CHAPTER 22

PUBLIC ADMINISTRATION'S LEGAL DIMENSIONS

Three Models

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Public administration in the United States has at least three highly developed legal dimensions: the constitutional separation of powers; administrative law; and individual constitutional rights. Respectively, these can be conveniently referred to as the "Madisonian model," based on James Madison's writings on the separation of powers in the *Federalist;* the "1946 legislative-centered model for administrative law," reflecting Congress's effort in 1946 to develop a framework for exercising greater control over federal administration; and the "judicial model for infusing constitutional rights into public administrative practice." In this chapter, consideration is given first to the relationship of law to U.S. public administration, followed by review of the origins, structure, and scope of each model as well as their collective impacts on public administration.

PUBLIC ADMINISTRATION AS A FIELD OF STUDY AND LAW IN THE UNITED STATES

As a self-conscious enterprise, U.S. public administration began as a field of management and science rather than an endeavor based on legal principles. It developed out of the confluence of the civil service reform movement of the 1870s–90s, which insisted that politics should be separate from administration, and the Progressive (1890–1924) and scientific management movements (1911–30s), which sought further depoliticization and the building of a science of administration. With management and science as its pillars, law was considered of secondary or even lesser importance to administration. Leonard White's *Introduction to the Study of Public Administration* (1926), the first U.S. textbook on the subject, affirmed 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). By 1937, Luther Gulick and Lyndall Urwick could present public administration as a science in their highly influential volume, *Papers on the Science of Administration.* In Gulick's view, this science treated efficiency as "axiom number one in [its] . . . value scale" (Gulick 1937, 192).

These early works and movements contributed to the public administration "orthodoxy" that had fully emerged by the late 1930s. The orthodoxy's claims of being both scientific and apolitical were debunked in the 1940s by a number of extraordinary works. Herbert Simon's *Administrative Behavior* (1947) and article "The Proverbs of Public Administration" (1946) convincingly

demonstrated that although the orthodoxy may have contained a lot of common sense, it was not scientific. Its prescriptions for organizational design and administrative behavior were, like proverbs, contradictory. In *The Administrative State* (1948), Dwight Waldo added to the attack on the orthodoxy by exposing its latent—and nondemocratic—political theory. In 1949, Paul Appleby, a leader in the field, referred to public administration as a "political process" in his book *Policy and Administration* (Appleby 1949).

Having lost what was as close to a dominant paradigm as modern U.S. public administration has ever had, in the late 1940s and 1950s the field turned to case studies as a means of rebuilding its body of knowledge. Many of the casebooks produced during this period highlighted public administration's political dimensions (Rosenbloom 1995). As the case study movement declined in the 1960s, "bureaucratic politics" became a major focus of the field. This coincided with the rise of logical positivism in political science, which strengthened the view promoted by Simon and others that public administration could and should be scientific. Not everyone agreed, and the field entered a prolonged period of epistemological pluralism and subject matter heterodoxy, with a variety of methodological approaches, intellectual currents, and subfields operating largely independently of one another. A major effort to reframe the field in the late 1960s, the new public administration, fell short, and it was not until the rise of the new public management and reinventing government movements of the 1980s and 1990s that the prospect of developing a dominant paradigm seemed plausible (Marini 1971; Kettl 2002).

Law stood largely on the sidelines through all this intellectual development and turmoil. It never came close to being center stage. Beginning in 1940, several administrative law texts designed for use in master of public administration (MPA) programs became available (Rosenbloom 1995). However, administrative law was never integrated into public administration's mainstream, and one would be hard-pressed to conclude that it constitutes even a subfield. Using Jay Shafritz and Albert Hyde's sixth edition of the *Classics of Public Administration* (2007) as a marker of high-impact works, it can be noted that from the 1950s forward the field produced excellent research and scholarship that skirted around law in dealing with federalism, intergovernmental relations, and ethics. However, much of the field was oblivious to the importance of law in public administration. Even the *Classics*' selection "Watergate: Implications for Responsible Government," a product of the elite National Academy of Public Administration, neglected to include adherence to the rule of law among its prescriptions for ethical political and administrative behavior. The only piece in *Classics* that presents law as a central component of public administration is Rosenbloom's "Public Administrative Theory and the Separation of Powers," first published in 1983.

A more systematic recent examination, "The Status of Law in Contemporary Public Administrative Literature, Education, and Practice," concludes that law is prominent neither in the contemporary public administration literature nor in MPA pedagogy (Rosenbloom and Naff, forthcoming). Reporting on Zeger van der Wal's research on public administrative values, it noted that lawfulness ranked near the bottom—twenty-first—on a list of thirty value clusters derived mostly from the U.S. public administration literature on ethics (van der Wal 2008). A survey jointly conducted by Katherine Naff and David Rosenbloom with the National Association of Schools of Public Affairs and Administration in 2008 found that although 88 percent of U.S. MPA programs accredited by the National Association of Schools of Public Affairs and Administration offer at least one law course, in about 60 percent of the MPA programs a student can receive a degree without taking a single law-oriented course. Most of the law courses offered emphasize administrative law (84 percent), constitutional law (45 percent), and personnel/human resources management law (36 percent), with the remainder focusing on environmental law, housing and community development, local government, collective bargaining, health, elections, nonprofit, and tax law (Rosenbloom

and Naff, forthcoming). The survey results indicate that a majority of MPA students do not take any law course (Rosenbloom and Naff, forthcoming).

Why is law not more central to U.S. public administration? One possible explanation could be that law is irrelevant to public administrative practice. However, multiple sources of evidence strongly suggest that this is not the case. For example, van der Wal found that "lawfulness" ranks very high in the value scale of Dutch administrators (van der Wal 2008, 70, 73, 74). Three decades ago, Marshall Dimock, a leading contributor to the field of public administration, observed, "To the public administrator, law is something very positive and concrete. It is his authority. . . . It does three things: tells him what the legislature expects him to accomplish, fixes limits to his authority, and sets forth the substantive and procedural rights of the individual and group" (Dimock 1980, 31). Steven Maynard-Moody and Michael Musheno's study *Cops, Teachers, Counselors* (2003) also finds that law is very salient to street-level administrators. In some areas of public administration, including environmental protection, litigation is frequent enough to be a normal part of the administrative process (O'Leary 1993). It should also be noted that in 2008, an American Society for Public Administration Task Force on Educating for Excellence in the MPA Degree called for MPA education in the United States to be anchored in the Constitution. It emphasized the need to teach students to use public authority "lawfully" (2008, 21).

If law is relevant to public administrative practice, then what else can explain its tangential status in public administrative literature and pedagogy? Perhaps part of the answer is that law should be left to the lawyers. This begs the question. Public administration is comprised of several subfields that could similarly be left to expert professionals: budgeting and finance (economists and accountants); organizational behavior (sociologists); personnel (human resources management specialists); (some) methodologies (statisticians); general management (MBAs and managerial consultants). Public administration is a distinctive academic field precisely because it combines several subfields in which others might claim greater expertise into a public sector context that studies and seeks to guide the behavior of millions of public servants.

Another possible explanation is that as a field of study, U.S. public administration remains captured by its origins in management and aspirations to become scientific. Managerial values are often at odds with legal values. Due process is not necessarily efficient process. Distributive issues are likely to be decided differently according to marginal costs than within the framework of the constitutional requirement of equal protection of the laws.

Law and science are also an uneasy fit. One can study many aspects of law scientifically—judicial and street-level enforcement behavior, compliance, the impact of legal liability, and much more. However, law has a fundamental normative component that does not seem amenable to scientific inquiry or resolution. U.S. courts are quite candid about making normative judgments. For instance, in a case involving the doctrine of state action, the Supreme Court noted, "What is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity" (*Brentwood Academy v. Tennessee Secondary School Athletic Association* 2001, 295). In another case, the Court reasoned that the cruel and unusual punishments clause of the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (*Rhodes v. Chapman* 1981, 346). More complexly, many legislative and judicial decisions involve normative trade-offs. For instance, which of the following should be valued more when conflicts arise: free exercise of religion or the prohibition against government establishment of religion; freedom of speech or a quiet neighborhood; individual privacy or public safety? Anyone who has read many Supreme Court constitutional law decisions can attest that the normative quality of law sometimes makes both the majority and dissenting opinions convincing.

On a deeper level, public administration and law incorporate different mind-sets that act to frus-

trate their integration. U.S. constitutional law tends to be contractarian in outlook, whereas public administration is utilitarian (benefit-cost) and instrumental (cost-effectiveness). The Declaration of Independence succinctly (and famously) captures the contractarian roots of the constitutional order: "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." Contractarianism has two features that are salient here. First, government is established by the consent of the governed. It is "we the people" who by mutual agreement created the U.S. federal government for the purposes set out in the Constitution's preamble. Government is contractually bound, in a sense, to fulfill or at least not undermine those ends. Second, individual rights are natural rights that predate government rather than owe their existence to it. This is most clearly expressed by the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The First, Second, and Fourth Amendment references to "the right of the people" similarly assumes that the rights they protect preexist the Constitution and the government it creates. The listing of these rights has nothing to do with their origins—it simply identifies them. Theoretically, these rights would be protected by the Ninth Amendment—and just as strongly—even if they were not enumerated. Contractarianism is not absolute, but it makes benefit-cost and cost-effectiveness irrelevant or of secondary concern. This is epitomized by the Fifth Amendment's "takings clause": "nor shall private property be taken for public use without just compensation." No matter how much the polity might benefit from taking someone's land for a road, dam, bridge, missile site, or other public good, government cannot take private land if it cannot afford, or is unwilling to pay, a just price for it. Contractarian property rights trump utilitarian calculations. Extrapolating from private property, the clause reflects the principle that public goods should not be produced by unshared private burdens. This principle militates against abridging individual rights because they are costly to protect or for the sake of administrative convenience. In a jail reform case, a federal district court explained, "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" (*Hamilton v. Love* 1971, 1194). In an equal protection case, the Supreme Court similarly reasoned that "the fact that the implementation of a program capable of providing individualized consideration [of each applicant to the University of Michigan College of Literature, Science, and the Arts] might present administrative challenges does not render constitutional an otherwise problematic system" (*Gratz v. Bollinger* 2003, 275).

More generally, constitutional law requires that when some rights are abridged, the incursion on them be by the means that are least restrictive of the exercise of those rights or narrowly tailored so that abridgments closely fit the achievement of the government's purpose. The least restrictive alternative and narrow tailoring requirements may make public policies and administrative actions more expensive without increasing the intended benefits. However, contractarianism demands that when individuals are compelled to sacrifice their rights for the common good, the loss should be minimized.

These aspects of contractarianism are clearly at odds with a great deal of public administrative interest in maximizing benefit-cost ratios and achieving high levels of cost-effectiveness. Perhaps the best—but certainly not the only—example is in budgeting. The core idea of modern public budget theory was explained by Vern Lewis in 1952: "Budget decisions must be made on the basis of relative values. . . . The results must be more valuable than they would be if the money were used for any other purpose," and "the results must be worth their cost in terms of alternative

results foregone or displaced" (Lewis 1952, 213–214, 215). In order to see where this logic can lead if unchecked by contractarian constitutional law, one has to look only as far as the treatment of prisoners before the Eighth Amendment was first applied to the conditions of their confinement in the late 1960s, or to residential public mental health facilities before involuntarily confined patients gained a right to treatment in the 1970s, or to a broad range of litigation dealing with public administrative violations of individual rights in the 1950s and 1960s (see Rosenbloom and O'Leary 1997; Rosenbloom, O'Leary, and Chanin 2010).

In the U.S. Madisonian system of checks and balances, it was virtually certain that once the modern administrative state developed, it would be retrofitted into the constitutional separation of powers and made to comport with constitutional values. To a substantial extent, the nation accomplished this from the mid-twentieth century forward. Retrofitting contributed mightily to public administration's contemporary legal dimensions. However, it came from outside public administration into it rather than from inside administrative doctrine and practice. Not being a creation of public administration, these dimensions are easily viewed negatively as unnecessarily complicating theory, practice, and education in the field. The next three sections explain the field's legal dimensions in terms of the models mentioned earlier with the intent of making law more accessible and central to public administrative thought.

THE MADISONIAN MODEL: THE SEPARATION OF POWERS

The Madisonian model for the separation of powers is an overarching legal dimension of U.S. public administration (see Bertelli and Lynn 2006; Rosenbloom 1983). It is familiar to students of U.S. government and is a leading framework for analyzing the impact of the Constitution on federal administration. The model rests on the assumption that the constitutional separation of powers and system of checks and balances promote incentives for both Congress and the presidency to control administrative agencies. In Madison's words, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others" (*Federalist* 51, 268). This can be achieved by connecting "[t]he interest of the man . . . with the constitutional rights of the place" so that "ambition [is] made to counteract ambition" (268).

Madison emphatically rejected the notion that the three branches of government should be completely separate from one another: "it is not require[d] that the legislative, executive, and judiciary departments, should be wholly unconnected with each other"; rather, they should "be so far connected and blended as to give each a constitutional control over the others" (*Federalist* 48, 256). Nevertheless, researchers looking through the Madisonian lens tend to view the relationship between Congress and the presidency as zero-sum. For instance, after assessing 141 post–World War II federal administrative reforms, Paul Light concluded that "69 *shift* power toward the president, 37 toward Congress" (1997, 205; emphasis added). Similarly, several researchers spawned a substantial debate over whether there is presidential or congressional dominance of federal agencies (among others, see McCubbins and Schwartz 1984; McCubbins, Noll, and Weingast 1989; Katzmann 1994; Wood and Waterman 1994; Weingast and Moran 1983; Calvert, McCubbins, and Weingast 1989; Vogler 1993).

Madison foresaw the zero-sum potential and had a "remedy" for the "inconveniency" that "in republican government, the legislative authority necessarily predominates." Bicameralism, in his view, would keep the legislature in check by dividing it "into different branches; and to render them, by different modes of election, and different principles of action, as little connected

with each other, as the nature of their common functions, and their common dependence on the society, will admit" (*Federalist* 51, 269).

It remains a moot point whether the constitutional design anticipates a large role for Congress in federal administration. The Constitution gives Congress a great deal of authority over administrative matters: All offices must be established and all money drawn from the treasury by law. Congressional action is necessary to create, empower, structure, staff, house, and fund federal agencies. Theoretically, Congress holds the ultimate trump card with respect to administration. By *inaction* in the annual federal budget cycle, it can fail to fund agencies. No funds, no agency—which is a weapon too powerful to use except in highly unusual circumstances. However, it is also one that can be used to reduce agency budgets through calibrated legislative action. For these reasons, W.F. Willoughby, a leading public administration scholar in the 1920s and 1930s, considered Congress to be "the source" and "possessor of all administrative authority" (Willoughby 1927, 11; 1934, 115, 157).

As Madison anticipated, however, fragmented congressional structure makes coordination difficult. Light (1997, 206) noted that "Congress was still quite capable of loaning the keys to administrative reform to the presidency" with respect to paperwork reduction. But what else could it do? Its committee structure makes it impossible to coordinate all the forms federal agencies use to obtain information from the general public. Congress gave this project to the Office of Management and Budget in the Executive Office of the President, which potentially has the wherewithal to coordinate agency action and thereby reduce the staggering paperwork burden generated by federal agencies.[1]

Also writing in *The Federalist,* Alexander Hamilton picks up on Madison's point regarding fragmentation with specific regard to administration. Hamilton noted, "The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual, and perhaps its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department" (*Federalist* 72, 374). Hamilton thought that despite Congress's far-reaching constitutional powers, federal administration would of necessity be dominated by the president. He contended that an energetic executive is "essential to the steady administration of the laws" (*Federalist* 70, 362). Energy and the unity of the presidential office went together because "decision, activity, secrecy, and dispatch, will generally characterize the proceedings of one man, in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished" (*Federalist* 70, 363).

The Constitution's vagueness with respect to presidential power can be used both to strengthen and to weaken Hamilton's view of the president as the primary force behind effective administration. Article 2 of the Constitution vests "the executive power" in the president but does not specify its content or scope. Article 2 also authorizes the president "to take care that the laws be faithfully executed." Some presidents and analysts have read these clauses as conveying broad inherent and implied powers over administration. Others read them more narrowly. With respect to domestic matters, the Supreme Court has generally taken the latter approach. Historical research is inconclusive, leaving presidential power and the presidency to be largely what presidents make of the office (Neustadt 1991; Skowronek 1997).

Following the zero-sum approach, Hamiltonian thinking often leads to prescribing a diminished role for Congress in federal administration. The 1937 President's Committee on Administrative Management, whose work eventually led to creation of the Executive Office of the President, sought to establish clear presidential dominance of federal administration. The legislative package it generated was denounced in Congress as the "dictator bill," and one senator seemed to sum

up the disgust of others in declaring that "no member of that committee had any real belief in Congress or any real use for the legislative department of government" (Karl 1963, 24; Polenberg 1966, 127; see Rosenbloom 2000, 16–20, for more context). The committee maintained that the president should have "final authority to determine the uses of appropriations, conditions of [federal government] employment, the letting of contracts, and the control over administrative decisions, as well as the prescribing of accounting procedures" (President's Committee on Administrative Management 1937, 22). Congress's role was essentially to fund agencies and get out of the way: "[O]nce the Congress has made an appropriation, 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" (President's Committee on Administrative Management 1937, 49–50). Importantly, the committee explicitly admonished Congress not to impose "upon the Executive in too great detail minute requirements for the organization and operation of the administrative machinery" which absolve "the President . . . from part of his executive responsibility" (President's Committee on Administrative Management 1937, 49). Although the committee averred that Congress had a legitimate constitutional role in overseeing federal administration, it blamed legislative disorganization for failure to do so effectively. Several of these themes are reflected in subsequent calls for federal administrative reform, most recently by the National Performance Review (Arnold 1986; Gore 1993, 17, 20, 34).

As explained in the next section, in 1946 Congress developed a legislative-centered approach to federal administration in an effort to restore its coequality with the outsized post–New Deal, post–World War II presidency. Having achieved considerable success by the 1970s, a growing consensus held that federal administration is under the "joint custody" of Congress and the president (Rourke 1993). Rather than one branch dominating, the kind of blending favored by Madison enabled the two branches to share influence over administration on different levels and in overlapping ways.

Joint Custody of Federal Administration

Joint custody is manifested in statutes such as the Inspector General Act (1978) and the Government Performance and Results Act (1993). Inspectors general are executive appointments who report to Congress. The president can dismiss them at will but must supply the reasons to Congress. They are likened to "congressional 'moles' within their agencies" (Moore and Gates 1986, 10; Gore 1993, 31). The Government Performance and Results Act requires agencies to consult with Congress (read committees and subcommittees) when engaging in mandatory periodic strategic planning. Although Congress has not consistently used this feature of the act to strengthen its influence over the agencies, it remains a tool that can be employed to enable (sub)committees to provide greater definition to the statutory missions and delegated legislative authority that empower agencies.

Constitutional interpretation by the Supreme Court also supports joint custody. In *Morrison v. Olson* (1988), the Court made it clear that federal administration is subordinate to all three branches of government. The decision upheld the constitutionality of the independent counsel provisions of the 1978 Ethics in Government Act. The act provided that when requested by the attorney general, a court called the Special Division would appoint an independent counsel. The independent counsel had the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice" (*Morrison v. Olson* 1988, 663). Armed with this authority, independence was also ensured by the provision that the independent counsel could be dismissed "by the personal action of the Attorney General . . . only for good

cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance" of his or her duties (*Morrison v. Olson* 1988, 663). The Special Division was authorized to terminate the independent counsels upon completion of their missions. The statute specifically gave Congress oversight of the independent counsel's performance.

From a *separation* of powers perspective, the statute was extraordinary. Using its statutory and constitutional authority, Congress provided for a court to appoint an individual to a core executive post in which he or she could exercise the powers of the Department of Justice and yet was subject to dismissal only by the attorney general for limited causes. In upholding the statute, the Court reasoned that the independent counsel was an inferior officer whose appointment did not require Senate confirmation and that the appointment, termination, and related duties it thrust on the Special Division did not violate article 3 of Constitution, which limits the judicial power to deciding cases and controversies. The core of the Court's holding was that nothing in the act "sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws" (*Morrison v. Olson* 1988, 693). Looking for clearer boundaries among the three branches a lone dissenting Justice Antonin Scalia was incredulous at the majority's decision: "There are now no lines. If the removal of a prosecutor, the virtual embodiment of the [president's] power to 'take care that the laws be faithfully executed,' can be restricted, what officer's removal cannot?" (*Morrison v. Olson* 1988, 726).

Morrison interpreted the Madisonian model to provide for separate institutions sharing power over administration. The Supreme Court read the Constitution to provide the president with something far less than exclusive authority over the agencies and officers of the national government. Its ruling is in keeping with the Supreme Court's 1838 decision in *Kendall v. U.S.,* which remains good law today: "It would be an alarming doctrine that congress [*sic*] 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 [*sic*]; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not the direction of the President" (*Kendall v. U.S.* 1838, 610).

By 1988, then, it seemed settled that, constitutionally, the executive branch was subject to joint custody or, more accurately as the judicial model for infusion of constitutional rights into public administrative practice explains, tripartite control. However, President George W. Bush's administration had a different perspective and pushed the Madisonian model away from shared and blended control toward a more rigid separation of powers in which the executive branch would overwhelmingly be the domain of the president.

Unitary Executive Branch Theory

The Bush-Cheney administration interpreted executive power under the Constitution very broadly, reflecting a version of the theory that the executive branch is unitary. Christopher Yoo, Steven Calabresi, Anthony Coangelo, and Laurence Nee prominently developed this theory in a series of law review articles covering interbranch conflicts from the founding to 2004. It holds that "all three branches of the federal government have the power and duty to interpret the Constitution and the meaning of the Constitution is determined through the dynamic interaction of all three branches" (Yoo, Calabresi, and Colangelo 2005, 606). This power and duty cannot be left to the Supreme Court alone "[b]ecause the Supreme Court is often an interested party in separation of powers disputes [and] permitting it to act as the final arbiter would contravene the jurisprudential rule against permitting parties from being judges in their own cases" (Yoo, Calabresi, and Nee

2004, 6). The theory maintains that the president has unfettered power to "remove subordinate policy-making officials at will," "to direct the manner in which subordinate officials exercise discretionary executive power," and to "veto or nullify such officials' exercises of discretionary executive power" (Yoo, Calabresi, and Colangelo 2005, 607).

As developed by these authors, it is obvious that the unitary executive branch theory is at odds with Supreme Court rulings such as *Morrison* and *Kendall* as well as a great deal of historical and contemporary practice. Anticipating this criticism, Yoo, Calabresi, and Colangelo (2005, 607) "do not claim that there is a consensus among all three branches of government as to the president's control of the removal power and of the powers to direct and nullify. Rather [they] claim only that there is no consistent, three-branch custom, tradition, or practice to which presidents have acquiesced permitting congressionally imposed limits on the president's sole power to execute the law."

Taken to its logical conclusion, this theory would go a long way toward placing the executive branch solely under the president and preventing Congress from prescribing administrative procedures for rule making, adjudication, transparency, human resources management, and other activities. To the extent that Congress did vest discretionary authority in executive branch officials, the theory would permit the president to exercise it personally regardless of where the law placed it. For instance, regardless of the president's level of expertise in environmental science and policy, he could directly exercise a congressional delegation of legislative authority to the Environmental Protection Agency to make rules for clean air or any other matter. Indeed, he could personally take over the rule-making authority of any or all executive branch agencies.[2] Presumably, following the President's Committee on Administrative Management, it would also mean that once Congress appropriates money to the executive branch, it is up to the president to determine how it should be spent. If implemented, the theory would dramatically strengthen the president's and weaken Congress's role in federal administration.

President George W. Bush made it clear in a series of signing statements that he subscribed to a version of the theory of a unitary executive branch. Signing statements are "official pronouncements" that a president may make upon signing a legislative bill into law (Halstead 2006, 1). These statements may include general comments about the law, the president's interpretation of it, how he proposes to administer it, and any constitutional or other objections he may have to one or more of its provisions (Halstead 2006, 1). Signing statements reach back to the presidency of James Monroe (1817–25). Relative to historic practice, Bush's signing statements were much more apt to assert that the laws being signed encroached on presidential power and would be implemented "in a manner consistent with the President's constitutional authority to supervise the unitary executive branch" (Halstead 2006, 9; Van Bergen 2006, 3; American Bar Association 2006, 15; Rosenbloom 2010). This or similar language was used by Bush upon signing the USA Patriot Improvement and Reauthorization Act (2005), McCain Detainee Amendment (2005), and a variety of laws dealing with reporting and military matters. Collectively, Bush's statements add up to the proposition that because the president is constitutionally bound to protect the article 2 powers and functions of the presidential office, he is required to assess the constitutionality of statutory provisions and to ignore those he deems unconstitutional.

As the Madisonian model predicts, Bush's reliance on this formulation of the unitary executive branch theory generated substantial pushback. The American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine concluded that it is "contrary to the rule of law and our constitutional system of separation of powers" for a president "to claim the authority or state the intention to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress"

(American Bar Association 2006, 5; see also Pfiffner 2008). Critics maintain that if the president believes parts of a bill are unconstitutional, the oath of office requires him to veto it. During the run up to the 2008 presidential election, Republican candidate John McCain expressed this position, saying he would "[n]ever, never, never, never" issue signing statements because "[i]f I disagree with a law that passed, I'll veto it" (Abramowits 2008).

The future of unitary executive branch theory is uncertain. As a candidate, President Barack Obama was critical of Bush's signing statements. Nevertheless, in March 2009, he issued one of his own claiming that several provisions of the Omnibus Appropriations Act encroached on his constitutional authority and would be treated as nonbinding (Obama 2009a). However, in so doing, Obama did not rely on unitary executive branch theory.

What is more certain is that the Madisonian model will continue to beget interbranch conflicts and tensions over control of federal administration. The question of the relative roles of the president and Congress in federal administration was raised in the earliest days of the Republic by the "Decision of 1789,"[3] and as Madison predicted, it remains for presidents and congresses to find workable answers for the conditions of the nation during their times. This dynamic interplay between the president and Congress forms U.S. public administration's longest recurring legal dimension.

THE 1946 LEGISLATIVE-CENTERED MODEL FOR ADMINISTRATIVE LAW

The 1946 legislative-centered model rests on three pillars: (1) Congress treats federal agencies as its adjuncts for performing legislative functions and regulates them through administrative law; (2) it supervises its adjuncts; and, (3) Congress and its members intercede in agency decision making regarding district-oriented spending and constituency service. The model was developed by Congress in 1946 out of concern that it might "lose its constitutional place in the Federal scheme" due to the vast growth of federal administration and presidential power during the New Deal and World War II (La Follette 1946, 11). By 1946, the scope of federal administration was so vast that any legislative effort to regain coequality in the separation of powers would necessarily require gaining greater control and influence over the agencies. For Congress, 1946 was very largely about strengthening its own operations and capacity rather than reining in or checking presidential power. In a very real sense, the exercise was one of "refounding" itself in response to the development of the administrative state (Rosenbloom 2000). Piecemeal efforts had been under way earlier, but putting all the pieces together had to wait until the conclusion of World War II.

ADMINISTRATIVE LAW

Regulating Federal Agencies as Adjuncts of Congress for Legislative Functions

By 1946, members of Congress realized that "as the country has grown and its activities have become more diversified and complex," they necessarily had to delegate more of their legislative authority to the agencies (U.S. Congress 1946, 5659). As Congressman Francis Walter explained: "There are the legislative functions of administrative agencies, where they issue general or particular regulations which in form or effect are like the statutes of the Congress. . . . Congress—if it had the time, the staff, and the organization—might itself prescribe these things. Because Congress does not do so itself and yet desires that these things be done, the legislative power to do them has been conferred upon administrative officers and agencies" (U.S. Congress 1946, 5648). For Congress in the 1930s, the question was about the propriety of delegation; by 1946, it was how to regulate

and oversee its use (Rosenbloom 2000, 30–35). The Administrative Procedure Act (APA) of 1946 provided one part of the initial answer; the Legislative Reorganization Act of 1946, the other.

The APA treats administrative agencies as legislative adjuncts primarily through its rule-making provisions. It bases these on the straightforward premise that insofar as feasible, agency rule making should mimic legislative lawmaking. In Walter's words, "Day by day Congress takes account of the interests and desires of the people in framing legislation; and there is no reason why administrative agencies should not do so when they exercise legislative functions which the Congress has delegated to them" (U.S. Congress 1946, 5756).

The APA's original provisions for rule making are relatively straightforward. Judicial decisions, executive orders, and additional statutes have added great complexity over time. There are three general types of rules: legislative (substantive), procedural, and interpretive (or "interpretative," as written in the APA). Agencies are required to publish final rules in the *Federal Register,* but the APA establishes procedural requirements only for the enactment of legislative rules. These procedures are too complicated to discuss in detail here (see Rosenbloom 2003; Lubbers 2006). Essentially, as rule making has evolved, informal rule making requires the agency to publish a notice of proposed rule making, accept and consider comments from the public, issue a final rule, and allow at least thirty days for affected entities to begin conformance. Formal rule making involves quasi-judicial hearings and processes. It is used far less frequently than informal rule making, may be presided over by an administrative law judge, and requires final rules to be supported by substantial evidence on the record as a whole. Direct final rules are published in the *Federal Register* and go into effect at a specified future date unless adverse comments are filed. Interim final rules are immediately effective upon publication and may be withdrawn after comments are received. Hybrid rule making allows an agency to combine informal and formal rule-making formats by grafting hearings or other types of input sessions onto notice and comment procedures. In negotiated rule making, agencies negotiate rules with committees of stakeholders. A good-cause exception allows agencies to make rules without a specified procedure other than publication in the *Federal Register* when normal requirements would be "impracticable, unnecessary, or contrary to the public interest" (APA 1946, section 553[a][3][b]).

Today, rule making is far more complex than originally required by the APA. Judicial decisions compel agencies to be able to defend the procedures and logic used to develop final rules. Rules can be rejected by courts because the notice of proposed rule making was inadequate, the relationship between it and the final rule was too attenuated, procedures were irregular, the agency failed to respond adequately to comments, the final rule is not supported by the record or logic, the agency failed to comply with a statute, and more. Executive orders give the Office of Management and Budget's Office of Information and Regulatory Affairs a large role in overseeing agencies' rule-making activity and the content of the rules they seek to propose. The substantive requirements of these orders change over time. However, they may require cost-benefit analysis and impact statements on a number of concerns such as inflation, vibrant federalism, family viability, and environmental justice. Additional legislation also requires a variety of impact assessments or statements as well, including consideration of how rules will affect small businesses and other entities. The Congressional Review Act (1996) creates an expedited procedure by which Congress may nullify major legislative rules before they go into effect.[4] Although Madisonian blending is certainly present with respect to rule making, overall, Congress has succeeded in regulating agencies' use of the legislative authority it delegates to them.

In the 1930s and 1940s, one of the complaints against federal administrative processes, including rule making, was that they were secretive. The Constitution requires each house of Congress to "keep a Journal of its Proceedings" for publication "from time to time" (article 1, section 5).

Following the idea that agencies should emulate legislative processes, the APA provided that they should release "matters of official record" to "persons properly and directly concerned" unless there were "good cause" or a statutory basis for not doing so (section 3[c]). "Properly and directly concerned" was interpreted as a standing requirement and became a basis for withholding information. Congress eventually tried to fix this problem through the Freedom of Information Act of 1966 and the Government in the Sunshine Act of 1976 (see Rosenbloom 2003, 119–133). Both acts view disclosure of agency records as the norm, and neither includes a general standing requirement. The Freedom of Information Act covers written records; the Sunshine Act covers multiheaded federal boards and commissions and brings transparency to their meetings. The 2007 Openness Promotes Effectiveness in our National Government Act (OPEN Government Act) strengthens the administration of freedom of information and extends it to some records generated by contractors.

The other two features of the 1946 legislative-centered model increase congressional control and influence over federal administration. They helped to make the model coherent and contributed to its institutionalization. However, they are given only cursory review here because they are tangential to federal administration's legal dimensions (for a fuller analysis, see Rosenbloom 2000).

Supervising the Agencies

From a Madisonian perspective, it is axiomatic that if agencies function as legislative adjuncts, Congress will supervise them. As Senator Robert La Follette Jr., a chief sponsor of the Legislative Reorganization Act of 1946, explained, having "delegated its rule-making power to" the agencies, Congress needed to establish "regular arrangements for follow-up in order to assure itself that administrative rules and regulations are in accord with the intent of the law" (La Follette 1946, 45).

The Legislative Reorganization Act was designed to improve Congress's capacity to legislate and oversee federal administration. It reduced the unwieldy number of standing committees in both houses, charged them with exercising "continuous watchfulness" of the agencies under their jurisdiction, and revamped their configuration so that their organization would be parallel in each chamber *and* the overall structure would be coordinated "with the pattern of the administrative branch" (U.S. Congress 1946, 10054). It also provided for each committee to hire professional staff to help with legislation and oversight. In addition, it contained several provisions intended to strengthen Congress's role in federal budgeting.

The Legislative Reorganization Act of 1970 strengthened Congress's oversight mission by calling on the standing committees more actively to "review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws" under their jurisdiction (section 118). It also reorganized the Legislative Reference Service into the Congressional Research Service in an effort to provide Congress with a modern-style "think tank," which can enhance its capacity to steer federal administration. As mentioned earlier, the Government Performance and Results Act (1993) goes further by involving Congress in agency strategic planning. It also requires annual performance reporting, which can improve congressional monitoring of the agencies.

Interceding for Districts and Constituents

The Legislative Reorganization Act of 1946 established a retirement system for members of Congress. Its provision for "continuous watchfulness" anticipated that the members would have sufficient expertise to supervise the agencies, which requires long tenure. Whether intentional

or coincidental, the 1946 legislative-centered model helped to generate the "career Congress" (Hibbing 1991). Morris Fiorina's 1977 and 1989 analyses of the decline in competitive congressional seats identify three main elements, each connected to 1946. First, the members quickly saw electoral advantage in delegating controversial policy matters to the agencies and then criticizing administrative action when it was unpopular with the voters back home. Second, casework, and third, district oriented public works spending "are basically pure profit" in terms of incumbency (Fiorina 1977, 45). Each of the latter two was facilitated by actions taken in 1946.

The Legislative Reorganization bill contained a provision for the members of Congress to hire additional personal staff. One member called it "the single, most valuable part of the bill, from the standpoint of the Congressman's work" because staffers could "take responsibility, especially in handling matters with the executive departments, thereby freeing us for our primary responsibility, namely, to study national problems and devise and enact wise legislation to deal with them" (U.S. Congress 1946, 10084). The provision was defeated in the House, but beginning in 1947 the senators began hiring personal staff for casework and other purposes and the House members eventually followed suit. Starting from a base of about two thousand personal staff in both houses combined in 1947, the number reached almost twelve thousand by the 1990s, of which about 47 percent were stationed in the home districts and states rather than in Washington, DC (Ornstein, Mann, and Malbin 1996, 127, 131, 133, 135).

District-oriented public works spending, often called "pork barrel," goes back to the Rivers and Harbors legislation of 1824 (Fitzgerald and Lipson 1984, viii). During the New Deal, federal public works were a major strategy for economic recovery. In the economic emergency, Congress lost much of its traditional control of where the money went. The Employment Act of 1946 is best known for ratifying Keynesian fiscal policy and creating the Council of Economic Advisers. However, rationalizing public works spending and making it wholly dependent on Congress were also among its core purposes. The idea behind this part of the act was for Congress to develop a prioritized list of public works for federal funding and to authorize their undertaking based on the level of economic stimulus necessary to reduce unemployment. From the members' standpoint, a key feature of the act was that "it all depends on Congress" and "does not authorize the Executive to spend a dime" (U.S. Congress 1945, 8954, 8959, 9055).

As noted earlier, the importance of casework and public works spending to public administration's legal dimensions lies primarily in their contribution to the legislators' incumbency, which helped institutionalize the 1946 legislative-centered model for administrative law.

THE JUDICIAL MODEL FOR INFUSING CONSTITUTIONAL RIGHTS INTO PUBLIC ADMINISTRATIVE PRACTICE

The federal judiciary began to infuse constitutional rights into public administrative practice in the early 1950s. By 1975, this infusion crystallized into a systematic model that remains the framework for defining constitutional rights in the context of U.S. public administration. Like the 1946 legislative-centered model, the judicial constitutional rights infusion model is coherent in that its individual features are mutually supportive. However, it developed incrementally in a variety of court decisions rather than according to an overall plan or "refounding." The underlying concern was that the rise of the administrative state, coupled with public administrative doctrine and practice, threatened to undermine individuals' constitutional rights and freedoms. Disquiet with administrative power was expressed in many judicial quarters, but perhaps nowhere more strenuously and consistently than by Supreme Court Justice William Douglas. In three cases in the early 1970s, he admonished 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; *U.S. v. Richardson* 1974, 201).

The judicial constitutional rights infusion model has two main components: (1) establishing previously undeclared constitutional rights for individuals in their encounters with public administration as clients and customers, public employees, inmates in prison, involuntarily confined patients in public mental health facilities, contractors, and subjects in street-level regulatory interactions; and (2) facilitating the enforcement of these rights. Enforcement, in turn, has three subcomponents: (a) relaxing the requirements of standing to sue government; (b) developing remedial law; and (c) making most public employees potentially personally liable in civil suits for money damages if they violate "clearly established statutory or constitutional rights of which a reasonable person would have known" (*Harlow v. Fitzgerald* 1982, 818). These are analyzed at length elsewhere and need only be outlined here (see Rosenbloom and O'Leary 1997; Rosenbloom, O'Leary, and Chanin, 2010).

Constitutional Rights in Administrative Encounters

Historically, clients, customers, and public employees lacked constitutional rights in their encounters with public administration due to a judicial construction called the "doctrine of privilege." It held that benefits and jobs conveyed by the government were privileges rather than rights and, therefore, one who voluntarily received them could not contest the conditions on which they were offered. Although somewhat illogical, the doctrine extended to the distribution of privileges, making discrimination largely safe from challenge under the Fourteenth Amendment's equal protection clause. The doctrine of privilege led to abridgments of clients,' customers,' and public employees' substantive, privacy, procedural due process, and equal protection rights. The Supreme Court began to replace the doctrine in the 1950s and by 1972 declared that it had "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights" (*Board of Regents v. Roth* 1972, 571). It was replaced by three doctrinal approaches that developed more or less simultaneously: new property, unconstitutional conditions, and modern equal protection of the laws.

New property doctrine redefined civil service employment and government benefits, such as welfare, contracts, and occupational and other licenses, as a form of property (see Reich 1964). In treating them as new property, the federal courts applied procedural due process to their deprivation and termination.[5] Procedural due process typically requires judges to balance the potential harm to an individual, the constitutional interest in correct decision making to prevent arbitrary governmental action, and the government's interest in avoiding administratively cumbersome, time-consuming, and expensive decision-making procedures. Depending on the circumstances, it can require agencies to hold elaborate hearings before terminating what were once considered privileges not subject to constitutional protection. New property doctrine has substantial impacts in many areas of administration, particularly welfare and public sector human resources management.

Unconstitutional conditions doctrine protects substantive rights, including freedom of speech, religion, and association, and privacy. It regulates the conditions government may attach to the benefits and jobs it supplies. Conditions that significantly impinge on the exercise of constitutional rights are likely to be unconstitutional unless the government has a compelling interest in making them part of the administrative scheme (see Baker 1990; Rosenbloom and O'Leary 1997, 134–138).

Modern equal protection doctrine controls the distribution of government benefits and jobs. It has a three-tier structure. Administrative and public policy classifications based on race or ethnicity are considered "suspect," as are classifications based on citizenship at the state and local governmental levels, but not at the federal level.[6] Suspect classifications are subject to strict scrutiny, meaning that the reviewing court will not be deferential to the government's claims. The government is required to demonstrate that it has a compelling interest for employing the classification and that its use is narrowly tailored to closely fit the achievement of that interest. In the context of affirmative action policies, which may serve a compelling governmental interest, narrow tailoring is fairly well defined. It requires (1) assessing the efficacy of alternative policies that do not use suspect classifications; (2) a fixed stopping point; (3) individualized consideration of each applicant; (4) a waiver provision so that adequate staffing is never foreclosed; (5) that individuals who are not members of the affirmative action target groups are not made significantly worse off in an objective sense;[7] and (6) proportionality in terms of the relevant population (*Gratz v. Bollinger* 2003; *Grutter v. Bollinger* 2003).

Classifications based on factors such as residency, wealth, and age are nonsuspect. The burden of persuasion is on the challenger to show that they are not rationally related to a legitimate governmental purpose. Classifications based on sex (male/female) are subject to intermediate scrutiny. The government must be exceedingly persuasive in demonstrating that they are substantially related to the achievement of an important governmental purpose (*U.S. v. Virginia* 1996).

In addition to these doctrinal developments, in the late 1960s and early 1970s, Eighth Amendment protection was expanded to cover the conditions of confinement (see *Rhodes v. Chapman* 1981). Involuntarily confined public mental health patients received a substantive due process right to treatment and habilitation (*Wyatt v. Stickney* 1971; *Youngberg v. Romeo* 1982). In the 1990s, the free speech rights of contractors and entities involved in noncontractual preexisting commercial relationships with government were interpreted to parallel those of public employees (*Board of County Commissioners, Wabaunsee County v. Umber* 1996; see also *O'Hare Truck Service v. City of Northlake* 1996).

Turning to enforcement, standing to sue was relaxed to the point that "one who is hurt by governmental action has standing to challenge it" (Davis 1975, 72). Standing requires an individual injury (or imminent injury) that is concrete and particularized, attributable to government action, and subject to redress through a judicial decision. Historically, "concrete" was generally interpreted narrowly. However, by the 1970s it could include injuries to aesthetic, recreational, and other somewhat intangible interests. Standing is flexible, and some post-1990 cases seem to make it more difficult to obtain, whereas others do not (see *Lujan v. Defenders of Wildlife* 1992; *Massachusetts v. Environmental Protection Agency* 2007).

The courts developed remedial law in cases dealing with public school desegregation and prison and public mental health reform. The essence of the remedial law case is that the remedy extends well beyond the original plaintiffs and requires the court to oversee the implementation of thoroughgoing institutional reforms that may take a decade or more to complete. By the late 1970s, remedial law was a well-established means of vindicating equal protection rights in public school and government personnel systems, as well as Eighth Amendment rights in prisons.

Finally, by 1975, public employees' historic absolute immunity from constitutional tort suits was redefined as qualified immunity only. This was the capstone of the judicial constitutional rights infusion model because it created a strong incentive for public employees to know and respect the clearly established constitutional rights of the individuals upon whom they act. Local governments face constitutional tort liability if their policies, including failure to train, lead directly to violations of individuals' constitutional rights (*City of Canton v. Harris* 1989; *Pembaur v. City of Cincinnati* 1986). State and federal agencies cannot be sued for money damages in this type

of litigation. Qualified immunity transcends retrospective enforcement. Because constitutional rights are what the courts declare they are, qualified immunity provides the judiciary with proactive leverage over public administrative behavior. When the courts rule that a customer, client, prisoner, or other individual has procedural due process, equal protection, or other constitutional rights, knowledge of these rights and the duty to protect them become a matter of job competence for public administrators (Rosenbloom and O'Leary 1997, 301–323).

As developed by 1975, the judicial constitutional rights infusion model remains in place, notwithstanding an almost complete change in the composition of the Supreme Court (Justice John Paul Stevens being the only holdover as of this writing). The Court has expanded rights in some areas (property under the takings clause and contractors' free speech rights), reduced them in others (aspects of public employees' freedom of speech and Fourth Amendment rights generally), provided greater equal protection when public policy classifications are based on sex, and, depending on one's interpretation, either expanded or contracted equal protection rights in the context of affirmative action-like policies in public employment, government contracting, and public university education (expanded if one thinks equal protection should be color-blind, contracted if color conscious).[8] The Supreme Court never displayed great enthusiasm for remedial law, which is typically a product of the federal district courts, and it may be even less inclined to support it now than previously (*Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* 2007 [decided together]). The Court also declined to extend constitutional tort liability to federal agencies and contractors (*Federal Deposit Insurance Corporation v. Meyer* 1994; *Correctional Services Corp. v. Malesko* 2001). However, none of the components of the judicial constitutional rights infusion model has been substantially changed, and public administration remains infused with constitutional rights.

THE FUTURE: THE PERDURABILITY OF PUBLIC ADMINISTRATION'S LEGAL DIMENSIONS

U.S. public administration's contemporary legal dimensions are highly likely to persist into the foreseeable future. The Madisonian model has defined some aspects of federal administration since the founding. Within its overall framework, the presidency and Congress share joint custody over federal administration. Depending on political, economic, and security circumstances, one institution or the other *or both* may expand control. Presidential influence over the agencies increased dramatically during the New Deal and World War II. Using the 1946 legislative-centered model, Congress imposed its values on federal administration in the immediate post-Watergate period by enacting the Federal Advisory Committee Act (1972), Privacy Act (1974), major amendments to the Freedom of Information Act (1974), Congressional Budget and Impoundment Control Act (1974), Government in the Sunshine Act (1976), Ethics in Government Act (1978), and Inspector General Act (1978). During the prolonged security threat brought home by the terrorist attacks of September 11, 2001, President Bush pushed the limits of executive power with considerable success. However, limits remain. As the Supreme Court's plurality emphasized in *Hamdi v. Rumsfeld* (2004, 535–536), "We 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." Two days into his administration, on January 22, 2009, President Obama issued an executive order mandating closure of the terrorist detention facilities at the U.S. naval base at Guantánamo Bay (Obama 2009b). In May, Congress refused to fund the closure (see Murray 2009). The constitutional system of checks and balances continues to function as "A Machine That Would Go of Itself," as it has for 220 years, with the Civil War its only major breakdown (see Kamen 1987).

The 1946 legislative-centered model and the judicial model for infusing constitutional rights into public administrative practice are also institutionally well entrenched. The legislative-centered model has been in place for more than sixty years. It is well established and requires only sporadic maintenance, tinkering, and upgrading. It serves both Congress's interest in regulating and supervising federal administration as well as its members' desire for incumbency. The judicial model for the infusion of constitutional rights into administrative practice may be more fragile. A reversal of qualified immunity doctrine, a return to something like the doctrine of privilege, or a clear rejection of remedial law would seriously damage it and probably cause its demise. However, fully in place since 1975, it provides the federal courts with considerable retrospective and prospective leverage over administrative behavior affecting constitutional rights. It serves politically conservative members of the bench who may be inclined to protect property rights more and free speech rights less and to interpret the equal protection clause as a barrier to affirmative action policies, as well as liberal members disposed to expand substantive due process and other rights and to promote equality through race-conscious measures. From an institutional perspective, it is difficult to imagine why the judiciary would want to lose its leverage over public administration or what would impel the courts to surrender it.

What is far less certain is whether these legal dimensions—the separation of powers, administrative law, and constitutional law—will be fully integrated into public administrative theory, research, scholarship, and pedagogy. The academic field of public administration tends to be executive centered. To some extent, the movement toward redefinition of public administration as public management reinforces this tendency. Neither approach—an executive-centered nor a narrow public-management focus—bodes well for bringing law into the mainstream. An executive-centered lens will often see law as an interference with cost-beneficial and cost-effective administration. A public-management lens tends to focus on tools, techniques, and practices more than on political and legal contexts. The irony is that public managers in the executive branch are acutely aware of public administration's legal dimensions (Ban 1995; Bertelli and Lynn 2006). Perhaps by turning more attention to how public administrators actually do their jobs, as Maynard-Moody and Musheno (2003) did with police, teachers, and counselors at the street level, the field can gain a better understanding and appreciation of its legal dimensions.

NOTES

1. In 1994, before passage of the second Paperwork Reduction Act (1995), the annual paperwork burden was estimated to be 6.5 billion hours and to consume 9 percent of the GDP (Strauss et al. 1995, 872).

2. It is not clear whether the unitary executive branch theory would encompass the independent regulatory agencies, which as a matter of constitutional law are not considered part of the executive branch (see Moreno 1994).

3. The Decision of 1789 was to allow dismissal of the secretary of the Department of Foreign Affairs by the president without the Senate's concurrence. (See Rosenbloom 1971, 26–33, for an analysis.)

4. Major rules are defined as those expected to have an economic impact of $100 million annually or substantial effects on costs, prices, productivity, employment, or other key economic concerns.

5. Procedural due process applies to the termination of a benefit during the term for which it was offered, but not to its expiration.

6. This is because the federal government has comprehensive authority over immigration and naturalization.

7. A harsh burden should not be placed on so-called innocent third parties (i.e., nonminorities). Truncating their horizons by not offering promotion or training is not considered unduly harsh because, objectively, it leaves them in the same position they already occupy. Dismissal or demotion to make room for affirmative action eligibles would generally violate narrow tailoring.

8. For examples, see among many others *Dolan v. City of Tigard* 1994; *Lucas v. South Carolina*

Coastal Council 1992; *Board of County Commissioners, Wabaunsee County v. Umber* 1996; *O'Hare Truck Service v. City of Northlake* 1996; *Garcetti v. Ceballos* 2006; *Atwater v. City of Lago Vista* 2001; *Ricci v. DeStefano* 2009; *U.S. v. Virginia* 1996; *Adarand Constructors v. Pena* 1995; *Gratz v. Bollinger* 2003; *Grutter v. Bollinger* 2003.

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