

PUBLIC MANAGEMENT IN THE SHADOW OF THE CONSTITUTION

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An unresolved issue in American constitutional governance is the role of public officials in a Madisonian scheme of separated institutions sharing power. Proposed answers range from broad delegation with reliance on expertise and professionalism to minimal delegation with formal checks on official discretion. In between are various pragmatic or realist views that accept discretion as both necessary and inevitable and offer normative principles of administrative conduct to guard against official abuse of power. None of these answers, however, satisfies criteria of constitutional legitimacy. The authors argue that such criteria can be derived by combining insights from traditional, normative literatures of public administration and from positive political theory and political economics. If the role of public managers is defined as maintaining a credible commitment to performing their duties pursuant to a precept of managerial responsibility that incorporates accountability, judgment, balance, and rationality, then, the authors argue, the Madisonian scheme of government embraced in the Constitution is complete.

Keywords: *public management; public administration; managerial responsibility; bureaucracy*

Students of the American administrative state have long sought to establish the legitimacy of public administration and management within our constitutional scheme (e.g., Appleby, 1952; Carpenter, 2001; Cleveland, 1913; Dickinson, 1927; Dimock, 1936a; Frederickson, 1997; Gaus, 1936; Goodnow, 1900; Mosher, 1968; Redford, 1969; Rohr, 1986; Skowronek, 1982; Wamsley et al., 1990; J. Q. Wilson, 1989).¹ Though only obliquely addressed by the founders,² the issue of legitimacy arises with all legislative delegations of authority to executive agencies and in all

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deliberations in which judicial deference to administrative judgment is at issue.³

Prescriptions for good delegation have varied from broad, generalized discretion combined with a reliance on official expertise and professionalism (Friedrich, 1940) to specific delegations of legislative power with formal measures of control and oversight over whatever official discretion must be tolerated in the name of effective governance (Finer, 1940). In between lie various pragmatic or realist views that combine acceptance of the inevitable—considerable official discretion cannot be precluded and is a practical necessity—with various normative principles to protect against bureaucratic abuses of power (Frederickson, 1980; Moore, 1995; Wamsley et al., 1990). The problem with such prescriptions, however, is that they are invoked in the manner of a *deus ex machina* rather than derived from a consideration of constitutional (or, to be precise, Madisonian) theory.

Theoretical ambiguity concerning the legitimacy of public management is manifest in the lack of clarity with which the field addresses issues of delegation that arise in policy making, administrative reform, and judicial review. Such ambiguity both reflects and helps to perpetuate inefficient competition for control of the administrative state among the three branches of government. The costs of such competition in terms of orderly administration, responsible public management, and public confidence in government are often high.

In this article, we argue that a constitutionally legitimate role for public management can be derived from the literatures of public administration, positive political theory, and political economics. In the following section, we describe how traditional public administration scholarship identified the theoretical problem of public management as ensuring a balance between administrative capacity and democratic control through what was widely termed responsible public management. Using concepts from information economics, we then show how solving the problem of legitimacy can be interpreted as a creating a retrospective solution to an unsolved, constitutional-level mechanism design problem: a game theoretic dilemma in which a principal wishes to design a game such that agents, by playing that game, truthfully reveal those of their characteristics relevant to the principal's desires (an approach intuitively recognized by Harold Laski as early as 1923).

We then show that if the role of public management is understood as maintaining a credible commitment to the exercise of delegated authority

according to what we term a *precept of managerial responsibility*—encompassing accountability, judgment, balance, and rationality—then our Madisonian scheme of government is complete. We briefly apply the precept to the managerial implications of institutional reform litigation, an issue for which the issue of managerial legitimacy is particularly important. Finally, we discuss the implications of our theory for the practice of public management.

STATE BUILDING AND PUBLIC MANAGEMENT

Beginning late in the 19th century, the creation of a “permanent government” (Friedrich, 1940; Mosher, 1968) staffed by professional civil servants (a) whose appointments were based on their qualifications, (b) who performed specialized functions, and (c) who, in time, came to be protected by tenure raised a clear issue for democratic governance at all levels. How might citizens, legislators, judges, and administrators themselves be assured that the operations of the emergent administrative state reflect the public will? In *Politics and Administration: A Study in Government*, Frank J. Goodnow (1900) stated the problem astutely:

Detailed legislation and judicial control over its execution are not sufficient to produce harmony between the governmental body which expresses the will of the state, and the governmental authority which executes that will The executive officers may or may not enforce the law as it was intended by the legislature. Judicial officers, in exercising control over such executive officers, may or may not take the same view of the law as did the legislature. No provision is thus made in the governmental organization for securing harmony between the expression and the execution of the will of the state. The people, the ultimate sovereign in a popular government, must . . . have a control over the officers who execute their will, as well as over those who express it. (pp. 97-98)

Separation of powers, Goodnow recognizes, creates a discontinuity in the constitutional scheme such that the people cannot be fully assured that their wishes will be carried out or enforced. The problem is one of coordination between law and implementation—the central, multibranch relationship in American public policy making—without creating unaccountable power in executive agencies.

THE PUBLIC MANAGER'S ROLE

Early public administration literature recognized as problematic the role of administrators (White, 1926), a role barely insinuated in the Constitution.⁴ Particularly under the New Deal, administrative officials were increasingly being assigned responsibility for accomplishing complex and controversial goals of public policy with few reliable protections against abuses of power. Public administration scholarship began to focus on issues of administrative discretion and accountability.⁵ Marshall Dimock (1936a), for example, put forth an expansive view of the public manager's role: "Those who view administrative action as simple commands . . . fail to comprehend the extent to which administration is called upon to help formulate policy and to fashion important realms of discretion in our modern democracies" (p. 127).

Yet administrative discretion, and hence what was early termed the art of administration, was recognized as a double-edged sword. Dimock (1936c) noted that "the important problem is the manner in which discretion is exercised and the safeguards against abuse of power which are provided" (p. 60). In the same vein, Pendleton Herring (1936) argued that

the bureaucrat . . . does not suffer so much from an inability to execute the law unhampered as from an uncertainty in direction. . . . Within the system of which he is but a subordinate part, his contribution to the total administrative responsibility is left largely to his own judgment. (p. 22)

How shall that judgment be exercised? To whom is the public manager responsible? In his famous dispute with Carl Friedrich, Herman Finer (1940) argued that responsible administration in a democracy can only be ensured through external control:

The servants of the public are not to decide their own course; they are to be responsible to the elected representatives of the public, and these are to determine the course of action of the public servants to the most minute degree that is technically feasible. (p. 336)

Friedrich (1940), in contrast, took a dim view of the ability of courts and legislatures to control administration. He argued that any movement toward democratic responsibility required that officials have the right orientation toward their work. The public has a right to call a policy irresponsible, he said,

if it can be shown that it was adopted without proper regard to the existing sum of human knowledge concerning the technical issues involved . . . [and] if it can be shown that it was adopted without proper regard for existing preferences in the community, and more particularly its prevailing majority. (p. 12)⁶

The checks on abuse of administrative discretion are, in Friedrich's view, expertise and professionalism.⁷

The question, then, was well defined and urgent in the light of the growing power of government: In a federal administrative state of separated but shared powers, how can responsible administration be defined and ensured? Only with a virtual guarantee of responsible administration could delegations of authority be made with a minimum of popular and legislative trepidation. As the New Deal made clear, mighty social forces govern the exercise of public responsibility (Appleby, 1949). How can a system of legislative delegation and oversight, the election of executives, and administrative law combined with judicial review operate together to sustain, rather than undermine, the managerial professionalism and commitment to democratic values widely recognized as essential to democratic governance?

NEW PUBLIC ADMINISTRATIONS

Many subsequent attempts to address this issue awakened a renewed interest in characterizing the public interest that public management should aspire to serve. Though the public interest has always been central to public administration (e.g., Goodnow, 1900), beginning in the late 1960s scholars began elaborating on its overriding normative importance to legitimizing managerial behavior (Marini, 1971). For example, John Rohr (1986) urged that "administrators should use their discretionary power in order to maintain the constitutional balance of powers in support of individual rights" (p. 181). Robert Denhardt (1993) exhorted administrators to commit themselves to "values that relate to the concepts of freedom, justice, and the public interest" (p. 20). Wamsley et al. (1990) argued,

The only possible source of governing impetuses that might keep our complex political system from either a dangerous concentration of power on the one hand, or impotence or self-destruction on the other, is a public administration with the necessary professionalism, dedication, self-esteem, and legitimacy to act as the constitutional center of gravity. (p. 26)

Such views imply that administration must be obedient to classical liberal theories of the state rather than to Madisonian principles of governance and the policy outcomes they produce. They remain suspect, however, without proof that they can be derived from the constitutional system of checks and balances.

THE CRAFT PERSPECTIVE

Though given lip service, the public interest was not seductive to the new public policy schools such as those created at Harvard, Princeton, and the University of California around 1970. When choosing to emphasize public management as a subject for research and teaching, public policy scholars rebuked traditional public administration for having too little regard for the public manager as a strategic political actor.⁸ Although strategic statecraft had been adumbrated by Dimock, Millett, Morstein Marx, and others, many in the older field seemed to agree that the policy schools' perspective on public management was not only new but a "challenge" (Kettl, 1990; Perry & Kraemer, 1983; Rainey, 1990).⁹

The new emphasis was on how to "realize the potential of a given political and institutional setting" (Moore, 1984, p. 3), that is, on public management as craft, an emphasis neglected if not ignored in traditional literature. Craft-oriented pedagogy and scholarship featured experiential learning and the extensive analysis of cases, with the goal of identifying best practices and universal principles of effective public management.¹⁰

However much the craft perspective may have enriched the teaching and practice of public management, its largely ahistorical, "institutions-are-given" orientation meant that it, as with the new public administrations, had nothing to contribute toward defining the manager's constitutional role or justifying legislative delegation and judicial deference to administrative judgment in the light of these branches' constitutional responsibilities.

PUBLIC MANAGEMENT: A SECOND TAKE

Traditional public administration literature, as we have remarked, identified managerial discretion—and, as a corollary, its responsible exercise—as the central problem of public administration without resolving the theoretical dilemmas of delegation and control. Because tradi-

tional literature is both normative and intuitive, moreover, those who would apply it to practice lack any analytic tools to adapt it to the variegated problems and circumstances of public management. For such tools, we turn to the contemporary study of positive political theory and political economics.

THE FORMAL ANALYSIS OF DELEGATION

Aligning legislative policy choices and agency policy making—both through *ex ante* delegation of authority and *ex post* legislative (oversight) and judicial (review) control—is central to the political economy of bureaucracy. Delegation has been analyzed predominantly in a principal-agent framework in which legislatures, courts, and chief executives are actively involved in establishing and controlling bureaucratic policy making, not simply deferring to agency expertise. The bases for conflicts between principals and agents, moreover, range from bureaucrats' self-interested career concerns to their substantive policy preferences.¹¹

Taken together, formal studies of delegation provide, perhaps ironically, a conceptual understanding of the paramount importance of the normative concept of responsibility. Figure 1 presents an extensive form representation of a generalized game of legislative delegation of policy-making authority.¹² To begin, political principals can choose not to delegate—whereby they set policy specifically in legislation—or, alternatively, to give agencies discretion to set policy (i.e., exercise discretion). When delegation occurs, the political principal has the opportunity to restrict the range of policy outcomes through statutory language (an *ex ante* control) and then again through oversight hearings (an *ex post* control) performed after policy has been chosen during the course of administration. The judiciary has the opportunity to restrict the set of policy alternatives *ex post* regardless of whether the legislature has delegated, as in the case of judicial review of agency action, or not, for example, in constitutional review of legislation. Interests in the polity—organized or not, though more likely if they are organized—can file such litigation and lobby legislatures.

Given these controls from various stakeholders, an administrative agent has the opportunity to use his or her technical expertise, observe situations, gather data, and otherwise become more informed than the legislature that made the delegation.

Various formal delegation studies, quite unsurprisingly, find that variants of the ally principle—when delegating, a principal chooses an agent

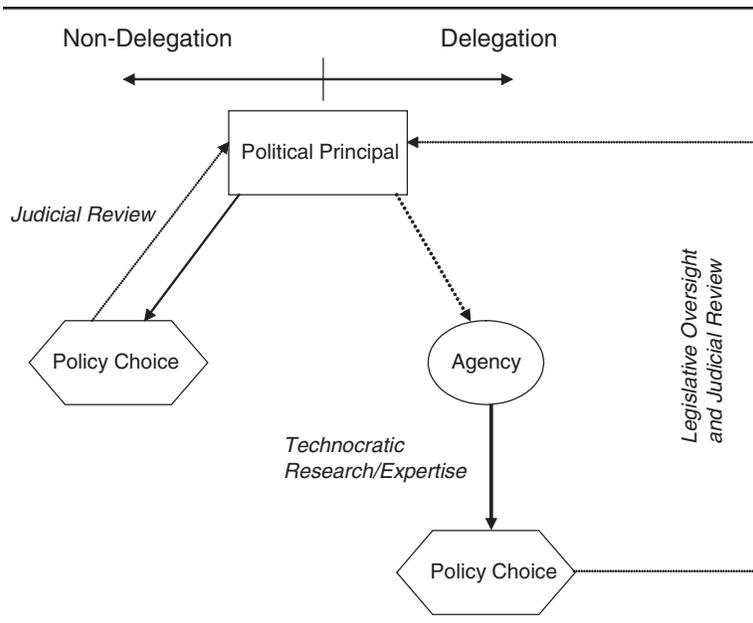


Figure 1: The Delegation Problem

whose preferences most closely reflect those of the principal—lead to equilibrium behavior (see Bendor, Glazer, & Hammond, 2001, p. 243). Thus, the political principal would have no difficulty writing legislation with sufficient ex ante provisions that the administrative agent would have no incentive to deviate from legislative intent. Alternatively, the economics literature on central bank independence suggests that delegations might effectively be made to nonally fiduciaries (e.g., Barro & Gordon, 1983; see also Majone, 2001). In other words, a legislative principal might create a fiduciary authority (e.g., a central bank) that would intentionally be insulated from the types of self-interested and ill-advised meddling by Congress that might invite political reprisals later.

But these two types of delegation, to allies and fiduciaries, are special cases. Legislators cannot be assured that the agencies they create will be policy allies, nor are most policy problems likely to be resolved by invoking the fiduciary principle; legislators prefer to retain their power to intervene. In the usual case, decisions to delegate confront uncertainties and potential costs. Moe (1991) has argued that because legislative membership varies over time, the inability of legislators to credibly commit their successors to their own policy choices leads to agencies that are ineffi-

cient because they are governed by rigid rules designed to restrict discretion. Likewise, agencies—which have little stability at the top and often violate the ally principle at middle and lower levels—and courts—driven by the complaints of interested parties (see Bertelli & Feldmann, 2002)—can seldom commit to perfect enforcement of legislative policy choices. Ensuring reliable public management is, therefore, inherently problematic.

CONTROLLING MANAGERIAL DISCRETION

The political economics literature bearing on public management differs in the extent to which emphasis is placed on external (cf. *Finer, 1940*) or internal (cf. *Friedrich, 1940*) checks on managerial discretion.

External checks on agency action may be both *ex ante* and *ex post* (*McCubbins & Schwartz, 1984*). Principals design a bureaucratic structure and a set of processes *ex ante*, and bureaucratic agents react to that structure *ex post*. In a well-designed structure and where information asymmetries are narrow, the incentives of principals and agents are aligned. In a poorly designed structure and where information asymmetries are wide, agents have more latitude to act on self-interest.

Those who emphasize external checks on managerial discretion differ in their assessments of the effectiveness of such checks. For example, *McCubbins, Noll, and Weingast (1987, 1989)* conclude that Congress can stack the deck in favor of their constituents through administrative procedures authorized by statutes. In contrast, *Bawn (1995, 1997)* uses game theoretic models to argue that on the basis of expected agency preferences, including a preference for autonomy, legislatures fashion legislation to create an optimal mix of technical delegation and political control. She contends that broad delegation is achieved where (a) there is little conflict between legislators and elected executives on the relevant substantive policy dimension and (b) there is considerable technical uncertainty over policy implementation with respect to matters on which the agency has expertise. It follows that legislatures must act *ex post* to reign in bureaus that drift.

Literature emphasizing external checks on managerial discretion has shown that imposing *Finer-type (1940)* controls is no simple matter, and therefore a role for *Friedrich-style (1940)* self-governance must be considered if democratic accountability is to be achieved.¹³

Internal checks are, by definition, *ex post* because they involve administrative self-governance. The internal check literature assumes that bu-

reaucratic agents are proactive and relatively autonomous. Downs (1967), for example, asserts that “authority leakage” follows from what might be called a “physics of hierarchy”: More levels of hierarchy imply more leakage, which in turn increases the likelihood of policy drift. Brehm and Gates (1997) identify three important constraints on the principal-agent model because of the characteristics of bureaucrats and their agencies: (a) bureaucrat predispositions and attitudinal considerations, (b) the type of production in which the bureaucrat engages, for example, information versus public goods, and (c) contact with supervisors. Based on “overwhelming evidence,” they argue that “the bureaucrat’s own preferences have the greatest effect upon performance. First and foremost, bureaucrats control their own behavior” (p. 196).¹⁴

MECHANISM DESIGN AND THE FOUNDING FATHERS

The main value of this delegation literature to our argument is that it reveals the limitations of legislation and of formal procedural controls as coercive mechanisms, especially in circumstances where either the ally principle (a spoils system) or the fiduciary principle (independent agencies) do not apply. This literature conceives of legislation not as a contract that the agency can accept or reject, but as an edict or order: Properly designed, *ex ante* instructions produce desired bureaucratic responses. But particular legislative enactments are not separable from the general body of legislation governing administrative procedures. Thus, we argue, each substantive enactment is better conceived of as a contract offered to the bureau under the general conditions of prior procedural enactments, such as the administrative procedure, ethics in government, or federal tort claims acts. The theoretical problem thus becomes one of understanding particular legislative enactments as part of a larger system of governance and the consequences of this system for managerial behavior. This problem can formally be addressed through the concept of mechanism design.

Within the Madisonian scheme, how can elected officials elicit behavior from public managers that legitimizes the managerial function? Game theorists have identified a problem known in the theory of contracts as the mechanism design problem. In a perfect world, a principal would prefer to act on the basis of particular information privately held by agents, thus minimizing agency costs. Under rational choice assumptions, asking agents for their private, advantageous information will elicit evasions unless there are incentives for these agents to reveal what they know. Pro-

viding such incentives is costly to the principal, however, and in making trade-offs between information costs and agency costs, inefficiencies may develop.

To deal with this problem, the principal designs a game (called a mechanism) for agents to play that, by virtue of its rules, gives the agents the incentive to reveal their private information.¹⁵ Of central importance is “that the principal is assumed to choose the mechanism that maximizes her expected utility, as opposed to using a particular mechanism for historical or institutional reasons” (Fudenberg & Tirole, 1991, p. 243). Of course, the mechanism must be designed such that the agents are willing to participate in it, which depends on the attractiveness of the mechanism’s incentives.¹⁶

The fundamental theoretical problem of public administration can be defined in these terms. In the framing period, Congress could reasonably exercise policy-making power through its constitutional role as lawmaker. As this situation gave way to the need for greater governmental regulatory and service activity, the administrative state developed gradually as agencies showed their capacity for performing governance tasks and gained credibility in the process (see Carpenter, 2001). Congress (the principal) wanted bureaus that would choose those policies Congress would have chosen. Policy choice is contingent, however, on the ability of a bureau to collect and evaluate information about the real world.¹⁷ If Congress could know the bureau’s private information (e.g., its choices of enforcement or treatment strategies) in advance, it could create an authorization for administrators that would give them incentives to act as Congress wished. However, Congress could not obtain such information in advance; it could only observe it after the fact. Thus, congressional confusion as to the choice of *ex ante* or *ex post* controls is because of the failure of the founding fathers to solve this mechanism design problem for the administrative state.

As the administrative state grew, public administration scholars, as we have seen, devised normative arguments that, if implemented, would constitute a credible commitment to responsible administration. In non-cooperative game theory, credible commitment by one actor can influence the strategies of other actors.¹⁸ Thus, the traditional scholarship implied that if administrators behaved according to various norms, such behavior would amount to a credible commitment to a form of administration that Congress could trust when delegating authority.¹⁹ In contrast, modern political economics has identified incentives required for bureaus to

behave in such a way that delegations are made without congressional concern about “bureaucratic drift.”

Combining the outcomes of these separate intellectual projects leads to the conclusion that the way in which administrators gather and use information about the world when making and managing policy constitutes their type. Type is, therefore, of primary importance in delegation. If administrators could credibly commit to gathering and using information and making policy according to a precept of managerial responsibility shared by legislators and courts, then, we argue, legislators could trust them with policy choice because they would know that though circumstances might change, administrators will act in a reliable way when adjusting to new or novel circumstances.

This argument is all the more plausible because, from the Pendleton Act to the Administrative Procedure Act and beyond (cf. Rosenbloom, 2000, 2001; Sunstein, 1986), Congress has already enacted rules governing public management in virtually every instance of delegation.²⁰ When an administrative agency agrees to implement a statute, it must play by these rules. If public management can also be assumed to be responsible, the other branches of government—a delegating legislature, a reviewing court—can make decisions with confidence that the agency receiving delegated authority will behave in reliable ways or, in other words, benefit from a credible commitment on the part of administrative agencies.²¹

A PRECEPT OF MANAGERIAL RESPONSIBILITY²²

There remains the task of defining the substantive dimensions of a precept of managerial responsibility that can legitimate the administrative state. Traditional public administration held that the capacity of the democratic state to carry out the will of its citizens must be balanced against the need for citizens to have adequate control over the uses of that capacity lest abuses of power go unchecked (Garvey, 1995). Responsibility characterizes the proper balance of these things. For Frederick Mosher (1968), “Responsibility may well be the most important word in all the vocabulary of administration, public and private” (p. 7). It is, he said, “the first requisite of a democratic state” (Mosher, 1992, p. 201).²³ But what, exactly, is responsible managerial behavior?

For elaboration, we examined the traditional literature of public administration more closely. There we found four distinct and recurring

qualities of responsibility, namely accountability, judgment, balance, and rationality, that are to govern every hierarchical level that imposes managerial responsibilities on office holders.²⁴ In contrast, irresponsible public management habitually acts without authority or in an arbitrary, non-transparent fashion, making it impossible for delegating legislators to depend on future administrative behavior.

ACCOUNTABILITY

Accountability is often used as a synonym for responsibility and answerability. As Frederickson (1997) puts it, "In the early days of modern public administration, the founders of the field were reformers and linked the field to broad issues of civics and citizenship in the management of public organizations" (p. 233). For our purposes, it has been more specifically defined as "those methods, procedures, and forces that determine what values will be reflected in administrative decisions" (Simon, Smithburg, & Thompson, 1950, p. 513). White (1955) referred to "accountability for substantive achievements," to accountability for maintaining long-term capacity for "production and service," and to "public acceptability of the agency and its program" (p. 222).

Judicial decisions, statutes, and administrative rules and guidelines are the three principal sources of formal controls over the values reflected in administration. But all three branches compete for control of administration, creating burdensome, often conflicting regimes of statutory, executive, and judicial mandates, rules, and guidelines (Moe, 1991). Moreover, large numbers of street-level employees and private contractors provide services at dispersed locations under the pressure of competing, often urgently expressed, citizen interests and values (Hargrove & Glidewell, 1990; Lipsky, 1980).

The density of such controls and interests is erroneously thought to ensure democratic control of administration. Of the three branches, "no one, nor all three jointly, provide the administrator with the totality of the value premises that enter into his decision" (Simon et al., 1950, p. 539). Moreover, although no regime of rules can eliminate possibilities for self-interested behavior by subordinate officials, "management guided by [the value of responsibility] abhors the idea of arbitrary authority present in its own wisdom and recognizes the reality of external direction and constraint" (Millett, 1954, p. 403).

Accountability or answerability to the collectively expressed values and will of citizens is, then, a long-recognized dimension of responsible public management.

JUDGMENT

As authoritative guidance is often ambiguous or incomplete, public managers must exercise judgment (synonymous with discretion) concerning what the public interest and professionalism require of them. No combination of structures and processes for enforcing administrative responsibility can extinguish the element of judgment from public management. Argued Laski (1923), "Administrative discretion is of the essence of the modern State" (p. 92). Levitan (1946) insisted that "the very continuance of the democratic system depends on our ability to combine administrative responsibility with administrative discretion" (p. 566). Simon et al. (1950) observed that "administrators have considerable freedom to decide matters on the basis of their own ethical promptings" (p. 539). The formal establishment of accountability intentionally and necessarily leaves a significant residual of discretion in the hands of public managers. In an essay honoring Frank Goodnow, Thach (1935) argued that "the conclusion seems irresistible that a part, at least, of the true significance of the law must nowadays rest on the judgment of the enforcing agency itself" (p. 275).

The importance of judgment in the context of judicial review has also been noted. Diver (1985) argued that a "strong presumption of deference to interpretations lying within an agency's *prima facie* policymaking domain best accommodates the competing demands for responsibility and initiative in the administrative state" (p. 593). Responsible judgment is more likely to result when public managers are assumed to be capable of exercising it within the domain of their legislative mandates. That judgment has been exercised in the absence of definitive rules is not a sign of regime failure. It is a sign, rather, that public managers recognize and accept their responsibilities, allowing them to credibly commit to responsible judgment. The question then becomes By what criteria might the appropriateness of administrative judgment be assessed?

BALANCE

One such criterion is balance. Morstein Marx (1959) argues that administrators should "give careful thought to the legislative balance of

power, the enunciated or anticipated preferences of the chief executive, and the probabilities of public reactions. Ideally, political and administrative thinking should blend into a joint process" (p. 102). Observed Arthur Macmahon (1955), "We may say of legislation generally that the pressures in a pragmatic democracy, sanctioned by majorities and guided by an instinct for equilibrium, are constantly writing a kind of balancing bias into one law or another" (p. 47).

To achieve balance, Marshall Dimock (1936b) has argued,

the law related to the subject must, of course, be considered, but in addition the economic situation, the pressure of political parties, and vested interests must be given consideration [as they constitute] influences acting upon the actual administration of government. (p. 8)

He continues: "Public administration is not merely an inanimate machine, unthinkingly performing the work of government. . . . It is also . . . interested in fulfilling the ends and objectives of the state" (pp. 11-12). Morstein Marx (1940) argued that administration requires "a profitable blend of judgments, political and professional, staff and line, general and special" (p. 286). Adds Herring (1936), "It is clear that the official must balance the interests of the conflicting groups before him" (p. 23).

RATIONALITY

A second criterion of good judgment is rationality. To be responsible, choice over alternatives necessarily must be rational and balanced. According to Skowronek (1982), state building during the Progressive era represented a "drive toward administrative rationality grounded in scientific principles of public administration" (p. 286). According to Waldo (1955), "Management is action intended to achieve rational cooperation in an administrative system" (p. 7), and "the central idea of public administration is rational action, defined as action correctly calculated to realize given desired goals" (p. 11). Rationality is achieved by "systematizing the process of securing and sifting relevant information so that the factors involved in arriving at a policy decision can be stated and the consequences of alternatives can get analyzed and balanced" (Leiserson & Morstein Marx, 1959, p. 46). Morstein Marx (1940) put it even more precisely: Institutionalized rationality is "putting proposed policy to the acid test of cause-and-effect relationships" (p. 42).

Whether viewed in pure or constitutive (e.g., Davidson, 2001; McDowell, 1994) terms, the implications of rationality are the same for

responsible public management: Managerial reasoning must be transparent, that is, accessible to disconfirmation or to analytical, normative, or critical analysis. Morstein Marx (1959) argues that “ultimately, [rationality] is controlled by its conscious premises or its unconscious predispositions” (p. 40), and the goal is systems rationalization, or “the search for rationally motivated consensus on the basis of the normative implications of systems designs or interventions” (K. M. Stokes, 1992).

FROM POLITICAL ECONOMICS TO MANAGERIAL RESPONSIBILITY

These elements of a precept of managerial responsibility are also implicit in the political economics of delegation and public administration. Accountability is the primary notion that underlies the external check studies. Actors having positive authority over the bureaucracy, namely, the political branches, and in some cases the courts, create rules, structures, and incentives that constitute what Redford (1969) called “directive activity.” In delegating authority, legislatures create an incomplete contract with the bureaucracy for public management services.

Directive activity, or political control, is neither costless nor definitive, however. The findings of Wood and Waterman (1991, 1993, 1994) that political control derives from various sources of differential effectiveness, of Carpenter (1996) that the bureaucracy dampens control signals, and of Scholz (1986) that interests can affect bureaucratic action *ex post* suggest that political control is inevitably incomplete. Agency information advantages defeat more rigorous political control (Banks & Weingast, 1992; Bendor, Taylor, & Van Gaalen, 1985, 1987), creating the need for normative guidelines for bureaucratic policy making.

When scholars such as Brehm and Gates (1997) peer within the agency, the need for an additional guarantor of accountability is equally apparent. Directive activity is undermined by well-developed agency preferences over public policy goals. Therefore, accountability, as a tenet of responsible administration, is necessary, although not sufficient, to complete the “public service bargain” (Hood, 2002). Accountable administration minimizes the transaction costs both of creating governance structures and of operating those structures.

Accountability alone is insufficiently precise, however, to ensure effective political control and responsible management. In political economics, judgment, balance, and rationality serve to bolster accountability, assisting delegating legislators by creating the effect of equal adherence to

an ally or fiduciary principle, depending on the nature of the delegation. Balance helps to discourage corrupting influences from strong interests (Banks & Weingast, 1992). Brehm and Gates (1997) have directed our attention to the psychology of bureaucrats, reminding us that political principals must consider the predilections of bureaucrats and those with whom they interact when they create control mechanisms (per Finer, 1940) and trust bureaucrats to act responsibly (per Friedrich, 1940). We learn from Krause (1999) and Moe (1985) that bureaucrats are capable of affecting the intent of principals, not simply policy drift. Thus competent, well-informed, goal-directed decision making—the essence of the institution of governance called public management—is essential to preclude bureaucratic behavior inconsistent with the public interest expressed by the political branches.

The polity possesses the ultimate positive authority in democracy. Epstein and O'Halloran (1999) and Bawn (1995, 1997) explain that the amount of discretion that bureaucrats have, regardless of how rationally they employ it or how good their judgment in that exercise, depends on the political and informational background of the delegation decision. When the legislature cannot congeal support for a comprehensive substantive policy choice, it gives the bureaucracy a narrow mandate and little discretion, and vice versa. Public managers must be able to divine the often cryptic expression of popular will embedded in their mandates—and, according to Moe (1991), their organizations—and balance concerns of social welfare within the constraints of those mandates.

AN APPLICATION OF THE PRECEPT

We have argued that institutionalizing a precept of managerial responsibility completes the constitutional scheme by addressing the political control dilemma perceived by Goodnow (1900) as we began and continued through both the traditional public administration and the modern political economics literatures. A good test of this proposition is its applicability to balancing the distinctive roles of the judicial and executive branches in cases of institutional reform litigation, a structural problem never addressed, as such, in public management literature.

Institutional reform litigation is an arena in which law and public management directly confront one another. Elsewhere (Bertelli & Lynn, 2001), we have argued for the adoption of a judicial test: Where the institutional defendant is operating under the precept of managerial responsi-

bility, federal courts should abstain from deciding the case. *Marisol A. v. Guiliani* (1996) was a class action pursued against the public child welfare agency in New York City on the theory that the agency had mishandled its cases, thereby violating various federal and New York State statutory and constitutional provisions and New York State administrative regulations. Plaintiffs sought

the appointment of a receiver with full authority to oversee and direct the implementation of all the injunctive relief . . . to restructure the NYC child welfare system, and to take all the steps necessary to ensure . . . compliance with all applicable law. (p. 687)

Plaintiffs sought the reconstitution of an agency that had only recently been reorganized into its then present form. An institutional defendant has the opportunity to show its compliance with the precept in the documents (and testimony if a trial is held) it presents to the court.²⁵ The child welfare agency in *Marisol* had exhibited accountability, and appropriate evidence was presented to the court: City officials, in direct response to evidence of mismanagement under the old scheme, created an entirely new agency under qualified leadership. The agency exhibited judgment: Agency leadership undertook a systematic and extensive program of initiatives covering all aspects of agency operations and given expression in an agency reform plan that became the blueprint for administration. That judgment was balanced: The agency reform plan established priorities (for both budgetary and effort resources) and timetables to guide agency resource allocation among its myriad functions and activities. That judgment was, finally, rational: New management information systems, statistics, and case reviews were used to create performance indicators, engage in focused troubleshooting, and establish best practice guidelines.

When a court undermines a responsible managerial scheme, it discards valuable information, expertise, and even progress in the achievement of public goals. It can also undermine not only administrative but more importantly, legislative policy choices. Courts should not do such things (and in this case the district court did not). Instead, the merits of judicial intervention should be decided in an incremental, "common law" process—an agency decision might be challenged in a court of competent jurisdiction and its resolution made part of a common law governing administration. In the context of cost-benefit analysis, Bertelli (1999) argues that such *tâtonnement* processes move toward an equilibrium characterized by responsible administration. Such administration, we suggest, can be defined as administration governed by the precept of managerial

responsibility, or a completion of the incomplete guarantee of accountability at the heart of public administration.

These claims with respect to conditional intervention by the judicial branch may be generalized into a multibranch review regime. Regardless of whether a constraint is judicial, legislative (statutory language), or executive (executive order), the most efficient governance is achieved when review is concerned with relatively narrowly circumscribed issue domains rather than with broad issue domains that are better governed by responsible management than by formal mechanisms of accountability. For example, review should encompass not all facets of agency operations, as is commonly the case in institutional reform litigation, but only specific procedures and should consider not all potential aggrieved agency clients but only those suffering actual harm. Over time, these specific rulings form a nuanced common law of administration.

CONCLUSION

The precept of managerial responsibility, derivable both from positive doctrines in the classical public administration and political economics literatures, is a normative ideal. As such, its fulfillment will not result from the usual *tâtonnement* processes and interest group influence characteristic of our constitutional scheme. Its use as a means for resolving the constitutional dilemma of public management will require affirmative action by all those involved in promoting the success of democratic public management. Note also that representative bureaucracy, whistleblower protection, and other instrumental solutions to the asymmetries in the delegation environment are partial solutions at best. Moreover, they impose significant transaction costs on the legislature. Adherence to the normative precept improves the contracting environment by making the legislature's agents more reliable and into the bargain, without the transaction costs associated with *ex post* enforcement.²⁶

We suggest that an affirmative action agenda includes the following: (a) Public management scholars must incorporate into their work the inextricable linkages between law, politics, and management within our constitutional scheme; (b) public managers must adopt the precept of managerial responsibility as a normative guide to their practice; (c) judges must use the precept to decide whether or not deference to public management is justified in particular cases to further the establishment of a proper balance between collective and individual justice; and (d) legislatures, in

light of their limited and contingent influence over governmental performance, must recognize the value to effective political control of administrative capacity of facilitating the necessary and constructive involvement of the other branches in accomplishing public purposes.

Fulfilling these objectives is admittedly a more demanding agenda than focusing more narrowly on the temperaments and skills of individual public managers or urging that public managers adopt a liberal ideology. It is, however, an appropriate agenda for a field, public management, which aspires to contributing to the achievement of democratically accountable governance.

NOTES

1. The general problem of legitimacy has been discussed under various headings: accountability, compliance, governance, and responsibility. McSwite (1997) argues that the discourse on legitimacy will be seen as pointless and that the problem of legitimacy dissolves if the false consciousness on which it is founded is replaced by an altogether different meaning system founded on mutual caring and understanding. The durability of the issue over centuries and across cultures suggests to us, however, that the consciousness from which a concern for administrative legitimacy is derived is not false and that the problem cannot be conjured away by invoking a utopian ideology.

2. In *The Federalist* number 72, Hamilton does suggest the credible commitment problem that lies at the heart of our argument:

To reverse and undo what has been done by a predecessor is very often considered by a successor, as the best proof he can give of his own capacity and desert; and, in addition to this propensity, where the alteration has been the result of public choice, the person substituted is warranted in supposing, that the dismissal of his predecessor has proceeded from a dislike of his measures, and that the less he resembles him the more he will recommend himself to the favor of his constituents. These considerations, and the influence of personal confidences and attachments, would be likely to induce every new president to promote a change of men to fill the subordinate stations; and these causes together could not fail to occasion a disgraceful and ruinous mutability in the administration of the government.

Nonetheless, the simplicity of the context of magistral assistance gives little guidance to students of the contemporary American administrative state.

3. The complexity of the issue is compounded when delegated authority has been used to make further delegations to nongovernmental entities, as was the case with airport security screening, which was refederalized following the 9/11 attacks.

4. We regard the terms *public managers*, *public administrators*, and *bureaucrats* as synonymous.

5. Similar debates in the administrative law community culminated with the Administrative Procedure Act of 1946.

6. If the preferences of the majority were (a) the only justification for administrative action and (b) definitive with respect to all aspects of administration, then administration would be reduced to executing the preferences of the median voter. Early public administration scholarship took pains to point out that such conditions are rarely satisfied. Proactive administration is therefore a necessity.

7. In a similar vein, Gaus (1936, p. 39) referred to an "inner check." According to Paul Van Riper (1958), the idea that

professional standards and scientific objectivity become measures of administrative action, relies primarily on an internalized and voluntary pattern of behavior. . . . Professionalism can often keep administrative discretion within bounds more severe than a legislature would dare to prescribe. (p. 550)

8. According to Joel Fleishman (1990), the policy schools' focus on public management originated with Mark Moore's efforts to "refocus political and organizational analysis into prescriptive subject matter, with a point of view that is decidedly strategic" (p. 743). Donald Stokes (1986) observed that

strategic political thinking sets off the public manager who is able to move an agency from one who plays a custodial role. . . . The strategic manager sees the small openings presented by the agency's routine to induce change toward an identified goal, step-by-step. (p. 55)

9. As argued by one of the principal authors, public administration scholars would have been justified in claiming that their field had owned the subject of public management for decades. As evidence, in addition to the citations in the text, the journal of the International City Management Association took the title *Public Management* in 1927. In 1940, a volume edited by Fritz Morstein Marx was titled *Public Management in the New Democracy*. John Millett's (1954) book *Managing in the Public Service* hits a strikingly contemporary note.

10. Case analysis, too, had been pioneered by traditional public administration in the activities of the Intercollegiate Case Clearing House, but these efforts were either ignored or dismissed as insufficiently strategic and political in orientation.

11. More recently, political transaction cost analyses have produced results that complement those flowing from principal-agent models (cf. Epstein & O'Halloran, 1999).

12. See Bendor, Glazer, and Hammond (2001) for a summary of formal studies of delegation in the political science literature.

13. Spence (1999) argues that ex ante controls are substantially weakened because any winning coalition in Congress does not have preferences over every policy problem that an agency will face when implementing a statute and, as a consequence, cannot supply checks on policy dimensions it does not foresee. Balla (1998) provides evidence that interests outside the winning coalition can achieve a substantial degree of influence over policy choice in implementation. Finally, West (1997) has argued that external check logic cannot explain procedural statutes, such as the Administrative Procedure Act, that cut across substantive policy areas.

14. Following this theme of active agency, Moe (1985) has shown that an "endogenous core" of actors involved with the National Labor Relations Board make mutually adaptive and equilibrating decisions. Krause (1999), in a study of the Securities and Exchange Commission, argues that bureaucratic control is a "two-way street," along which bureaucracies and political branches interact in a dynamic process of mutual influence.

15. As an example of a mechanism, one might think of the employment contract of an appliance salesperson working for commission. Commission is earned at varying levels for (a) selling specified numbers of all units, (b) selling expensive energy-saving appliances, and (c) selling even more expensive Internet refrigerators. The store owner wants an agent whose type maximizes the owner's profit, so the contract is designed such that when the salesperson makes discretionary decisions on the sales floor, he or she considers selling more profitable items whenever possible. Type, then, is revealed through agent action.

16. For a public sector example of mechanism design, see Laffont and Tirole (1991) on procurement.

17. Of course, the president wanted control over bureaus as well but solved a different problem. The spoils system selects on agent type *ex ante* such that a mechanism need not be carefully crafted.

18. By *credible commitment*, we mean a statement or promise to be taken by one party that is believable for another party. This implies that the party making the statement has the appropriate incentives to truthfully reveal in the statement.

19. This is why new public administration views about how to establish legitimacy for administration fail: Such norms would be unlikely to engender congressional trust across a broad range of opportunities to delegate (see Thompson, 1975).

20. The recent debate over civil service protection in the Department of Homeland Security demonstrates that Congress has the capacity to craft mechanisms individually tailored to specific delegations. Moreover, the executive orders of Presidents Reagan and Clinton requiring cost-benefit analyses in regulatory agencies suggest that presidents enter the mechanism design game as well.

21. The traditional literature includes intuitions that are equivalent to the solution to a mechanism design. According to Laski (1923), "What, then, we require is a system of mechanisms which enable the discretion exercised to be at once fully known and so known as to be checked if it can be shown to be without warranty" (p. 95). Argued Dimock (1937), "The only kind of effectiveness which is acceptable to a democratic people is that which is produced by those who can be trusted" (p. 40).

22. The discussion in this section draws on, but further develops, material in Bertelli and Lynn (2001, 2003).

23. Woodrow Wilson (1887) observed that "there is no danger in power, if only it be not irresponsible" (p. 213). *The Budget and Responsible Government* was the title of a seminal 1920 book (Cleveland & Buck, 1920). The answer to the danger inherent in bureaucracy, argued John Pfiffner in his 1935 textbook, combines power with responsibility to political officers who are under popular control (p. 19). Carl Friedrich wrote of responsible government service under the American constitution in a 1935 monograph (Friedrich, 1935, pp. 3-74). Subjective elements appear, he argued, wherever the possibility of relatively voluntary choice enters in, and here political responsibility is the only method that will ensure action in accordance with popular preferences (p. 37). Wrote David Levitan (1946), "The problem of the responsibility of administrative officials in a democracy is the very crux of the problem of the maintenance of the democratic system" (p. 566).

24. Maas and Radway (1953) advanced the following criteria: responsibility for exercising discretion in the formulation and execution of public policy, responsibility to organized interest groups, and responsibility to the legislature through the chief executive, involving coordination with other executive agencies. These criteria are, the authors noted, incomplete.

25. Elsewhere (Bertelli & Lynn, 2001), we have argued that abstention is appropriate when adherence to the precept is demonstrated. Of course, the precept applies to the act of providing information to the court.

26. For a discussion of alternatives to the precept, see Bertelli and Lynn (2003).

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