported civil service reform, but he also admitted that it “is not democratic in idea” (Rohr 1986:231, note 61). He advocated administrative reforms partly because “the only way in which we can preserve our nationality in its integrity and its old-time
originative force in the face of growth and imported change is by concentrating it, putting leaders forward vested with abundant authority in the conception and execution of policy” (Rohr 1986:231, note 61). In his view, and that of many other Progressives, administrative reforms were a weapon in a battle for the nation’s soul (see Hofstadter 1955). They felt a sense of crisis and urgency because, as Wilson put it,

the character of the nation … is being most deeply affected and modified by the enormous immigration which year after year pours into the country from Europe: our own temperate blood, schooled to self-possession and to the measured conduct of self-government is receiving a constant infusion and yearly experiencing a partial corruption of foreign blood: our own equable habits have been crossed with the feverish habits of the restless old world. We are unquestionably facing an ever-increasing difficulty of self-command with ever-deteriorating materials, possibly with degenerating fibre (Rohr 1986:72).

By the 1920s, the orthodoxy ceased to serve such large political objectives. Immigration had been severely restricted and Progressive presidents had been in office for two decades. The orthodoxy was institutionalized as city management, merit-based civil service, and political neutrality became “best practices” and dominated much of the public sector. Eventually whole generations of American public administrative thinkers would neglect the orthodoxy’s political roots in their efforts to promote honest, efficient, economical, and science-based public management. Never intended to be apolitical in its consequences, the orthodoxy could not be made so. It favored centralized authority and was not democratic, participatory, or designed for political responsiveness (Waldo 1948). (Nor was it good science [Simon 1947].) But it proved to be a very “perdurable” administrative culture that continued to inform a great deal of administrative practice well after its inadequacies were widely understood (Waldo 1984a). It was only in the 1990s that it began to rapidly disintegrate and to be replaced by a “new public management” (see Mascarenhaus 1993; Hood 1990).

1.3 “Reinvented” Public Administration: Toward a New Public Management

By the mid-1990s a new public management (NPM) offered an alternative managerial paradigm for the public sector. In the English-speaking world, the NPM became dominant in New Zealand, Australia, and the United Kingdom. Its core tenets also informed a great deal of reform in the United States, where its variant is more commonly called “reinventing government” (Osborne and Gaebler 1992).
Although highly critical of the orthodoxy, which it considers a relic of the machine age (Osborne and Gaebler 1992), U.S. reinvention is managerially oriented and shares the orthodoxy’s commitment to the politics-administration dichotomy and to the core values of efficiency, economy, and effectiveness. Note how the chief federal reinvention tract, the Report of the National Performance Review (NPR report), echoes Wilson: “This performance review is not about politics. … We want to make improving the way government does business a permanent part of how government works, regardless of which party is in power” (Gore 1993:iv).

At the heart of reinvention is the belief that government should be results—rather than process—oriented. To achieve results, it argues, public administration should make better use of market-like competition in the provision of goods and services. This may be accomplished through privatization, competitive sourcing, reorganizing agencies to more closely resemble private corporations, or by forcing them to compete with one another and/or nongovernmental organizations. Like firms in a market, reinvention maintains, agencies should be responsive to customers. They should also be entrepreneurial in developing and offering products and services that the public will demand; they should develop niches and find customers. “Customer” is broadly defined as those persons and organizations that interact voluntarily or involuntarily with a public agency. Because not all government agencies sell something to the public, customer satisfaction is sometimes treated as a generic means of evaluating facilities, information, products, and behavior in administering services and constraints.

Reinvention considers efficiency and effectiveness to be impeded by the kind of procedurally oriented controls the orthodoxy relied on for depoliticization, financial regularity, and preventing corruption. It views across-the-board regulations, such as those associated with centralized personnel systems and government-wide procurement rules, as especially inimical to results-oriented public administration. Reinvention advocates “deregulating” the public service; that is, freeing agencies from restrictive rules regarding personnel, spending, work methods, and so forth. The NPR report complains:

When we … impose more controls, we make the systems worse. Over the past 15 years, for example, Congress has created within each agency an independent office of the inspector general. The idea was to root out fraud, waste, and abuse. The inspectors general have certainly uncovered important problems. But as we learned in conversation after conversation, they have also so intimidated federal employees that many are now afraid to deviate even slightly from standard operating procedure (Gore 1993:2–3).

Along with deregulation, the Clinton-Gore (1993–2001) administration’s version of reinvention emphasized decentralization and employee empowerment as means of achieving results. There is no consensus on the extent to which the NPR
was successfully implemented (Rosenbloom and Piotrowski 2008). However, it introduced new concepts and changed the language of federal administration. Its continuing impact was assured by the commitment of President George W. Bush’s administration (2001–2009) to several reinvention tenets. During the 2000 election campaign, Bush echoed Gore in indicating that “[m]y policies and my vision of government reform are guided by three principles: Government should be citizen-centered, results-oriented, and wherever possible, market based” (Bush 2000:15).

These three principles partly guided the President’s Management Agenda, announced by Bush in the summer of 2001. The agenda included five general items, all of which were generally compatible with reinvention: Strategic Human Capital, Competitive Sourcing, Financial Performance, Electronic Government (e-gov), Budget and Performance Integration. Strategic human capital referred to right-sizing agencies and programs, with a view toward reducing the organizational layers between decision makers and the public. Competitive sourcing followed reinvention’s commitment to “steering” rather than “rowing,” but recognized that government is sometimes able to perform more cost-effectively than private entities. The financial performance initiative was aimed at reducing and recovering erroneous government payments. The objectives of e-gov were to increase government productivity and facilitate customer service. Budget and performance integration was intended to establish performance budgeting, something that has remained elusive in the federal government during on again, off again efforts since the late 1940s.

Perhaps the main difference between Bush and Clinton with regard to public administration was Bush’s strong emphasis on enhancing executive power. This militated against employee empowerment and decentralization. To the contrary, Bush sought to strengthen political appointees’ managerial control over the career civil service through homeland security legislation and the development of a National Security Personnel System. The essence of this effort was to reduce career employees’ protection against transfers and adverse actions while making their pay more dependent on performance. Bush relied on the U.S. Office of Management and Budget (OMB) to centralize control over agencies’ implementation of the President’s Management Agenda. OMB scored agency progress on the agenda through a “traffic light” scorecard. It also played a central role in evaluating agencies through the Bush administration’s Performance Assessment Rating Tool, which was oriented toward defining programmatic objectives in operational terms.

Based on his campaign rhetoric and appointment to key posts of several individuals who previously served in the Clinton-Gore administration, it appears likely that President Barack Obama will generally follow reinvention principles (Brodsky 2009). Consequently, it is reasonable to assume reinvention will become the new public administration “orthodoxy,” if it has not already done so.

Like the orthodoxy of the 1930s and 1940s, however, reinvention pays little attention to individual rights in the context of public administration. Guided by its commitment to results and flexibility rather than to procedural regularity, reinvention reforms do not seek to enlarge constitutional and legal controls on public
administration. The NPR report argues that “[t]o deliver what the people want, we need not jettison the traditional values that underlie democratic governance—values such as equal opportunity, justice, diversity, and democracy. We hold these values dear” (Gore 1993:8). This rendition of democratic values is revealing in itself. Equal opportunity, diversity, and justice are mentioned, but their constitutional referents, equal protection and due process, are not. Yet Supreme Court decisions make it abundantly clear that efforts to promote equal opportunity and diversity are controlled by equal protection doctrine (Adarand Constructors v. Pena 1995; Grutter v. Bollinger 2003; Gratz v. Bollinger 2003) and that justice is defined by due process (e.g., Cleveland Board of Education v. Loudermill 1985). Further, the report envisions a separation of powers in which Congress and the courts play a much more limited role in federal administration.

The Bush administration also offered little if any reason to believe there is a positive relationship between reinvention, on the one hand, and constitutional rights and procedure, on the other. Whether driven by a commitment to results or a desire to enhance executive power, the Bush administration came under heavy criticism for disregarding the Constitution and the rule of law, especially in connection with signing statements, which the American Bar Association called “contrary to the rule of law and our constitutional separation of powers”; wiretaps; and the treatment of enemy combatants (see American Bar Association 2006; Pfiffner 2008; and Hamdi v. Rumsfeld 2004). If public administration offers no guarantee that when individuals interact with public agencies their constitutional rights will be respected and protected, what will?

1.4 U.S. Constitutionalism

American constitutionalism embraces a radically different set of values than those of managerially focused public administration, both in the orthodox and reinvented versions. It rests on classical liberal contract theory, which holds that the purpose of government is to preserve natural rights and to protect individual liberty. The Declaration of Independence captures its essence in a few famous lines: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. …” Constitutional theory also views government as a tool for securing public goods. The Constitution’s preamble indicates that provision for “the common defence” and promotion of “the general Welfare” are among the regime’s preeminent permanent goals.

None of this necessarily runs counter to managerially based public administration. In The Federalist, No. 68, Alexander Hamilton proclaimed that “we may safely pronounce that the true test of a good government is its aptitude and tendency to
produce a good administration” (Federalist Papers 1787–1788:414). However, there is a serious hitch. Governments can become “destructive” of liberal ends, as the Declaration puts it; consequently, they must be subject to a wide array of checks, balances, and constraints. In James Madison’s enduring words: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions” (Federalist Papers 1787–1788, No. 51:322). In the American context, these external and internal controls predate large-scale public administration and can frustrate it. They also embody values that are sometimes antithetical to managerially oriented public administration.

1.4.1 Efficiency

According to the orthodoxy, efficiency is “axiom number one in the value scale of administration” (Gulick 1937:192). The NPR identifies efficiency as a top objective of administrative reform, along with effectiveness and responsiveness to customers (Gore 1993:i). As interpreted by the courts, the Constitution also respects efficiency, but it frequently ranks other values, such as individual rights and constitutional integrity, much higher. In *Stanley v. Illinois* (1972:656), the Supreme Court explained that “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.” In *Immigration and Naturalization Service v. Chadha* (1983:959), Chief Justice Warren Burger admonished that Madison’s “internal controls” were of enduring importance and that it would be perilous to circumvent them in the name of convenient, efficient shortcuts.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided. … With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found
a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Such reasoning is intended to ensure that constitutional values continue to dominate the organization and operation of government. Arrangements such as the separation of powers and the requirement that administrative activity be regulated by due process complicate the public administration immensely. There is much in the Constitution that the orthodoxy would have rewritten and reinvention would like to change. Woodrow Wilson was no fan of the separation of powers, and Luther Gulick found grass roots democracy bothersome (Wilson 1887:20; Gulick and Urwick 1937:192–193). As discussed below, the NPR and the Bush administration envisioned a very crimped role for Congress in federal administration, but from the constitutional point of view, it is public administration, not the Constitution, that must be adjusted. As Burger suggests, constitutional theory requires public management to serve the purposes of government. It does not support restructuring government to serve the needs of better public management.

1.4.2 Who's in Charge of Public Administration?

Orthodox public administration strongly subscribed to the principle of “unity of command” as a means of coordinating work. As Gulick explained: “A workman subject to orders from several superiors will be confused, inefficient, and irresponsible; a workman subject to orders from but one superior may be methodical, efficient, and responsible” (Gulick 1937:43). In this view, public administrators ought to be subordinate to one branch of government, not three. In the orthodox tradition, this was made most clear by the U.S. President’s Committee on Administrative Management, also known as the Brownlow Committee, after its chair, Louis Brownlow. Brownlow was a staunch supporter of executive power (Brownlow 1949), as were the other two members, Gulick and Charles Merriam. According to its 1937 report:

- [C]anons of efficiency require the establishment of a responsible and effective chief executive as the center of energy, direction, and administrative management. …
- [A]ccountability is often obscured by the Congress itself in imposing upon the Executive in too great detail minute requirements for the organization and operation of the administrative machinery. …
- We hold that once the Congress has made an appropriation … which it is free to withhold, the responsibility for the administration of the expenditures under that appropriation is and should be solely upon the Executive (U.S. President’s Committee on Administrative Management [PCAM] 1937:3, 49–50).
John Rohr, a leading present-day administrative scholar, is quite correct in noting that “[a]t the heart of the [committee’s] doctrine is a fundamental error that transforms the president from chief executive officer into sole executive officer” (Rohr 1986:139).

The Bush administration went much further than the Brownlow Committee and the NPR in advancing a theory that centralizes control over federal administration in the president. Bush’s theory of a unitary executive branch undercut both the constitutional separation of powers and individual rights. His theory holds that all power vested in or delegated to the executive branch resides, ultimately, in the president. Consequently, executive branch agencies and officials are not constitutionally authorized to act independently of the president, even when a statute calls upon them to do so. Under this theory, for example, all congressionally delegated legislative authority to agencies to make rules rests with the president rather than the agencies themselves. Therefore, the president can exert full control over rulemaking by executive branch agencies such as the Environmental Protection Agency and the Occupational Safety & Health Administration, despite the fact that in delegating legislative authority to them to act as supplementary lawmakers, Congress may have contemplated that they would exercise their expertise independently (see Rosenbloom 2000). Moreover, the president has a constitutional duty to preserve the powers of the presidency and is the final judge of their limits. Bush’s unitary executive branch theory manifested itself in his administration’s unwillingness to share information with Congress, the unconstitutional treatment of enemy combatants, illegal wiretaps, signing statements, and unilateral revision of the Presidential Records Act of 1978. Each of these measures has been analyzed and evaluated elsewhere, making recapitulation unnecessary here (Pfiffner 2008; Rosenbloom 2008). However, some outstanding features of Bush’s unitary executive branch theory should be emphasized. First, it puts the president above the law and the historical operation of the constitutional system of checks and balances (American Bar Association 2006; Pfiffner 2008:245; Rosenbloom 2008). Second, it strongly supports centralized control of federal administration by a unit in the Executive Office of the President, such as OMB. Third, it necessarily follows the Brownlow Committee and NPR in prescribing a very limited role for Congress in overseeing administration.

Adherence to orthodox and NPR prescriptions and Bush’s unitary executive branch theory might plausibly yield more cost-effective administration, but their executive-centered administrative vision is not shared by the Constitution. The Constitution and constitutional law give Congress tremendous authority over federal administration. Most generally, Article I, section 8, vests a great deal of the federal government’s total power in Congress, subject to such checks as the president’s veto. The section begins with the words, “The Congress shall have the Power to,” and goes on to identify the following policy areas: taxation and other financing for the “common Defence and general Welfare of the United States”; commerce; naturalization; bankruptcy; coinage; weights and measures; post offices and roads;
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patents and copyrights; creation of federal courts; declaration of war; raising and supporting armies and providing and maintaining a navy; organization, arming, and disciplining of the militia; and regulation of the nation's capital district. It also authorizes Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Plainly, administrative operations depend on congressional authorization for their establishment, missions, organization, and authority. Note further that the Constitution explicitly says, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law” (Article I, section 9, clause 7), and that all offices “shall be established by law” (Article II, section 2). Although the president is charged with taking “[c]are that the Laws be faithfully executed” (Article II, section 3), the Constitution makes Congress responsible for fashioning, funding, and evaluating the administrative tools and techniques the president will use to do so.

The following are among the administrative activities subject to regulation by Congress through statutes and legislative oversight: personnel, staffing, civil service pay and benefits, strategic planning, performance evaluation, budgeting and spending, accounting, collection and release of information, rule making, enforcement, dispute resolution and adjudicatory procedures, and open meetings. A great deal of congressional regulation of federal administration comes in the form of administrative law, which specifies the procedures agencies must follow when carrying out many of their functions. Even in the realm of defense, where the president is the “commander in chief,” Congress has the specific power “[t]o make Rules for the Government and Regulation of the land and naval Forces” (Article I, section 8, clauses 12–14).

Neither can proponents of executive-centered federal administration find much solace in constitutional law decisions. Since 1838, it has been settled law that “[i]t would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of law, and not to the direction of the President” (Kendall v. United States 1838:610 [capitalization, sic]). More than a century later, a federal district court applied the same principle in ruling that the head of an executive branch agency could not refuse to spend money already appropriated by law on the grounds that the president wanted the agency abolished and sought to zero out funding for it through his budget message to Congress (Local 2677, American Federation of Government Employees v. Phillips 1973). In Hamdi v. Rumsfeld (2004:535–536), the Supreme Court circumscribed the president’s powers as commander in chief by noting that “[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”
Myers v. United States (1926) held that the executive power vested in the president by Article II includes the unfettered power to dismiss executive officers appointed with the advice and consent of the Senate. Writing for the Court, Chief Justice William Howard Taft, who had been president from 1909 to 1913, reasoned that the president’s power to execute laws must reasonably include the power to fire those subordinates who act at his direction. However, a few years later, in Humphrey’s Executor v. United States (1935), the Court specifically limited Myers’ applicability by ruling that it extended to purely executive officers only. The Court held that members of the Federal Trade Commission, which has quasi-legislative and quasi-judicial functions, occupies “no place in the executive Department” and exercises “no part of the executive power vested by the Constitution in the President” (Humphrey’s Executor v. United States 1935:627–628). The Humphrey’s decision and the logic behind it place independent regulatory commissions beyond the reach of many regulations and controls imposed by the president and OMB on other agencies (Moreno 1994). If the executive branch were unitary in Bush’s sense, agencies such as the Securities and Exchange Commission, the National Labor Relations Board, the Federal Communications Commission, and several others would still be independent.

Perhaps the Supreme Court’s decision in Morrison v. Olson (1988) deals an even harder blow to executive-centered administration than its ruling in Humphrey’s. Morrison required interpretation of the “Appointments Clause,” which reads in part that “Congress may by Law vest the Appointment of … inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments” (Article II, section 2). The Ethics in Government Act of 1986 provided for the appointment of an independent counsel within the Department of Justice to investigate and prosecute alleged violations of federal ethics law. Appointment was by a court called the Special Division. The independent counsel, Alexia Morrison at the time, could not be fired by her nominal supervisor in the executive branch, the attorney general, except for cause related to performance. Although the Court’s majority was clearly troubled by some aspects of this arrangement, it upheld the act’s constitutionality. The Court did not find the appointment of this executive officer by a court so “incongruous” as to have “the potential to impair the constitutional functions assigned to one of the branches” (Morrison v. Olson 1988:675–676). Nor were the restrictions placed on her removal such that they would “impede the President’s ability to perform his constitutional duty” (Morrison v. Olson 1988:691). In language that modified the Myers-Humphrey’s line of thought, the Court reasoned that

our present considered view is that the determination of whether the Constitution allows Congress to impose a “good cause” type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is “purely executive.” The analysis contained in our removal cases is designed not to define rigid categories of
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those officials who may or may not be removed at will by the President, but to ensure Congress does not interfere with the President’s exercise of the “executive power” and his constitutionally appointed duty to “take care that the laws be faithfully executed” under Article II (Morrison v. Olson 1988:690).

Morrison is a potential nightmare for opponents of congressional involvement in federal administration. In dissent, Justice Antonin Scalia warned, “There are now no lines. If the removal of a prosecutor, the virtual embodiment of the power to ‘take care that the laws be faithfully executed,’ can be restricted, what officer’s removal cannot? … As far as I can discern from the Court’s opinion, it is now open season upon the President’s removal power for all executive officers” (Morrison v. Olson 1988:726–727).

Just because Congress can experiment does not mean it will, but while the legislature may be willing to limit micromanagement, it is clearly not ready to turn the executive branch over to the president, as the Brownlow Committee, the NPR, and President Bush would like. For example, the Government Performance and Results Act of 1993 (GPRA) affords Congress vast opportunities to micromanage. The act starts from the premise that “[f]ederal managers are seriously disadvantaged in their efforts to improve program efficiency and effectiveness, because of insufficient articulation of program goals” (section 2[a][2]). In many cases, this results from a legislative failure to use precise language in drafting statutes. However, Congress can rely on its committees and subcommittees to accomplish what it cannot do as a whole. The act requires agencies to consult with Congress (read, “committees and subcommittees”) in establishing strategic plans that identify specific objectives and performance indicators. Consequently, it provides (sub)committees with a formal basis—indeed, a legal obligation—to define statutory objectives in a fashion that is binding on executive branch agencies. Importantly, the act conceives of executive agencies as extensions or adjuncts of the legislature and complains that “congressional policymaking, spending decisions and program oversight are seriously handicapped by insufficient attention to program performance and results” (section 2[a][3]).

1.4.3 Consolidation of Functions

Managerially oriented public administration typically favors the consolidation of administrative functions for the sake of cost-effectiveness. Viewing the sprawling New Deal bureaucracy, the Brownlow Committee asked, “How is it humanly possible to know fully the affairs and problems of over 100 separate major agencies, to say nothing of being responsible for their general direction and coordination?” (PCAM 1937:93). The committee called for their “reorganization under a few large departments in which every executive activity would find its place” (PCAM 1937:93). Similarly, the NPR called for a variety of streamlining measures, including consolidation of offices and functions (Gore 1993: especially Appendix C). Agencies are often vested with executive, legislative, and/or judicial functions in an effort to promote flexible governance. One of the great advantages of public administration is that it allows the three functions of government separated by the Constitution to collapse into single entities. A typical regulatory commission will make rules, adjudicate cases of eligibility and/or violations of legal requirements, and enforce the rules and law.

Such arrangements may be acceptable when subject to adequate legal regulation, but they run counter to a broader constitutional logic. In The Federalist, No. 47, James Madison proclaimed that “[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny” (Federalist Papers 1787–1788:301).

Reflecting on the administrative state in 1952, Supreme Court Justice Robert Jackson explained that “[t]he rise of administrative bodies has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. … They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three dimensional thinking” (Federal Trade Commission v. Ruberoid 1952:487). In practice, “the severe strain on the separation-of-powers principle” caused by administrative agencies (Buckley v. Valeo 1976:280–281) has been addressed by placing legal restrictions on agencies’ use of their powers and by subjecting them to constitutional constraints such as due process. This approach is discussed throughout the book. Here it is necessary only to note that regulations intended to reduce potential abuse stemming from the consolidation of constitutional functions are often at odds with the prescriptions of managerially oriented public administration. Administrative law judges (ALJs) are an example. They frequently run adjudicatory hearings for agencies. Their decisions can have substantial impacts on agency budgets, the application of rules, and determinations of individuals’ eligibility for benefits, licenses, and programs. However, under the APA, as amended, ALJs have considerable legal independence, are not subject to performance appraisals by their agencies, and can only be disciplined and removed
for good cause. This is precisely the kind of barrier to administrative coordination that the orthodoxy condemned (Gulick 1937:79–89).

### 1.4.4 Instrumentalism and Utilitarianism versus Contractarianism

Driven by a managerial focus, American public administration tends to be instrumental in the sense of placing a premium on cost-effectiveness and utilitarian in seeking favorable benefit-cost ratios. From Woodrow Wilson to Al Gore, managerial thinkers have argued that the political function is to establish public policy goals, whereas the administrative task is to use the most appropriate means to achieve them. “Most appropriate” is typically determined with regard to some mix of efficiency, economy, effectiveness, and overall utility. Consequently, managerial public administration is often instrumental and utilitarian in outlook. It seeks to provide the greatest amount of beneficial regulation and service for the least cost. This is highly pronounced in (1) spending decisions and (2) cases in which collective action is particularly beneficial.

#### 1.4.4.1 Spending

The history of American public budgeting techniques since the 1940s is largely a quest to provide decision makers with greater information regarding the expected benefits from their allocations to agencies and programs. As Verne Lewis explained in an early classic statement on how to budget:

> Budget decisions must be made on the basis of relative values. There is no absolute standard of value. It is not enough to say that an expenditure for a particular purpose is desirable or worth while. The results must be more valuable than they would be if the money were used for any other purpose. …

> Costs must be judged in relation to the results and the results must be worth their cost in terms of alternative results that are foregone or displaced (Lewis 1952:213–214, 215).

This logic underlies performance budgeting, program budgeting, and zero-based budgeting, each of which was introduced into the federal government during the past half-century with great fanfare and hailed as a major step forward in linking appropriations to management. Such budgeting requires analysis of marginal costs and benefits. Like other aspects of public administration, it also prompts agencies to strive to reduce costs. Calculations of this kind may reveal that a better mix of costs and benefits can be obtained by placing burdens on a relatively small number of people. Taking an extreme case as an illustration, during the early Cold War the
Atomic Energy Commission (AEC) knowingly placed the populations downwind from atmospheric nuclear tests at great risk from radioactive fallout. Some of the tests were “dirty” in the sense that they had especially large amounts of fallout. In one case, fallout dusted the ground like snow, and residents, who were never warned of the dangers by the AEC, allowed their children to play in it and to eat it. Predictably, the cancer rate in downwind communities eventually reached epidemic proportions (see Ball 1986). As late as 1957, though, the director of the AEC argued that “if we continue to reduce the fraction [of radiation] we are willing to release, we eventually reach a cost of control [that] makes the operation prohibitive” (Ball 1986:35). That would have been unacceptable in the AEC’s view, because it would have jeopardized the nation’s security. In 1955, one commissioner said, “We must not let anything interfere with this series of tests—nothing” (Ball 1986:41). Another easily brushed off the welfare of the downwinders: “people have got to learn to live with the facts of life, and part of the facts of life are fallout” (Ball 1986:41). Obviously, the downwinders could not come out ahead in an analysis weighing costly protective measures for them against national security as a whole.

The AEC’s behavior was extreme in its disregard for the burdens it placed on the downwinders. However, the extremity was in degree, not kind. More mundane examples abound. The former Department of Health, Education, and Welfare once calculated the cost of “averting deaths” from motor vehicle accidents and disease in a way that would lead cost-effective administrators to give very short shrift to cancers that overwhelmingly or only affect women (Drew 1967). Street-level administrators frequently conserve resources by disinvesting in individuals or neighborhoods that are considered too expensive or time-consuming to serve adequately (Lipsky 1980; Maynard-Moody and Musheno 2003; Nivola 1979; Bardach and Kagan 1982).

1.4.4.2 Collective Action

Many public policies require collective action. Achieving a policy outcome may depend on universal or nearly complete participation. Zoning, eradicating diseases, and reducing air pollution are familiar examples. In each case, there may be widespread agreement that although the policy objective is highly desirable, it cannot be achieved without coordinating individuals’ action. A collective action problem occurs when individual self-interest militates against such coordination; in other words, if each individual follows his or her self-interest, the collective outcome sought by the policy cannot be attained. Individuals may face perverse incentive systems and/or high costs that impel them not to act toward the accepted outcome on their own, no matter how desirable they consider it. Reducing harmful pollutants from motor vehicle exhausts is a familiar case. Standing alone, clean air is a policy objective that would be difficult to oppose; however, it cannot be achieved unless a great number of people take steps to reduce harmful exhaust emissions. There is little incentive (other than moral) to act individually if having the only nonpolluting car in an area is costly and contributes very little to overall air quality. By the same
token, if the air is already clean, individuals acting separately have little incentive not to pollute because their dirty emissions have no significant effect, and they may be able to save money by not keeping their antipollution devices in good repair.

Collective action problems can sometimes be resolved by moral suasion and manipulating incentives, but coercion is often required. Consequently, individual self-interest may be subordinated to the collective goal sought. Sometimes the cost to the individual is high. In the air pollution example it appears at first that everyone is asked to bear roughly equal burdens; however, an increase in the cost of cars will make them unaffordable for some people, who will then incur all sorts of inconveniences and dislocations, including, perhaps, even the wherewithal to get to their jobs. From a constitutional perspective, troubling cases occur when coercion for collective action violates individuals’ fundamental belief systems or property rights.

Several examples in which governments transgressed constitutional rights are illustrative. One state, which considered education a public good from which all society benefits and, therefore, an activity in which all should participate, tried to fine Amish parents for attempting to protect their religious way of life by not educating their children past the eighth grade (Wisconsin v. Yoder 1972). As part of an effort to instill a collective patriotism, public school children were once required to salute the U.S. flag even though it violated their religious tenets (see West Virginia State Board of Education v. Barnette 1943). The application of zoning regulations intended to reduce visual clutter violated a homeowner’s freedom of speech by prohibiting her from placing a small sign urging “Peace in the Gulf” in one of her windows (Gilleo v. City of Ladue 1994). In other instances, zoning and building permit regulations were used to try to induce property owners to give up their land and/or the right to exclude others from it (Dolan v. City of Tigard 1994; Nollan v. California Coastal Commission 1987).

In one case, an Air Force psychologist, S. Simcha Goldman, was disciplined for refusing to remove his religious skullcap in violation of the Air Force’s dress code for headgear. In upholding the Air Force’s action, the Supreme Court went to the heart of the conflict between collective action and individuality.

The essence of military service is the “subordination of the desires and interests of the individual to the needs of the service.” …

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except those of rank. … [T]he necessary habits of discipline and unity must be developed in advance of trouble (Goldman v. Weinberger 1986:507–508).
1.4.4.3 Contractarianism

The outcome of Goldman’s legal confrontation with the Air Force notwithstanding, the Constitution is based on a contractarianism that makes protecting individuality “the first object of government” (Federalist Papers 1787–1788, No. 10:78). Individual rights are of primary importance; costs are a secondary concern. The Constitution can be viewed as a contract among “We the People” to live in civil society and to establish a government as our agent for protecting individual rights and promoting common goals. Constitutional design seeks to ensure that government acts in the common interest by making it dependent on the people. However, the Framers knew well the dangers of “majority tyranny,” which could ride roughshod over individual rights, and sought to build in protections against it (Federalist Papers 1787–1788, No. 10:77–84). The original document protected some rights, such as habeas corpus. However, it did not go far enough to win ratification without assurance that a Bill of Rights would be attached. Among the guarantees that are most relevant as a counter to utilitarianism are the First Amendment’s protection of free exercise of religion and proscription of the establishment of religion; the Fourth Amendment’s protection against unreasonable searches and seizures; Fifth Amendment protections in criminal cases, its guarantee that no one will be “deprived of life, liberty, or property, without due process of law,” and its provision that private property can be taken only for public use and with just compensation; Sixth and Seventh Amendment rights concerning trials; and the Eighth Amendment’s banning of excessive bail or fines and infliction of cruel and unusual punishments. Later, in 1868, the Fourteenth Amendment prohibited states from denying to any person within their jurisdiction “equal protection of the laws.”

Protecting such rights can be expensive and a barrier to collective action, but constitutional law has valued them very highly (as is discussed comprehensively in Chapters 4–8).

Four broad constitutional dictates illustrate how constitutional contractarianism often stands opposed to administrative utilitarianism. First, lack of funds or high costs do not relieve government of its obligation to protect individual rights. This reasoning is most prominent in institutional reform cases. A federal district court expressed it succinctly yet globally in Hamilton v. Love (1971:1194), a case dealing with jail reform: “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.” In Missouri v. Jenkins (1990), a federal district court effectively (though indirectly) imposed higher taxes on local residents to fund a very expensive plan to desegregate public schools in Kansas City, Missouri. The increases were contrary to tax limits contained in Missouri’s constitution.

The U.S. Supreme Court upheld the district court’s indirect taxation in 1990, but later, in 1995, found the remedial desegregation plan itself to be too broad
Exceptions to the view that inadequate resources should not affect the definition and scope of individual rights occur when a constitutional right is structured to include a balancing test that specifically considers administrative costs, as in the case of procedural due process (see Chapter 4).

Second, the use of “suspect classification” analysis under equal protection illustrates the potential conflict between utilitarianism and contractarianism. Legislative and administrative classifications are clearly necessary; public policy must often use categories such as age and residency to define eligibility, benefits, and obligations. Most classifications pose no significant constitutional issue; however, the courts consider classifications based on race or ethnicity to be inherently suspect. In view of the nation’s history, it is thought likely that such classifications will allocate benefits and burdens in contravention of equal protection. It is not difficult to find examples of utilitarian efforts to promote the greatest good of the greatest number, as perceived by policy makers, at the expense of equal treatment for racial or ethnic minorities. The rationale for treating some classifications as suspect was first explained in *United States v. Carolene Products Co.* (1938). Its famous footnote 4 noted that

prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

The judiciary’s more probing treatment of suspect classifications is now called “strict scrutiny.” It places the burden of persuasion on the government to show that the classification serves a compelling governmental interest that cannot be achieved by means significantly less invasive of equal protection. This standard sometimes makes it difficult to use affirmative action even though the intent is to promote racial and ethnic equality. (See *Adarand Constructors v. Pena* 1995, and Chapter 4 for further discussion of equal protection.)

The “least restrictive alternative” and “narrow tailoring” are a third constitutional dictate that illustrates how contractarianism opposes administrative utilitarianism. Constitutional rights are not absolute; they may be abridged in favor of a compelling governmental interest. However, because they cannot constitutionally be curtailed gratuitously, the government must promote its compelling interest by the means that are least restrictive of protected rights or narrowly tailored to do limited damage to them. Again, costs will be of secondary concern. The least restrictive alternative requirement was explained as follows: “[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. ‘Precision of regulation must be the touchstone in an area so closely touching most precious freedoms.’ If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties” (*Elrod v. Burns* 1976:362–363). Narrow tailoring
can be less precise. It requires the selection of means that closely fit the achievement of a policy’s objectives rather than those that least abridge protected constitutional rights (see Chapter 4).

Under the least restrictive alternative and narrow tailoring approaches, regulations can be unconstitutional for “overbreadth,” or prohibiting more protected activity than necessary. For similar reasons, regulations may be unconstitutional if they are so vague that neither individuals nor enforcement agents can know what they require (*Kolender v. Lawson* 1983). Regulations may also be overturned by the courts on the grounds that they needlessly “chill” the exercise of protected rights. For example, Arkansas once required that public school and state higher education faculty list all the organizations to which they belonged. Although there was no penalty specified for belonging to any particular organization or any number of them, the Supreme Court held that the requirement unconstitutionally inhibited faculty from exercising their right to freedom of association (*Shelton v. Tucker* 1960).

Finally, “under inclusiveness” bolsters contractarianism by prohibiting regulations that bear harshly on individual rights but are not comprehensive enough to achieve their stated policy purposes. For example, a regulation ostensibly aimed at preventing cruelty to animals that prohibits the slaughter of animals in religious rituals but allows it in other contexts will be unconstitutionally under inclusive (*Church of Lukumi Babalu Aye v. City of Hialeah* 1993).

Constitutional contractarianism requires public administrators to consider carefully the distribution of burdens and benefits when seeking to be cost-effective. Do they fall on identifiable social groups? Can a suspect classification or intent to discriminate be inferred from the administrative action? Do the burdens compromise constitutionally protected rights? Is cost-saving the chief rationale for the action, or is there a more substantial objective or compelling state interest? As the analysis in Chapters 4 through 7 shows, these are among the questions that the legal dimension requires public administrators to consider when fashioning the means for implementing public policies.

### 1.4.5 Regulation versus Liberty and Property Rights

The American administrative state initially developed as an instrument for enhancing governmental regulatory capacity. Between 1887 and 1914, the federal government sought to regulate a wide array of conditions brought about by rapid industrialization in the post–Civil War period. The Interstate Commerce Commission (ICC), created in 1887, is generally viewed as the first federal independent regulatory agency. Its primary responsibility was to regulate railroads. The Sherman Act of 1890 sought to control economic monopolization and to limit the growth of large trusts. It was later augmented by the Clayton and Federal Trade Commission Acts of 1914, both of which sought to regulate economic practices. With industrialization came urbanization and new public health problems. After germs were discovered in the 1890s, the government began to regulate food
The Problem

processing and drugs. The Pure Food and Drug Act, passed in 1906, was quickly followed by the Meat Inspection Act of 1907. The Federal Employers’ Liability Act of 1908 created a greater incentive for private employers to reduce industrial accidents. In 1913, banks came under the regulatory regime of the Federal Reserve Act. Regulation also grew at the state and local levels, especially in the areas of public health, safety, and municipal transportation.

Managerially based public administration promoted some of these measures and informed others. The Progressives had an agenda for economic and social reform. They favored developing the administrative state as a means “to control and humanize and moralize the great powers that had accumulated in the hands of industrialists and political bosses” (Hofstadter 1963:197). They had witnessed the severe limitations and dislocations of the free market and believed that the public interest demanded greater regulation of its negative aspects. Preferably, in order to avoid distortions based on political influence, such regulation would be by trained experts who were shielded from political control. The independent, bipartisan ICC emerged as an “archetype of the modern administrative agency” (Schwartz 1977:293), but while such administrative structures may be politically independent, they are not neutral. They have consequences for who shall govern and how.

Progressive era regulatory initiatives were seen by much of the judiciary as a fundamental threat to traditional American constitutionalism. Administrative rules and statutes for regulating the economy and society would perforce upset a “legal system [that] was almost wholly dominated by the judicially administered common law” (Johnson 1981:10). The judiciary, a coordinate branch of the constitutional government, was threatened by partial displacement by relatively independent administrative experts whose legitimate role in the constitutional system was anything but clear. The common law, which was thoroughly entwined with laissez-faire economic theories and concepts, would be eclipsed by values less supportive of free markets. Judges, who were deeply committed to the common law as the product of centuries of wisdom, and who viewed themselves as protectors of economic liberty and private property, could not help but resist these changes. Two famous judicial decisions well illustrate the underlying conflict between regulatory administration and traditional liberal constitutionalism.

First, in *Chicago, Milwaukee, and St. Paul Railway Co. v. Minnesota* (1890), the Supreme Court held that absent judicial review, administrative agencies were not constitutionally equipped to set rates because deprivation of property had to be accompanied by due process. But applying due process to rate-setting required more than may be immediately evident. It led to “two very real grievances against the common law and judicial review as developed under the common law” (Pound 1942:28). One was that the courts did not accept administrative proceedings as producing a reliable record for subsequent judicial review. Rather, “every fact necessary to the administrative determination might have to be shown de novo” in the reviewing court (Pound 1942:29). Second, the courts “enforced upon administrative
tribunals … the rules of evidence developed by the common-law courts to meet the exigencies of jury trial” (Pound 1942:29). Such rules, of course, are difficult to learn, as well as complex, cumbersome, and expensive to apply. Requiring them impairs the very flexibility administrative agencies were supposed to possess. Eventually, the courts accepted administrative rate setting, although for the most part public utility commissions and similar agencies still employ an adjudicatory format.

Second, *Lochner v. New York* (1905) applied a theory of “substantive due process” that upset a great deal of economic regulation. Substantive due process is formally defined as “protection from arbitrary and unreasonable action” (*Black’s Law Dictionary* 5th ed., 1979). It focuses on the meaning of “liberty” in the Fifth and Fourteenth Amendments. People engage in lots of activities and behavior. Which of these should be granted constitutional protection? In *Lochner*, the Supreme Court’s answer was, more or less, such economic liberty as is concomitant with a laissez-faire economy.

The specific regulation involved was a New York State statute prohibiting the employment of bakery workers for more than 10 hours a day or 60 hours a week. The measure was intended to promote public health. Lochner, a Utica baker, was convicted and fined for allowing an employee to work beyond the 60-hour limit. The Supreme Court held that the law unconstitutionally interfered with the liberty of employees and employers to form contracts. Today, the decision is often viewed as an abuse of power by a conservative court trying to uphold its values in the face of rapid political and economic change. However, while it may be that, it is also a very clear statement of the conflict between regulation and American constitutionalism at the time:

There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence or judgment and of action. They are in no sense wards of the State. … The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. …

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as an employer or employee. … There must be more than the mere fact of the possible
existence of some small amount of unhealthiness to warrant legislative interference with liberty. …

Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual (Lochner v. New York 1905:57–61).

A dissenting Justice Holmes described the case as being “decided upon an economic theory which a large part of the country does not entertain” (Lochner v. New York 1905:75). He derided the Court’s majority for failing to accept the premise that “a constitution is not intended to embody a particular economic theory” (Lochner v. New York 1905:75). Nevertheless it is also true that “constitutional law is what the courts say it is” (Owen v. City of Independence 1980:669), and that much early regulatory administration and policy was considered contrary to the basic theories and values that informed constitutionalism. The courts struck down approximately 200 regulations during the “Lochner Era” (Gunther 1975:565).

Eventually, constitutional jurisprudence divorced itself from laissez-faire economics. The separation was a political necessity. In this case, the extant constitutionalism was adjusted to accommodate society and public administration. Otherwise, government would have been almost powerless to regulate a wide range of employment and economic practices. In some respects, though, constitutionalism is so rooted in common law interpretations based on economic liberalism that the judiciary lost a touchstone for determining the appropriate reach of contemporary due process (Sunstein 1990). Once “[t]he common law system began to be seen not as a natural or impartial order, but as a set of collective choices,” the courts had to develop other baselines for limiting administrative activity (Sunstein 1990:596). Nonetheless, they have sometimes fallen back on the common law, however illogically, when defining “new property” and liberty interests (Sunstein 1990; see Chapter 4, infra, for a more complete discussion). Furthermore, abandoning the common law background of constitutionalism does not compel less protection for property rights. The Supreme Court sees “no reason why the Takings Clause … , as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation” (Dolan v. City of Tigard 1994:392).

1.4.6 Legitimacy

Legitimacy is another dimension of the tension between managerially oriented public administration and American constitutionalism that merits consideration.

Much ink has been spilled over the issue of the administrative state’s legitimacy. (For starters, see Freedman 1978; “Forum” 1993.) Public administration is obviously here and entrenched. Its rules and orders are enforced and obeyed; therefore, from some perspectives it is clearly legitimate. Yet there is an “enduring sense of
crisis historically associated with administrative agencies” that is a “manifestation of a deeper uneasiness over the place and function of the administrative process in American government” (Freedman 1978:9). Political discourse rings with denunciations of bureaucrats, administrative power, and administrative intervention in economic and social life. Much of the debate over the administrative state’s legitimacy turns on issues of performance: Are agencies cost-effective? Are they representative and responsive? Are their processes and decisions fair? But part of it goes to the much more fundamental matter of popular sovereignty.

The orthodoxy favored increasing the extent to which the nation was governed by experts who were insulated from direct political control. Orthodox thinkers had difficulty with democratic institutions and values. Gulick begrudgingly admitted that “[t]here are … highly inefficient arrangements like citizen boards and small local governments which may be necessary in a democracy” (Gulick and Urwick 1937:192–193). Both he and Woodrow Wilson had a great problem explaining how managerially centered public administration would be sensitive to public opinion. Wilson (1887:20, 21) thought public opinion should “play the part of authoritative critic” of administration but not be “meddlesome.” To accomplish this balance, the “authoritative critic” first had to be instructed, persuaded, and improved, which Wilson viewed as a formidable task (Wilson 1887:16, 21). Instruction “in executive expertness or in the conditions of perfect functional balance in government” would be by the very experts in the science of public administration that public opinion would later supervise (Wilson 1887:16). One wonders how effective a check on administration public opinion can be if it is created by the same leaders it is expected to criticize.

Gulick could be just plain dismissive of public opinion. In his understanding, “democracy is a way of government in which the common man is the final judge of what is good for him” (Gulick 1937:86). However, he was not above imputing his own values to the public at large and structuring government around them. “Efficiency is one of the things that is good for him because it makes life richer and safer. That efficiency is to be secured more and more through the use of technical specialists. These specialists have no right to ask for, and must not be given freedom from supervisory control, but in establishing that control, a government which ignores the conditions of efficiency cannot expect to achieve efficiency” (Gulick 1937:87).

The Brownlow Committee tried to institutionalize this view by restructuring and strengthening the presidency in the name of promoting greater efficiency. It had no qualms about doing so because “the President is indeed the one and only national officer representative of the entire Nation,” and because the fate of the world depended on American democracy becoming more efficient: “Facing one of the most troubled periods in all the troubled history of mankind, we wish to set our affairs in the very best possible order to make the best use of all our national resources and to make good our democratic claims. If America fails, the hopes and dreams of democracy over all the world go down” (PCAM 1937:11).
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The NPR rationalized its effort to reinvent federal administration in a strikingly similar way. Finding that “[t]he federal government is not simply broke; it is broken,” the NPR report offers to fix it by “creating entrepreneurial organizations” (Gore 1993:1, 5). This not only requires a smaller role for Congress in federal administration, it also demands the wholesale gutting of traditional accountability and control systems. The report advocated cutting back the federal civilian workforce by 252,000 employees according to the following plan: “Most of the personnel reductions will be concentrated in the structures of over-control and micromanagement that now bind the federal government: supervisors, headquarters staffs, personnel specialists, budget analysts, procurement specialists, accountants, and auditors” (Gore 1993:iii).

Although public opinion clearly supports the view that the federal government is ineffective and too expensive, there is no evidence that it favors empowering federal employees by reducing accountability or changing how it is exercised. Accountants and auditors are supposed to combat abuse, not necessarily enhance efficiency. Accountability, of course, is basic to popular sovereignty. Democracy would seem to demand that accountability’s reinvention be accompanied by public discussion and approval, but here again, managerially oriented public administrative thinkers impelled by business values neglect countervailing political concerns. Like the orthodoxy, the NPR claims to know what the public would want if it had the opportunity to form and register its preferences.

American constitutionalism rests on popular consent, not the consensus of administrative experts. It favors a system of rule that rests on conditions, processes, and values that are at odds with much of managerially oriented public administration, whether in the orthodox or reinvention versions. Table 1.1 conveys this efficiently. These differences make it necessary for managerially oriented public administration to enjoy widespread popular and political support in order to gain and maintain legitimacy. Neither expertise nor performance will be sufficient if accountability seems grossly inadequate, as today when only 17 percent of Americans trust government to do the right thing most of the time (McClatchy 2008).

Historically, the legitimacy of administrative arrangements has been greatest when they were connected to the ideologies of dominant political coalitions and movements. In the early days of the Republic, federal administration was an arm of the nation’s ruling elite and apparently was considered legitimate (White 1965a). The Jacksonian Revolution used patronage hiring and firing to turn the federal service into an adjunct of the political party in power (White 1965b). Although there were always critics of its abuses, this “spoils system” enjoyed broad legitimacy until the Civil War. Later, Progressive administration was able to garner great public support. In the 1990s, the NPR viewed orthodox arrangements as barriers to good government. In each case, the core principles of dominant and accepted administrative practice lost their legitimacy after the political groups supporting them fell from power. In short, legitimate public administration tends to be part of the political worldview of those who win elections and
control government. The longer they stay, the more entrenched it may become. By contrast, the nineteenth century civil service reformers, who lacked deep political backing for their proposals, made only limited inroads—and even then partly because politicians found it expedient or advantageous to extend the merit system. The President’s Committee on Administrative Management also had limited success overall because, despite the strength of the New Deal presidential coalition, its recommendations were not strongly supported in Congress (see Arnold 1986; Karl 1963; Polenberg 1966). More than a decade after its report was issued, Brownlow was still complaining bitterly about congressional micromanagement (Brownlow 1949).

Despite a century of claims to the contrary from Wilson to the NPR, governmental design cannot be apolitical. If history is the guide, public administration that is not consonant with American constitutionalism will be legitimate only when it enjoys broad popular consent and support. Administrative expertise must be in service of the nation’s dominant political vision.

Table 1.1 Requirements of American Constitutional Democracy, the Orthodoxy, and the NPM

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1.5 Controlling Administrative Discretion: The Role of Law

Administrative discretion compounds the uneasy fit between U.S. constitutionalism and large-scale managerially oriented public administration. Kenneth C. Davis, who is generally considered to be both a founder of and a leading expert on U.S. administrative law, provided the classic definition of discretion: a public administrator “has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction” (Davis 1980:4). This definition can encompass both legal and illegal, but unchecked, discretion. In a broad sense, though, Anglo-American legal tradition views all discretion as antithetical to the rule of law, and therefore undesirable. An inscription on the U.S. Department of Justice building reads, “Where Law Ends Tyranny Begins.” From this perspective, the problem of administrative discretion is exacerbated when administrators’ actions are informed by values and/or interests that conflict with those of the broader political system and community. Nevertheless, it is widely recognized that administrative discretion is inevitable, necessary, and indeed, often highly desirable. Theoretically, administrators may actually reduce tyranny by neglecting to enforce repressive laws (Maynard-Moody and Musheno 2003; O’Leary 2006). The dilemma is that administrative discretion is simultaneously feared and prized.

Public administration has two great advantages in rule making, adjudication, and policy implementation. It is flexible and able to rely on expert specialization in decision making. Although subject to criticism for costliness and delay, administrative processes are typically less cumbersome than those of legislatures and courts. A great deal of administrative activity can be classified as “informal”; that is, actions that do not “fall well within prescribed (usually written) procedures, as dictated by legislative statutes, court rulings, and/or agency rules and regulations” (Warren 1988:358). Many key administrative decisions dealing with whether to undertake an action, such as rule making, enforcement, or planning, are informal. Administrative agencies also bring a great deal of specialized expertise to bear on their decisions and actions. Who knows the tax code better than the Internal Revenue Service? Who knows federal personnel law better than the Merit Systems Protection Board? Who knows labor law better than the National Labor Relations Board? Who can enforce complicated safety and health law better than inspectors and other personnel in the Federal Aviation Administration, the Occupational Safety and Health Administration (OSHA), and similar agencies?

These advantages impel the government to rely on administrative discretion to accomplish its purposes. Two types of discretion are most pertinent: “(1) authority to make legislative-like policy decisions, and (2) authority to decide how general policies apply to specific cases” (Bryner 1987:6). Legislative discretion is common when Congress or a state or local legislature is unable or unwilling to be specific in statutes. Vagueness is sometimes the price of agreement. Such terms as “adequate,”
advisable,' 'appropriate,' 'beneficial,' 'convenient,' 'detrimental,' 'expedient,' 'equitable,' 'fair,' 'fit,' 'necessary,' 'practicable,' 'proper,' 'reasonable,' 'reputable,' 'safe,' 'sufficient,' 'wholesome,' or their opposites” are prime examples of language that virtually forces agencies to engage in supplemental legislative action (Warren 1988:370). Some instances are particularly egregious. Congress charged the Federal Communications Commission to regulate use of the nation’s airwaves in the “public convenience, interest, or necessity,” without supplying meaningful guidance (McConnell 1966:285). In trying to interpret the words “to the extent feasible” in the Occupational Safety and Health Act of 1970, Supreme Court Justice William Rehnquist wrote

I believe that the legislative history demonstrates that the feasibility requirement … is a legislative mirage, appearing to some Members [of Congress] but not to others, and assuming any form desired by the beholder (Industrial Union Department, AFL-CIO v. American Petroleum Institute 1980:681–682).

Under such circumstances, virtually any consistent set of agency actions will tend to define a statute.

Discretion in policy implementation is also common. First, at the most basic level, public administration involves execution of the law. A major purpose of the administrative state is to give government a tool for intervening effectively in the society and economy. Administrative expertise is sought in determining the most appropriate means for achieving a legislative purpose. Administration has long been viewed as a science of means (Wilson 1887), and both the orthodoxy and reinvention celebrate the use of administrative discretion in policy implementation. Second, agencies frequently have discretionary power to do nothing at all. They “may simply decide not to initiate, prosecute, negotiate, settle, contract, deal, and so on” (Warren 1988:360). Third, agencies must often decide how and where to apply the law because they lack the human, technological, and financial resources to engage in universal enforcement or treatment. This is very common in regulatory and social service administration; not every facility can be inspected, speeder ticketed, or client’s needs accommodated. Fourth, in some kinds of administration “an official must make many decisions involving subtle and complex assessments of human characteristics” (Shapiro 1994:502). This is particularly common in street-level encounters involving law enforcement, inspections, and frontline service delivery to clients or customers (Lipsky 1980; Maynard-Moody and Musheno 2003), as well as in therapeutic work (Mashaw 1983). Finally, legislatures may build discretion into administrative policy implementation in order to facilitate micromanagement and garner pork barrel benefits (Fiorina 1977; R. Arnold 1979).

From a practical perspective, the obvious problem with administrative discretion is that it may be used poorly. Public administrative actions may be contrary to the public interest. There are countless bases and numerous reasons for this.
Administrators may place their self-interest or convenience ahead of the public’s. They may shirk. They may be inappropriately risk-averse. Their specialization may give them “tunnel vision,” or an inability to correctly assess the importance of the goals they are pursuing relative to those sought by other policies and units of government. It may also desensitize them to the needs or plights of those upon whom they act, as is common in the administration of mental health facilities and prisons (see Chapter 7). They may be socially different from the population at large and have a different worldview and/or understanding of reality. Decision makers in an agency’s headquarters may be out of touch with conditions in the field. Administrators may act out of personal preferences and prejudices. Corruption is a common problem and subversion is sometimes present.

Some failures of administrative discretion have been spectacular: the AEC and the downwinders were mentioned previously; under J. Edgar Hoover, the FBI harassed the Reverend Martin Luther King, Jr., and tried to pressure him into suicide; from 1932 to 1972, the U.S. Public Health Service conducted a study on the effects of untreated syphilis on black men that misled them and withheld cure or relief as the disease took its awful and painful toll. (For descriptions of these cases of maladministration, see Rosenbloom, Kravchuk, and Clerkin 2009:350, 511, 512.)

More theoretically, from a legal perspective, as noted above, administrative discretion can undermine the rule of law. By definition, discretion involves unconstrained or weakly constrained official action or inaction. Review may be difficult, impossible, or prohibitively expensive. Inaction may be invisible. Discretionary nonenforcement of the law may be very hard to check. In some cases, administrators may appear to be above the law or outside its limits because they are unable to explain their actions. Sometimes they rely on intuition, which defies logical explanation. (For an example, see New Mexico v. Bloom 1976:930, and the discussion in Chapter 5.) Patterns of selective enforcement may not become apparent until it is expensive or impossible to reverse them. As Michael Lipsky (1980:3) notes, in practice, the cumulative effect of the discretionary actions of numerous individual administrators may amount to agency policy. Discretion involving legislative choices may make the law look like an instrument of temporary agency preference or even whim. For instance, in one well-known case, the Environmental Protection Agency interpreted the words “stationary source” in a single statute in two very different ways (Chevron v. Natural Resources Defense Council 1984). In another, the National Highway Traffic Safety Administration flip-flopped a remarkable number of times with regard to whether the National Traffic and Motor Vehicle Safety Act of 1966 should be read to require automobiles to be equipped with air bags and/or automatic seat belts (Motor Vehicle Manufacturers Association v. State Farm Mutual 1983).

Politically, placing legislative discretion in administrative agencies can weaken constitutional government (Lowi 1969). To the extent that policy is made by administrative agencies, legislatures become relatively less important to interest groups and to the public. Those seeking particular policy outcomes will focus their
activity on agencies. But unlike legislatures, agencies do not have the vantage point to view a wide spectrum of competing claims on government. At the federal level there is very little interagency mobility by top-level careerists. Neither are agency decision makers directly accountable through elections. At worst, vague delegations enable legislators to avoid responsibility for difficult choices in a cynical attempt to promote their own incumbency (Fiorina 1977).

Discretion cannot (and should not) be eliminated, but it can be limited and constrained to reduce its negative qualities. Organizational design, culture, management, and internal procedures can be used to structure discretion and militate against its misuse (see Davis 1980). So can legislative oversight. Law is another means, and the one of greatest concern in this book. Three types of statutes are commonly used to deal with administrative discretion. First, law may deny administrators discretion altogether. For example, the “Delaney Amendment” deprived the Food and Drug Administration (FDA) of any discretion when ingestion of a food additive causes cancer in laboratory animals. The agency was required to ban the sale for human consumption of any food item containing the substance. Sometimes, such action may not be scientifically justified. The doses given to the animals may be astronomical relative to their body weights or there may be significant differences in the way the substance affects humans.

However, the FDA had no choice. When it took very unpopular steps to ban saccharin products, Congress intervened. The amendment was modified in 1996 to require banning substances when the risk to humans is less than a one in a million lifetime risk (U.S. History Encyclopedia 2009). Technically speaking, OSHA inspectors are in a similar predicament; they have no discretion to ignore violations, however minor or unthreatening (see Bardach and Kagan 1982:5). The federal Clean Water Act poses similar problems for state and local administrators, who feel that it deprives them of all discretion in too many circumstances.

Second, the law may place administrative discretion within fixed limits. Federal mandates on state and local governments are a common example. They often require municipalities to reach or maintain certain levels of a public good, such as clean air or water. However, in some circumstances they allow administrators considerable discretion in determining how to do so. Reinvention’s focus on employee empowerment and entrepreneurship, as well as on obtaining results, would make discretion within fixed limits the norm. Agencies would be given clear goals, sufficient resources, and tremendous flexibility in selecting the administrative strategies, processes, and techniques to be employed.

Third, law may structure the use of administrative discretion. In large part, this is the purpose of administrative law. Such a law may be generic—that is, apply to agencies generally—or it may be adjusted specifically for individual agencies or their subunits. The APA is generic; it is not tailored separately for the missions and programs of each agency. It specifies the procedures agencies will use when engaging in rule making, adjudication, enforcement, and other activities. For instance, section 552, which includes the Freedom of Information Act, requires agencies to
release information to interested persons. It allows, but does not compel, agencies to withhold information that falls into relatively specific categories called exemptions. Release of exempted information is further constrained by other requirements that it not constitute an unwarranted invasion of privacy or reveal certain proprietary information. Consequently, the use of discretion is structured as follows: (1) an agency has no discretion regarding the release of some information; (2) it has considerable discretion with regard to exempted information; but (3) it must withhold some information that threatens privacy and proprietary secrets. (See Chapter 2 for further discussion of federal administrative law regarding information.) The National Environmental Policy Act of 1969 is another example. Agencies have the discretion to undertake actions that will significantly affect the environment, but they must develop impact statements that consider adverse effects, alternatives, economic productivity, and resource commitments that are irreversible or irretrievable. The environmental impact statement is a means of structuring agency decision making. It specifies the minimal concerns an agency must consider. Much constitutional law operates the same way. It structures agency processes, such as adjudication, and guides administrators’ thinking where individual rights are a factor. (This is discussed at length in Chapters 4 through 8.)

In sum, law is an important means of dealing with administrative discretion and constraining administrative action. It can play a major role in making public administration more compatible with U.S. constitutional democracy. The APA and related statutes have clearly done this. But the law is not solely the purview or product of legislatures. It is also defined, and in the case of constitutional law, made (or “found”) by the courts. The next section broadly outlines how the courts have responded to the growth of large-scale public administration.

1.6 Judicial Responses to the Administrative State

Understanding Supreme Court justices and their motives is difficult. (See Woodward and Armstrong 1979, for an effort to construct a portrait.) Their decision-making conferences are secret and many of their conversations with one another go unrecorded. We know that judges and justices may be influenced by their own attitudes, their relationships with other jurists, legal argumentation and precedent, the legal community’s interest in particular issues, the decisions of other courts, interest group participation in cases, politics and public opinion, institutional concerns, and other factors. (See among many others Epstein 1995; Epstein and Knight 1998; Spaeth and Brenner 1990; Spaeth and Segal 2002.) The judiciary is also influenced and constrained by other governmental actors. Some statutes, like the APA, limit and structure judicial review of administrative action. Congress frequently passes legislation with the intent to reverse specific judicial decisions, but definitive explanations of why courts act as they do are often elusive. Supreme Court Justice Benjamin Cardozo explained
There is in each of us a stream of tendency, whether you choose to call it a philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James’s phrase of “the total push and pressure of the cosmos,” which, when reasons are nicely balanced, must determine where choices fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own (Murphy and Pritchett 1961:27).

Ultimately, the plain words of judicial opinions may often be the best guide to judicial intent.

The outcome of cases and the reasoning contained in judicial opinions can reveal a great deal about what members of the judiciary are hoping to achieve. Judicial activity concerning the most pressing political issues of any given historical period sometimes falls into relatively coherent patterns. Judge Learned Hand and Justice Felix Frankfurter referred to these patterns as “moods” that preoccupy and inform judicial thought (Frankfurter 1957:793). Analysis of the case law and related judicial statements reveals that historically the Supreme Court has responded to issues raised by the administrative state in three relatively distinct and more or less internally consistent moods. These are outlined below as background material for the remainder of the book. A detailed analysis of the third period, dating from the 1950s to the present, is presented in Chapters 4 through 8.

### 1.6.1 Judicial Opposition to the Administrative State (1890s–1936)

The period of judicial opposition to the administrative state began in the 1890s and persisted with more or less force until 1937. As noted earlier, judges were wedded to the common law and the laissez-faire worldview embedded in it. Aside from using economic substantive due process in such cases as *Lochner* and zealously protecting property interests in those such as *Chicago, Milwaukee, and St. Paul Railway*, the courts frustrated regulation by using two juridical canons and narrow interpretations of federal power under the Commerce Clause. The “derogation canon” held that statutes that ran counter to the common law ought to be interpreted in the fashion so as to least interfere with it (Johnson 1981:76). A prime example, discussed in Chapter 8, was the Civil Rights Act of 1871, which sought to afford federal court protection to freed slaves. Although the act’s language specified that “every person”
who violated their federally protected rights under color of state or local governmental authority was potentially liable for damages, the federal courts concluded that “every person” did not include almost all public officials. This was because common law provided such officials with absolute immunity from suits arising out of the conduct of their governmental functions. By contrast, where there was no conflict with the common law, the judiciary often used the “plain meaning rule,” which “decreed that the courts should not look past the exact language of a statute unless the words were prima facie confusing or lent themselves to absurd consequences” (Johnson 1981:76). In one case the Wisconsin Supreme Court declined to apply a statute pertaining to “every railroad company” to “an electric interurban railway” (Jones v. Milwaukee Electric Railway Co. 1911).

Judicial interpretation of the Commerce Clause during this period was extremely convoluted and, by today’s standards, restrictive. The federal government could not regulate commerce that did not cross state lines, enter into the stream of interstate commerce, or affect it directly in some significant way. Carter v. Carter Coal Co., decided by the Supreme Court in 1936, was a classic statement of this line of jurisprudence and also one that led to its demise. The Court reasoned that

The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment … affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or by adding to the expense or complexities of the business, or by all combined (Carter v. Carter Coal Co. 1936:308).

As C. Herman Pritchett (1977:193) notes, Carter “illuminated as by a flash of lightning a judicial dream world of logical abstractions where there was no difference between one ton of coal and a million tons of coal, where considerations of degree were not cognizable by the law. Production was local. A production crisis in every part of the country simultaneously could never add up to a national problem with which Congress could deal. …”

Furthermore, the Tenth Amendment, which protects state power in matters not delegated by the Constitution to the United States or prohibited by it to the states, was read to limit the national government’s powers to pursue social objectives under the Commerce Clause. A classic illustration was Hammer v. Dagenhart (1918), in which the Supreme Court invalidated a federal statute seeking to reduce child labor by prohibiting the interstate shipment of goods produced by it. It was not until 1941 that this line of reasoning was definitively rejected (United States v. Darby 1941).
The judicial opposition to the administrative state nearly resulted in a constitutional crisis in the mid-1930s. The Supreme Court and much of the federal judiciary stood firmly in the way of New Deal efforts to resuscitate the severely depressed national economy. The courts clung tightly to the limitations they had imposed through the Commerce Clause, and found delegations of legislative power to the executive to be unconstitutional violations of the separation of powers. Robert Jackson, attorney general under President Franklin D. Roosevelt and later a Supreme Court justice, accused the judiciary of trying to “nullify the New Deal” (Jackson 1941:Chapter 4). In his view, “‘hell broke loose’ in the lower courts. Sixteen hundred injunctions restraining officers of the Federal Government from carrying out acts of Congress were granted by federal judges” in 1935 and 1936 (Jackson 1941:115).

Aside from the Carter case, two 1935 Supreme Court decisions seemed to create almost insuperable barriers to more activist federal administration. In Panama Refining Co. v. Ryan, the Court held that the Congress could not delegate its powers concerning the regulation of interstate commerce to the president in the absence of strict guidelines for their use. According to Jackson (1941:92), it was the first time in the nation’s history that a federal statute was held unconstitutional on this basis and seemed to contravene the Court’s previous decisions sustaining delegations of this nature. In Jackson’s view, the decision violated a host of precedents and past practices and was best understood “as a deliberate forewarning of what was to come. …”

The decision created a new obstacle to effective democratic government. It added a further perplexity in framing legislation. A rigid and inflexible law was in danger of being held unconstitutional because, as applied to unforeseen situations, it might appear to the Court to be arbitrary or capricious. Now it appeared that if legislators sought to avoid this risk and make for greater equity by delegating discretion, such a law ran another risk equally great. Of course some delegations would be permitted if adequate standards for the exercise of discretion were laid down. But the Court that required Congress to define standards to govern delegated power has … failed to set forth standards by which to define unconstitutional delegation (Jackson 1941:94–95).

The Court’s invocation of the separation of powers to limit administrative penetration of the economy was reiterated even more forcefully in Schechter Poultry Corporation v. United States. Much of the New Deal hope for terminating the depression had been pinned on the National Industrial Recovery Act of 1933. The statute was passed in response to Roosevelt’s request that Congress provide “for the machinery necessary for a great co-operative movement throughout all industry in order to obtain wide re-employment, to shorten the working week, to pay a decent wage for the shorter week, and to prevent unfair competition and
disastrous overproduction” (Jackson 1941:110–111). The act authorized the president to approve industry codes of fair competition, which resulted in the creation of a recovery administration in the executive branch. The Supreme Court was called upon to adjudicate the government’s enforcement of a live poultry code, promulgated pursuant to the act. The code regulated wages, hours, and selling practices in the live poultry industry. The Court came down hard on legislative delegation: “Congress is not permitted to abdicate or to transfer to others the essential functions with which it is … vested” (Schechter Poultry Corp. v. United States 1935:529). Legislative discretion could be granted to executive branch agencies only if Congress “has itself established the standards of legal obligation, thus performing its essential legislative function” (Schechter Poultry Corp. v. United States 1935:530). For good measure, the Court went on to find the act in violation of the Commerce Clause as well.

President Roosevelt responded to these decisions by asking Congress for the authority to appoint an additional justice for each member of the Court who had held his position for at least 10 years and had reached the age of 70, until the Court reached a total of 15. The “court-packing plan” was never enacted. Justice Willis Van Devanter, who was appointed in 1910, retired in 1937, and Justice Owen Roberts, who previously had been part of a 5 to 4 anti-New Deal majority, began voting with the pro-New Deal justices. Between 1937 and 1943, Roosevelt had the opportunity to appoint a chief justice and eight associate justices. Roberts and Chief Justice Harlan Stone, whom Roosevelt elevated to that position, were the only remaining members from the earlier period. Nowadays it might be said that the “litmus” test for appointment was support for a broader reading of the federal government’s powers under the Commerce Clause, willingness to accept legislative delegations to the executive branch, and deference to administrative expertise. The same concerns applied to many lower court appointees. In addition, the Judiciary Act of 1937 required district court judges to sit in panels of three, rather than individually, when hearing cases seeking to enjoin the activities of federal officials on constitutional grounds—enter the period of acquiescence in the administrative state.

1.6.2 Judicial Acquiescence in the Administrative State (1937–Early 1950s)

During the period of acquiescence in the administrative state, the judiciary accepted legislative delegations and administrative intervention in the economy and society. This mood was driven largely by the political need to avoid confrontations over administrative action rather than by the development of constitutional theory that would legitimize the exercise of agency authority or explain how it should be integrated into the political system.

One of the most striking developments was in the area of interstate commerce. The judiciary virtually abandoned the field. The Commerce Clause was “rewritten”
by the Supreme Court to permit the federal government to reach almost any activity, whether for economic, social, or other purposes. The Fair Labor Standards Act of 1938, which regulated the wages and hours of workers engaged in interstate commerce, was upheld in United States v. Darby (1941). In Wickard v. Filburn (1942), the Court reformulated the Commerce Clause to permit regulation of non-market activity that if sufficiently aggregated could have a substantial effect on the national economy (see Chapter 2).

By today’s standards and those of the earlier period, the courts displayed great deference toward administrative expertise, but they also largely ignored the potential for abuse. Although Schechter remained good law, no delegations of legislative power were overturned. Despite the population’s growing dependency on administrative agencies, the courts clung to older doctrines that did not impose meaningful constitutional constraints on the allocation of governmental benefits (see Chapter 4). They could be granted or withheld with little or no regard for procedural due process or individuals’ substantive constitutional rights. Equal protection continued to be largely informed by “separate but equal” analysis and therefore to accommodate racial segregation and discrimination. Furthermore, it did not yet clearly apply to the federal government through the Fifth Amendment (Bolling v. Sharpe 1954).

Acquiescence enabled the federal government to expand its power tremendously while ensuring that the Constitution would be irrelevant to a great deal of administrative interaction with individuals. Abuses were inevitable, and eventually the lack of a compelling constitutional rationale for acquiescence would spell its doom.

The Supreme Court’s approach to administrative power during the middle part of the period of acquiescence was studied comprehensively by C. Herman Pritchett. He described the “Roosevelt Court’s” political consensus as “[a] controlling philosophy which sees ‘court and agency’ as co-workers for the attainment of a common aim [that] requires that the courts limit themselves to those functions which they are better fitted than the agencies to perform” (Pritchett 1948:172). This approach dictated deference to administrative findings and conclusions in economic and social areas in which “agencies possess an expertness and competence … which the Court does not share” (Pritchett 1948:172).

In some respects, the courts’ faith in administrative expertise was as unrealistic as the judiciary’s earlier belief in laissez-faire principles and the abstractions of the common law. It also constricted the judiciary’s role in regulating administrative activity, which was now at the center of government. Even after acquiescence had been eroded by newer approaches using constitutional law to regulate administrative behavior, it was fair to conclude with Martin Shapiro that “[j]udicial review of administrative decision making is then marginal in the sense that, at least in the current Washington situation [1968], policy differences are unlikely to arise in most instances in which review is theoretically possible. Thus most of the relations between agencies and courts are relations of acquiescence, consent, or compromise.
arrived at by anticipation of the other participant’s position even before a tremor of conflict arises” (Shapiro 1968:268). Administrative power would inevitably become a political concern and the courts would be moved to do more.

1.6.3 Constitutionalization and Partnership: The 1950s Forward

Beginning in the 1950s and continuing to the present time, the judicial response to the administrative state has featured the constitutionalization of public administrative practice and the use of administrative and environmental law to turn the courts into full-fledged partners in administration. Constitutionalization refers to judicial decisions that force constitutional rights, values, and procedures into day-to-day public administration. Partnership involves expansion in the scope of judicial review of and involvement in agency decision making.

Specifically, constitutionalization involves four fundamental shifts in judicial doctrines. First, the courts declared (or found) new constitutional rights for individuals in their encounters with public administrators as clients, customers, persons involved in street-level regulatory matters, public employees, prisoners, and public mental health patients. In each type of encounter, individuals had very limited constitutional rights prior to the 1950s—in most circumstances, effectively bordering on none. Consequently, the Constitution and constitutional law were largely irrelevant to social welfare, public personnel, street-level, prison, and public mental health administration. By the mid-1970s, this had all changed. Individuals had incrementally gained broad substantive, procedural due process, and equal protection rights under the First, Fifth, and Fourteenth Amendments. Prisoners’ Eighth Amendment rights against cruel and unusual punishments were expanded to include the conditions of confinement. Involuntarily confined public mental health patients gained substantive due process rights to treatment and habilitation. Fourth and Fourteenth Amendment privacy rights became relevant to street-level encounters, though only to a limited extent. In the 1990s, those who encounter public administration as government contractors gained First Amendment protections that parallel the free speech rights of public employees. These developments are analyzed in Chapters 4 through 7.

Having established new constitutional protections for individuals in the administrative state, the courts made it far easier for aggrieved persons to assert their rights and for the judiciary to enforce them. This involved three additional changes that deeply affected litigation. One was to modify the requisites of gaining standing to sue, making it easier for individuals to bring cases against public administrators and agencies. Another was to develop a new type of lawsuit, known as “public law litigation” or “remedial law,” which enables judges to institute thoroughgoing reforms of public institutions, such as prisons and public schools and mental hospitals. Remedial law can also be used to reform administrative systems, including
public human resources management, welfare, and public housing programs. Finally, the courts revamped the liability of public administrators for violating the constitutional rights of those upon whom they act within the context of their official responsibilities. This was the capstone of the current judicial response to the administrative state. It was in place by 1975, and although there have been adjustments to constitutional rights in the various encounters, standing doctrine, the use of remedial law, and liability, the framework for constitutionalization remains in place. Together, easier standing and remedial and liability law expand the legal avenues through which “antagonists” of the administrative state can use the courts to protect their legal rights and bring about reforms. This is the subject matter of Chapter 8.

Turning to the courts’ partnership with public agencies, Chapters 2 and 3 explain how judges and justices have used the APA and a host of environmental statutes to probe administrative decision making and seek to correct what they perceive as defective decisions. The model is one of partnership because, benefiting from easier standing, individuals and groups have made litigation a normal, rather than extraordinary, part of U.S. public administration. Unlike judicial activity during the period of opposition to the administrative state, partnership involves trying to correct administrators’ tunnel vision and other limitations rather than to stifle the exercise of administrative authority altogether (see Chapter 2).

Constitutionalization and partnership were precipitated by a number of factors. With Earl Warren as chief justice (1953–1969), the Supreme Court dramatically expanded the scope of individual civil rights and liberties. Many of President Lyndon Johnson’s appointees to the lower courts reflected the Great Society view that state and local governments were obstacles to promoting equality and eliminating poverty. These judges were often at the forefront of efforts to revamp public schools, state mental health facilities, prisons, and administrative systems (Rosenbloom 1986).

Although it was anticipated by many that President Richard Nixon’s Supreme Court appointees, including Chief Justice Warren Burger (1969–1986), would be more conservative, the Warren Court’s “rights revolution” was not reversed (Blasi 1983). In some respects, as with personal privacy, it even intensified (e.g., Roe v. Wade 1973). Throughout the Warren and Burger Court years, the judiciary placed extensive constitutional constraints on public administrators’ actions and virtually forced constitutional values in to their thinking, a process that has continued to the present day.

At the root of constitutionalization and partnership was a growing judicial concern that administrative practices could undermine the traditional rights and freedom of a large and rapidly expanding share of the population. The federal Loyalty-Security Program of the late 1940s and early 1950s was so abusive that it jarred several Supreme Court justices into rethinking earlier doctrine that afforded those dependent upon the administrative state for jobs or other benefits very little constitutional protection (see Chapters 4 and 6). The Court’s ruling in Brown v. Board of Education (1954) that the Equal Protection Clause prohibits
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state-sponsored racial segregation in public schools had a carryover effect to other administrative operations where racial inequality was rife, including prisons and public employment (see Chapters 4, 6, and 7). Even after the rights revolution was well under way, Justice William O. Douglas continued to warn his colleagues that “the bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent”; “today’s mounting bureaucracy, both at the state and federal levels, promises to be suffocating and repressive unless it is put into the harness of procedural due process”; and “the sovereign of this Nation is the people, not the bureaucracy” (Wyman v. James 1971:335; Spady v. Mount Vernon 1974:985; United States v. Richardson 1974:201). The modern administrative state was very much part of the judicial “mood” in the 1950s–1970s.

Constitutionalization and partnership were related to one another. Judge David Bazelon (1976:104–105), who apparently coined the term “partnership,” noted that

Administrators are not always happy about judges meddling in their affairs; judges are not always happy with the administrative responses to their meddling. Under the circumstances, a certain amount of disappointment and frustration on both sides is entirely natural. As the Constitutional right to due process of law expands, more and more administrators will find themselves locked into involuntary partnerships with the courts.

Bazelon wanted the new partnership to be more productive, although he assumed that judges would be the controlling partners.

1.7 Conclusion: Retrofitting as an Incremental Project

Much of the analysis in this chapter is theoretical; however, it pertains directly to concrete administrative action. Even at its most thoughtful, orthodox administration was “indifferent to rights” (Rohr 1986:148) and the consequences have been real. Constitutional democracy is seriously compromised when public administrators in highly respected, technologically based agencies can knowingly poison children with radioactive fallout, withhold medical treatment from those dying of a painful and debilitating disease, and attempt to eliminate a national hero, as previously discussed. Such spectacular maladministration is aberrant, but zero tolerance for it should be the norm. There is a clear and continuing need to ensure that administrative activity is compatible with constitutional democracy.

Law is one tool for retrofitting public administration into U.S. constitutional government. In 1946, the APA was hailed as “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. It is designed to provide guarantees of due process in administrative procedure” (statement by Senator Patrick McCarran, U.S. Congress 1946:298). The broad thrust of judicial review of public administration since the 1950s has been to constrain administrative activity within a framework of individual rights, to infuse it with constitutional values, and to supervene to promote the rule of law.

Contemporary retrofitting is incremental. As Justice Burger noted in the Chadha case, as a nation we do not know a better way to preserve freedom than to insist on constitutional integrity. Whether a better constitutional design for the administrative state is possible is a moot point. Woodrow Wilson (1887) leaned toward a parliamentary system; the Brownlow Committee preferred centralizing authority for administration in the presidency, as would President George W. Bush’s unitary executive branch theory. Such approaches would drastically alter the constitutional separation of powers and might make for smoother public administration. However, they would do nothing to ensure that public administrative doctrine is fully compatible with and protective of individual constitutional rights.

Instead of following grand designs, retrofitting public administration to U.S. constitutional democracy is likely to continue to be incremental. As Dwight Waldo (1984b:xviii), perhaps the leading public administrative theorist of the twentieth century, contended, the tension between public administration and democracy “cannot be solved acceptably, workably given our constitutional system, our constitutional history, and our democratic ideology. All we can hope for is piecemeal solutions, temporary agreements.” The federal courts have taken a large share of the burden of fashioning incremental adjustments to bring public administration into greater consonance with U.S. constitutional democracy. The other branches of government, political parties, interest groups, media, and a variety of political actors have also contributed to retrofitting, but a great deal depends on the public administration community itself—students, practitioners, theorists, teachers, leaders, and professional organizations. It is they who are called upon to build constitutional thought, values, concerns, and law into highly varied day-to-day administrative practices. There is an objective, but no map. A firm understanding of public administration’s contemporary legal dimension is a prerequisite for finding one’s way.

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