A Precept of Managerial Responsibility: Securing Collective Justice in Instituional Reform Litigation

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Cover Page Footnote
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Institutional reform litigation confronts public administrators with troubling dilemmas. Plaintiffs routinely accuse public officials of violating their constitutional rights. Federal judges order officials to make sweeping changes to their agencies. Of course, sometimes, as with the school desegregation cases, federal courts have had no choice but to be heavy-handed with public officials. Yet court directives often contradict the duties and responsibilities of public managers. The argument for judicial intervention is rarely straightforward.


2. See Hutto, 437 U.S. at 686-88 (upholding the trial court’s remedial order imposing new standards on the state’s use of solitary confinement); Hills, 425 U.S. at 299 (ordering the agencies to create housing alternatives beyond the city limits of Chicago).

3. See, e.g., Goss v. Board of Education, 373 U.S. 683, 689 (1963) (invalidating “one-way transfers,” allowing students to transfer to schools in which they belonged to a racial majority group); Green v. County School Board, 391 U.S. 430, 441-42 (1968) (invalidating a similar “freedom of choice” provision).

4. We acknowledge that “heavy-handedness” on the part of the trial judge may be the result of the particularities of the case. Parties often ask the judge to make orders when they are unable to come to a resolution, and appellate decisions may confine judges to a set of orders that are not what even they consider remedially adequate. See, e.g., Phillip J. Cooper, Hard Judicial Choices 105-35 (1988); Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 394-95 (1982).
Consider the case of Marisol A. v. Guiliani. The case was filed in the Southern District of New York in 1995, shortly after the widely publicized death of Eliza Izquierdo. New York City Child Welfare Administration ("CWA") officials had placed Izquierdo, a six-year old child, in foster care. The CWA later returned Izquierdo to her mother. Despite receiving numerous reports of the mother's subsequent abuse, CWA took no further action on Izquierdo's file. Izquierdo was subsequently beaten to death by her mother. Catalyzed by Izquierdo's death, children's rights advocates sued CWA, claiming the agency failed to protect children at risk of being placed in foster homes. The lawsuit was based on various New York and federal statutes and the New York and federal constitutions.

Four weeks after the Marisol complaint was filed, Mayor Rudolph W. Guiliani announced his own program to reform the City's child welfare program:

Following the shocking death of Elisa Izquierdo, a child under the protection of the City's Child Welfare Administration, New York City Mayor Rudolph Guiliani initiated a sharp departure from the status quo. He separated the child welfare administration from the Human Resources Administration and created, by Executive Order No. 26 in January 1996, a new agency, "Administration for Children's Services ("ACS"), that would report directly to him rather than through a deputy mayor, as is the case with other cabinet departments. To head the new agency, the Mayor appointed Nicholas Scoppetta as Commissioner and promised him the full financial and operational support of his administration. These moves were intended to insure that "business as usual" in child welfare services could not continue in New York City.

7. The plaintiffs' constitutional claims included violations of the First, Ninth, and Fourteenth Amendments to the United States Constitution and violation of Article XVII of the New York State Constitution.
Marisol v. Guiliani was ultimately settled without a provision for federal court oversight. The judge only required that a panel of national experts review the agency's reform efforts for two years.\(^9\) If within that time, ACS made good faith efforts towards reforming its operation, the lawsuit would not be reinstated.\(^10\)

The case raises a larger question. Should a state's interest in the exercise of managerial discretion on behalf of legislated goals weigh in a court's determination if a human services agency has violated constitutional rights?\(^11\) Under what circumstances should federal courts allow public administrators to manage their own agencies? How should state and local public administrators answer for their performance so as to justify this judicial restraint?

We argue that federal courts should refuse to hear institutional reform cases not only when federal court intervention would upset a state administrative scheme (the traditional Burford abstention doctrine),\(^12\) but also when the institutional defendant is governed by a precept of managerial responsibility.\(^13\) When the agency's challenged actions have comported with this precept, we urge federal courts to let their state counterparts determine the agency's managerial responsibility in a common law process.

The analysis begins, in Part I, by addressing the Burford abstention arguments in the Marisol case itself. In Part II, we turn to the application of abstention doctrines to institutional reform litigation.

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10. Id.
11. In some ways, the question has been squarely addressed. The United States Supreme Court has dealt with this difficult question in the context of prison detention methods in *Bell v. Wolfish*, 441 U.S. 520, 540 (1979):

   The Government . . . has legitimate interests that stem from its need to manage the facility in which the individual is detained . . . . For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees. Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment . . . .

   In this article, we provide a generalized "attempt to detail the precise extent of the legitimate governmental interests" of public human service agencies.


generally, and *Marisol* in particular. In Parts III and IV, we justify these abstention doctrines on grounds of federalism and the professionalism of public administrators. In Part V, we propose a test federal judges may use to decide whether to abstain from an institutional reform litigation case. In Part II, we derive the basis for this test — our precept of managerial responsibility — from the intellectual history of the concept of responsibility in public administration.

I. ABSTENTION IN *MARISOL A. v. GUILIANI*

In *Marisol A. v. Guiliani*, the federal district court dismissed the child welfare agency’s motion urging the court to abstain under the *Burford* abstention doctrine. The *Burford* doctrine permits a federal court to relinquish jurisdiction in order to avoid unnecessary conflict with a state’s internal administration. The agency argued that the district court should have avoided interfering with the child welfare policy of New York City. The agency claimed that *Burford* abstention was proper because “a federal ruling could conflict with [New York’s] administrative scheme, and the area of child welfare services is an area of substantial state concern.”

The court rejected this motion, reasoning that *Burford* abstention was not appropriate. According to the court, the plaintiffs did not ask the court to interfere with or change the underlying policies of the agency. Instead, the court reasoned, the plaintiffs had asked

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14. Plaintiffs’ claims were that ACS failed to take the following actions:
(1) appropriately accept reports of abuse and neglect for investigation; (2) investigate those reports in the time and manner required by law; (3) provide mandated preplacement preventive services to enable children to remain at home whenever possible; (4) provide the least restrictive, most family-like placement to meet children’s individual needs; (5) provide services to ensure that children do not deteriorate physically, psychologically, educationally, or otherwise while in CWA custody; (6) provide children with disabilities, including HIV/AIDS, with appropriate placements; (7) provide appropriate case management or plans that enable children to return home or be discharged to permanent placements as quickly as possible; (8) provide services to assist children who are appropriate for adoption in getting out of foster care; (9) provide teenagers adequate services to prepare them to live independently once they leave the system; (10) provide the administrative, judicial, or dispositional reviews to which children are entitled; (11) provide caseworkers with training, support, or supervision; and (12) maintain adequate systems to monitor, track, and plan for children.


15. *Id.*
the court to ensure agency compliance with an existing administrative and statutory scheme.\textsuperscript{16}

The court recognized that the \textit{Burford} doctrine was intended to keep federal courts from interfering with state efforts to develop, effect, and enforce state policy.\textsuperscript{17} Although the court agreed that child welfare is an area of substantial state concern, the court refused to abstain since the plaintiffs asked the court to ensure agency compliance with an existing administrative and statutory scheme.\textsuperscript{18} We disagree. What exactly had the plaintiffs’ requested?

The \textit{Marisol} plaintiffs claimed New York’s child welfare agency had mishandled its cases in violation of the Federal and State Constitutions, federal and state statutes, and state administrative regulations. The plaintiffs requested injunctive and declaratory relief.\textsuperscript{19} Furthermore, plaintiffs’ requested that the court appoint a receiver to oversee the injunctive relief, restructure the child welfare system, and ensure the agency’s compliance with all applicable law.\textsuperscript{20} This drastic relief was sought against an agency that Mayor Giuliani had only recently restructured.\textsuperscript{21} There is no plausible way the court could “ensure agency compliance with an existing administrative and statutory scheme”\textsuperscript{22} without interfering with the scheme, embodied by the new ACS itself, that Mayor Giuliani had created — a scheme that had not been given the opportunity to show its potential for effective child welfare administration.

One of the defendants’ experts described the easily-misunderstood context in which ACS functions:

\begin{quote}
From a child advocate’s perspective, from the perspective of Children’s Rights, Inc., for example, the relevant “unit of analysis” and focus of concern for an agency such as ACS is the indi-
\end{quote}

\begin{footnotes}
\textsuperscript{16} 929 F. Supp. at 687-88.
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.}
\textsuperscript{20} \textit{Marisol}, 929 F. Supp. at 672.
\textsuperscript{21} 929 F. Supp. at 669 n.1.
\textsuperscript{22} 929 F. Supp. at 687.
\end{footnotes}
vidual child, the individual case. The goal of advocates is the treatment of each and every case in accordance with an uncompromised moral imperative: every child must be protected with skill, good judgment, and utter humanity so that no mistakes are made, no child is lost, no harm is done, ever . . . . An idealistic world view of mistake-free administration may be held up as a goal to strive for, but cannot be taken as a realistic standard for assessing the competence of management.\textsuperscript{23}

The \textit{Marisol} court could not, in granting the injunctive relief requested by plaintiffs, avoid interfering with state efforts to develop state policy.\textsuperscript{24} To accept such a responsibility is to embrace the "idealistic world view of mistake-free administration,"\textsuperscript{25} which ACS, as an executive agency, could not practically achieve under any circumstance.

II. \textbf{ABSTENTION DOCTRINES: WHY \textit{BURFORD} IS PROPER}

The U.S. Supreme Court has carved out three doctrines permitting federal courts to abstain from adjudicating claims over which they have proper jurisdiction.\textsuperscript{26} The \textit{Pullman} doctrine, named for the Supreme Court's decision in \textit{Railroad Commission of Texas v. Pullman Co.},\textsuperscript{27} suggests a federal court must avoid deciding a federal constitutional question when the case can be disposed of on state law grounds.\textsuperscript{28} \textit{Pullman} abstention is not proper when a case involves a nonconstitutional federal issue that can be resolved by deciding an underlying state law issue. In such cases, federal courts should decide both the federal and state law issues.\textsuperscript{29} Such situations invoke the Supremacy Clause, and transform the case into an interpretation of federal law alone.\textsuperscript{30} Thus, \textit{Pullman} abstention is not proper in a case like \textit{Marisol}, where the plaintiffs relied on federal statutory claims.

A second abstention doctrine arose in \textit{Younger v. Harris}, where the Supreme Court held that federal courts are not permitted, except in extreme instances, to interfere with state criminal prosecu-

\textsuperscript{23} \textsc{LYNN}, \textit{supra} note 8, at 10.
\textsuperscript{24} \textit{Marisol}, 929 F. Supp at 688.
\textsuperscript{25} \textsc{LYNN}, \textit{supra} note 8, at 10.
\textsuperscript{26} \textsc{Deakins v. Monaghan}, 484 U.S. 193, 203 (1988) (citation omitted).
\textsuperscript{27} \textit{Railroad Comm'n of Tex. v. Pullman Co.}, 312 U.S. 496 (1941).
\textsuperscript{28} \textsc{Charles Wright et al., Federal Practice and Procedure 2d § 4241 (2d ed. 1988).}
\textsuperscript{29} \textsc{Propper v. Clark}, 337 U.S. 472, 490 (1949).
\textsuperscript{30} \textsc{See United States Auto Ass'n v. Muir}, 792 F.2d 356, 363-64 (3d Cir. 1986).
tions. The Court later extended the reach of *Younger* abstention to situations where federal claims were or could have been presented in an ongoing state judicial proceeding dealing with an important state interest. In *Marisol*, the child welfare agency unsuccessfully argued that issues regarding its compliance with state and federal statutes could have been heard by the family courts of New York State. The court rejected this argument, reasoning that none of the plaintiffs were improperly challenging a state court proceeding through the federal courts. Apparently, the fact that the plaintiff did not have an ongoing case against the agency in a New York state court was dispositive. We will not challenge the court’s loosely reasoned holding on the *Younger* issue, since a

34. *Id.*
35. In *J.B. by Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999), the Tenth Circuit reviewed a New Mexico district court’s decision to abstain under *Younger* in a structural reform suit against New Mexico’s child welfare agency. The question at issue was whether there was an ongoing state judicial proceeding where the plaintiffs had an adequate opportunity to raise their federal claims. 186 F.3d at 1291. The Tenth Circuit affirmed the abstention. The court noted that plaintiffs were subject to biannual review hearings before the New Mexico Children’s Court. “These proceedings, while admittedly less than full adversarial hearings, are judicial in nature. Moreover, they exist as long as the child remains in state custody, so they are ongoing.” 186 F.3d at 1291. Furthermore, the court found that

plaintiffs’ federal action would interfere with this proceeding by fundamentally changing the dispositions and oversight of the children. The federal court would, in effect, assume an oversight role over the entire state program for children with disabilities. This places the federal court in the role of making dispositional decisions such as whether to return the child to his parents in conjunction with state assistance or whether to modify a treatment plan.

186 F.3d at 1291-92. Finally, the court noted that

we are less certain about whether they could have adequately raised their federal statutory and constitutional claims in these state proceedings. This uncertainty, however, militates in favor of abstention . . . . Plaintiffs bear the burden of proving that state procedural law barred presentation of their claims in the New Mexico Children’s Court . . . . In this case, plaintiffs have failed to clearly show that they could not have raised their claims during the periodic review proceedings.

186 F.3d at 1292 (citations omitted).

Judge Briscoe dissented on the *Younger* question. Concerning the holding that the federal court was justified in not intervening in a state proceeding, he wrote:

As did the district court, the majority in essence assumes *Younger* precludes the coexistence of federal and state suits involving abused or neglected children in the custody of the State of New Mexico. This sweepingly broad rule would bar any abused or neglected child in State custody from obtaining federal court access to vindicate violations of federal constitutional and statutory rights. For any such child, a Children’s Court proceeding would al-
third abstention doctrine, also rejected by the court, fits the Marisol case more appropriately.

That doctrine originated in the Supreme Court's decision in Burford v. Sun Oil, Co.\textsuperscript{36} The Burford doctrine was aptly summarized by the Supreme Court in New Orleans v. New Orleans Public Service, Inc.:

Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance tran-

ways be pending or ongoing. The appropriateness of abstention, however, turns neither on the mere availability of a state judicial forum nor on the existence of parallel federal and state court proceedings . . . Younger abstention springs from notions of comity, federalism, and respect for state sovereignty, and turns on whether a federal court is called upon to interfere in a state judicial process. The healthiest respect for this rule does not dictate abstention here. Numerous federal courts have exercised jurisdiction over similarly broad child welfare cases, many of them expressly finding Younger abstention inappropriate notwithstanding the presence of periodic reviews in state family courts.

186 F.3d at 1295 (Briscoe, J. concurring and dissenting) (citations omitted). Furthermore, he disagreed with the majority's view of the state proceeding as ongoing and flatly denied the ability of a dispositional hearing to provide a forum for plaintiffs' claims:

The purpose of the periodic dispositional reviews is not to determine a state official's compliance with federal laws mandating the provision of specific services, or the constitutional adequacy of New Mexico's entire service delivery system, but rather to reassess the Children's Court's previous determinations regarding custody and treatment. These determinations are intensely individual, focusing only on the child and his or her family or guardian. The nature of the proceedings does not permit a prolonged, critical, and adversarial examination of the gamut of services being provided to a child in state custody. Moreover, many procedural safeguards that are present in a typical adversarial proceeding, and that are designed to ensure fundamental fairness and the reliability of admitted evidence, are noticeably absent in Children's Court hearings. For example, the court itself is not required to conduct the review hearing, but may designate that task to a special master, who in turn submits recommendations to the court. And, although evidence may be presented and witnesses cross-examined at the hearing, discovery is limited and the rules of evidence do not apply. The Children's Court is not suited to adjudicate the complex constitutional, statutory, and systemic claims raised by plaintiffs.

186 F.3d at 1296 (citations omitted).

We circumvent Younger because it is less applicable, in our view, than the doctrine of Burford abstention discussed below. As the debate in the Tenth Circuit clearly shows, Younger is problematic in child welfare institutional reform scenarios. However, Judge Ward's opinion does not address these serious issues in foregoing Younger abstention.

scends the result in the case then at bar'; or (2) where the ‘exer-
cise of federal review of the question in a case and in similar
cases would be disruptive of state efforts to establish a coherent
policy with respect to a matter of substantial public concern."37

The Supreme Court recently stated that Burford abstention is
not limited to cases in equity, but rather extends to all cases where
a federal court is asked to provide discretionary relief.38 Regarding
the second part of the Burford test, where federal review would
disrupt state efforts to establish a coherent policy in an area of sub-
stantial public concern,39 the U.S. Court of Appeals for the Sev-
enth Circuit held that there are
two fundamental elements of Burford abstention. First, and
most obvious, the state must offer some forum in which claims
may be litigated... Second, that forum must be special, it must
stand in a special relationship of technical oversight or concen-
trated review in the evaluation of those claims. The ability to
point to a specialized proceeding is a prerequisite of, not a fac-
tor in, the second type of Burford abstention.40

Burford doctrine provides courts with wide latitude to abstain in
a given case. The Supreme Court in Colorado River Water Conser-
vation District v. United States, however, muddied its potential ap-
pliability by describing the doctrine as a narrow exception to the
exercise of federal jurisdiction.41 The doctrine does not seem to
apply to cases in which federal preemption is shown, although
there is no per se rule against applying Burford in such cases.42
Moreover, even where no state law claim can be found in the case
at bar, abstention may be proper because the motive behind Bur-
ford is not the desire to avoid a state law question, but the reluc-
tance to intrude into a complex state regulatory system.43

Courts have disagreed over Burford's breadth:

ing Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).
40. Prop. and Cas. Ins., Ltd. v. Cent. Nat'l Ins. Co. of Omaha, 936 F.2d 319, 323
(7th Cir. 1991).
41. See William E. Ryckman, Jr., Land Use Litigation: Federal Jurisdiction and the
42. New Orleans Pub. Serv., Inc. v. City of New Orleans, 798 F.2d 858, 862 n.1
(5th Cir. 1986). Federal preemption refers to areas of law where states may not legis-
late in a manner inconsistent with existing federal law. BLACK'S LAW DICTIONARY
43. New Orleans, 798 F.2d at 862 n.1.
Some courts apply *Burford* only when the facts are analogous to the *Burford* case. Others interpret *Burford* as a general mandate to exercise caution when decisions will impact on issues of local concern. Some courts appear so baffled by the distinction between *Pullman* and *Burford* that they apply the doctrines in aggregate form.\(^4\)

We argue that such difficulties in *Burford*'s application stem from an attempt to understand it solely on grounds of comity and federalism. Deference to administrative professionalism in public management provides a third justification as well as some clarification.\(^4\) Part IV unpacks this rationale in its explication of the precept of managerial responsibility.

*Burford* abstention may be raised by the court on its own motion if the court finds such action is warranted.\(^4\) If a court abstains, three dispositions of the case are possible. The case may be dismissed, as is typical, with no retention of jurisdiction.\(^4\) The court may also order a stay to be vacated only if the state proceeding cannot reach a prompt, final determination on the merits.\(^4\) Third, given the Supreme Court’s holding in *Carnegie-Mellon University v. Cohill*,\(^4\) the court may be able to remand the case to the state court for reasons other than lack of jurisdiction.

Courts have found *Burford* abstention proper in several key instances. In *Canaday v. Koch*,\(^5\) a case cited by the *Marisol* court,\(^5\) the U.S. District Court for the Southern District of New York (the same court as that deciding *Marisol*) adjudicated a lawsuit brought by homeless mothers against New York City for denying them emergency housing. The district court abstained under *Burford*, finding that since the case involved a question of substantial local interest, the decision of which would disrupt local remedial efforts, the *Burford* test was easily satisfied:

The problem of New York City's homeless is one of predominantly local concern. State law regarding governmental obliga-


\(^{45}\) See infra notes 71-75 and accompanying text.


tions to the destitute homeless is unsettled and unclear. Local officials are still endeavoring to formulate and effect a coherent policy for providing shelter for the homeless. Obviously, federal court intervention in this area would interfere with those efforts. Allocation of resources for welfare programs is a task uniquely within the sphere of local control. Placing that task under the supervision of this court is fraught with dangers. This court has no particular expertise in structuring welfare programs, or allocating scarce resources among competing needs. Nor is it on familiar terms with the state and local political and procedural apparatus which could come under its receivership were it to proceed with deciding this case. Nor does it have the familiarity with state law that is indispensable to adequate decision of this wrenching problem.\textsuperscript{52}

The court also found that the Seventh Circuit's refined version of the test, requiring an adequate, even special, remedy available in the state system, was also satisfied:

The state has constructed a complex system of administrative review and appeal . . . and has specified a method of judicial review by way of proceedings in New York Supreme Court under CPLR Article 78. I am reluctant to intrude on this system. My reluctance is magnified in this case by indications that plaintiffs' attorneys are engaging in forum shopping and attempts to avoid going through normal state channels.\textsuperscript{53}

The \textit{Canaday} court was not persuaded by plaintiffs' claim that abstention would be improper because they presented a federal statutory claim in their complaint.\textsuperscript{54} "The presence of a federal constitutional question will not in and of itself prevent abstention . . . . If there is in fact a federal statutory claim here at all, it is so intertwined with unsettled questions of state law that sound discretion argues in favor of abstention."\textsuperscript{55} The \textit{Marisol} court's dismissal of the \textit{Canaday} opinion, which was affirmed by the Second Circuit, without so much as a comment on the above analysis, is disquieting. The child welfare issue in \textit{Marisol}, like the homelessness issue in \textit{Canaday}, is a matter of substantial state interest regulated predominantly by state and local efforts.\textsuperscript{56}

In \textit{Marisol}, Mayor Giuliani's ACS was an entirely new local effort housed within a complex administrative scheme. In both

\textsuperscript{52} \textit{Canaday}, 608 F. Supp. 1460, 1469-70.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.} at 1470-71.
\textsuperscript{56} \textit{See supra} note 79.
Canaday and Marisol, a remedy was available at the state level through Article 78 of the New York State Civil Code.\textsuperscript{57} The ultimate issue in Marisol was whether ACS was operating so as to violate plaintiffs’ state and federal rights. Any statutory and constitutional questions were so inextricably intertwined with the resolution of state administrative law questions that discretion would suggest abstention. Finally, the Canaday court judge was not convinced by plaintiffs’ argument that relief in the state courts would take an inordinate amount of time. He did not “comprehend the logic that says a federal court can familiarize itself with the intricate workings of the City’s and State’s welfare policymaking, unravel the various state law issues and fashion appropriate relief more easily and quickly than the state system can rule on its own law.”\textsuperscript{58} In failing to rely on Canaday, the Marisol court ignored precedent without so much as a word to distinguish the facts of the two cases.

The scope of Burford abstention was further illustrated in Morrow v. Winslow,\textsuperscript{59} where a Cherokee father challenged the validity of an Oklahoma adoption proceeding under the Federal Indian Child Welfare Act (“ICWA”) and the Due Process Clause of the U.S. Constitution. Though it recognized a unique federal interest in the welfare of Indian children, and though the ICWA permitted challenges “in any court of competent jurisdiction,” the Tenth Circuit abstained under Burford. The State of Oklahoma had an important interest in the orderly conduct of its adoption proceedings, and the court found the issue better resolved in the ongoing state judicial action. Thus, even where a statute explicitly grants jurisdiction to “any court of competent jurisdiction,” Burford abstention is possible.

Regarding the application of Burford in federal preemption cases, the Supreme Court’s New Orleans opinion stated:

Unlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State’s attempt to ensure uniformity in the treatment of an “essentially local problem.”\textsuperscript{60}

\textsuperscript{57.} N.Y. C.P.L.R. 7801 (McKinney 2001).
\textsuperscript{58.} Canaday, 608 F. Supp. at 1475.
\textsuperscript{59.} Morrow v. Winslow, 94 F.3d 1386 (10th Cir. 1996).
\textsuperscript{60.} New Orleans, 491 U.S. at 362.
In this passage, the Court asserts that *Burford* abstention is appropriate when a state agency has wrongly utilized its lawful power or ignored state law. Questions of federal statutory law, meanwhile, fall well within the competence of the federal courts. We read this to imply that true issues of federal law preempt state claims, while vague statutory claims, such as those in *Marisol*, can be dismissed where more pressing state law issues exist.

III. FEDERALISM

In *Younger v. Harris*, Justice Black justified abstention on grounds of comity and federalism:

[The] underlying reason for restraining courts of equity from interfering with criminal prosecutions is . . . ‘comity,’ that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as ‘Our Federalism.’

It may be thought that the consent decree, the typical remedy in child welfare institutional reform litigation, eliminates or dramatically reduces federalism concerns because the state agency voluntary consents to federal oversight. Federalism concerns, however, have traditionally not been so easily dismissed.

In *Pennsylvania v. Williams*, for example, the U.S. Supreme Court overturned a district court’s appointment of a receiver to liquidate a bankrupt Pennsylvania building loan firm. Instead, the Court dictated that the liquidation be carried out under a Pennsylvania administrative procedure, stating that federal courts must respect the independence of state governments in carrying out domestic policy. This rationale is similar to that of the *Burford* doctrine, and set the stage for the *Marisol* court to refuse to provide the requested equitable relief. More recently, in *Rizzo v. Goode*, the Supreme Court rejected the order of a federal district court mandating that the Philadelphia Police Department develop a pro-

61. *Younger*, 401 U.S. at 44.
62. The consent decree is a “judgment entered by consent of the parties whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing.” *Black’s Law Dictionary* 411 (6th ed. 1990).
64. *Id.* at 185.
gram, under a series of court-issued guidelines, for citizens to com-
plain about alleged police misconduct. Writing for the majority,
Justice Rhenquist suggested that appropriate consideration be
given to federalism in determining the availability and scope of eq-
uitable relief. Though Rizzo remains good law, federalism has
never served as the basis for limiting the equitable power of a fed-
eral court. Even the concept has provoked unkind words from
some commentators.

A Columbia Law Review Note suggests that since a court is not
required to enter consent decrees, it can, through Rizzo, consider
federalism in such refusals, forming the basis for Burford abst-
ention in the principal case. We agree with the argument set forth
in the Note insofar as it suggests that federalism is a factor in deter-
mining whether to refuse to enter a consent decree. However, we
add the additional consideration of managerial responsibility to the
list of factors a federal court should consider. In our view, where
both federalism and managerial responsibility are substantially at
issue, a federal court should, through Burford and Rizzo, abstain
from decision and refuse to enter a consent decree.

IV. Abstention and Professional Public Administration

Judge Bork, writing for the District of Columbia Circuit, found
deference to local decision making an insufficient justification for
Burford abstention:

66. 423 U.S. at 379.
67. Note, Federalism and Federal Consent Decrees Against State Governmental En-
68. See, e.g., Laurence Tribe, AMERICAN CONSTITUTIONAL LAW § 3-30 (2d ed.
1988) (noting “the inappropriateness of blind deference on federalism grounds to
non-judicial organs of the state in the face of federal challenges to them . . . ”); Owen
Fiss, Dombrowski, 86 YALE L.J. 1103, 1159-60 (1977) (noting that the federalism ar-
ticulated in Rizzo “consists of a desire to insulate the status quo from judicial interfer-
ence,” and that it represents “a hostility toward the activism of judges”).
69. Note, supra note 66.
70. One might also view this as an administrative extension of the logic of Walter
Dellinger in Of Rights and Remedies: The Constitution as a Sword, 85 HARV. L. REV.
1532, 1552-53 (1972):

Where the judiciary independently infers remedies directly from constitu-
tional provisions, Congress may legislate an alternative remedial scheme
which it considers equally effective in enforcing the Constitution and which
the Court, in the process of judicial review, deems adequate substitute for
the displaced remedy.
In the Marisol scenario, for example, ACS constituted a legislative act by the City of
New York to create a remedial scheme. In continuing the litigation, Judge Ward ef-
fectively vetoed this legitimate remedial process.
The sensitivity of state policy . . . is the traditional reason for invoking Burford abstention, and deference to local decision-making does further federalism. Nonetheless, sensitivity and the notion of localism alone do not provide a principled rationale for abstention where federal jurisdiction admittedly exists. Federal courts routinely decide local matters of great sensitivity and we are not convinced that abstention from a federal question case may be based on this rationale.\(^7\)

Judge Bork’s eloquence rightly gives us pause. Are federalism and the need to prevent federal courts from imposing upon a state administrative scheme sufficient to warrant abstention? These are important rationales; however, a third rationale, that of responsible administration, when added to the other two, ultimately justifies Burford abstention.

Federal courts have frequently deferred to bureaucratic expertise in the past. According to Mark Tushnet, the Supreme Court’s procedural due process cases embody such deference:

The Court’s judgments play out as deference to professionals in bureaucracies. They are not expressed, as a general theory of judicial restraint might suggest they would be, as deference to the will of the majority as embodied in the decisions of the representative legislatures that established the bureaucracies that adopted the procedures at issue. The imagery of professionalism, not that of democracy, makes more sense of the situation.\(^7\)

The nation need not fear a professional executive respected by federal courts. Such respect can create more intelligent and feasible remedies for aggrieved parties.\(^7\) We welcome, then, the U.S. Supreme Court’s words in Parham v. J.R.:

As the scope of governmental action expands into new areas creating new controversies for judicial review, it is incumbent on courts to design procedures that protect the rights of the individual without unduly burdening the legitimate efforts of the states to deal with difficult social problems. The judicial model for factfinding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise.\(^7\)

\(^7\) See supra notes 95-95 and accompanying text.
\(^7\) Parham v. J.R., 442 U.S. 584, 608 n.16 (1979) (emphasis added).
Expertise matters. We hasten to add, however, that such expertise must be applied responsibly to the public interest. This notion of responsibility is the subject of the remainder of this article.

V. A Test Regarding the Propriety of Abstention

We propose the following test for *Burford* abstention where an institutional defendant is a human services agency: A federal District Court should abstain from adjudicating constitutional claims raised by plaintiffs seeking structural remedies where (1) the management is not the proximate cause of the infringement of the right, and (2) the management is responsible.

The management is not the proximate cause of the infringement in cases where, like *Marisol*, management has had no chance to begin reforms, or where there is simply no proof that managerial decisions have violated a plaintiff's rights. Management is responsible when the managerial decisions comport with the precept of managerial responsibility.

This test permits the responsible exercise of administrative discretion. It allows a cadre of professionals—public administrators of human service agencies—to interpret the laws that govern them, and to work towards collective justice—providing adequate services to most beneficiaries at the expense of the constitutional rights of a few. If the precept of managerial responsibility is operating, constitutional considerations of individual justice may safely give way to executive concerns of collective justice. To be sure, the cost of providing services alone is not compelling enough to outweigh an individual constitutional right. Maintaining a level of services for other clients, however, is often compelling under the "mere rationality" approach to constitutional review of social regulation. Collective justice in child welfare, we urge, should be determined at the state level, where it and many other social welfare

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75. See infra notes 265-301 and accompanying text for a discussion of responsible public administration.

76. Note that we urge abstention only where structural remedies are sought, see, for example, text accompanying note 20. If the remedies sought would not overturn the administrative regime of the institutional defendant, our extension of the *Burford* abstention doctrine would not apply.

77. B.H. v. Johnson, 715 F. Supp. 1387, 1398 (N.D. Ill. 1989) (noting that "concern with the availability of resources is rarely part of the constitutional decisionmaking process where a recognized constitutional right is violated.")

policies have historically been formed. Our proposed test would allow courts to encourage innovative solutions to policy problems by state and local governments, or "policy diffusion," an important function of modern federalism.

We believe the Marisol court should have abstained and remanded the case to the New York state courts. The state courts could have determined if the child welfare agency's administrative scheme was "arbitrary or capricious" under the judicial review provisions of Article 78 of the New York Civil Practice Code. Ab-


81. N.Y. C.P.L.R. § 7803(3) (McKinney 1999). Article 78 provides the basis for judicial review in the New York State courts. It was enacted in 1937 to replace the confusing use of common law writs for actions against government: "the intended purpose and effect of Article 78 . . . was to simplify and unify the procedure in connection with the three old remedies of certiorari, mandamus, and prohibition, and to wipe out technical distinctions which hampered the court in granting relief for proved grievances." N.Y. JUR. 2d 6 § 2 (1997). Nonetheless, Article 78 retains many characteristics of writ pleading. Under the common law, claims such as those we suggest should be heard by the state courts in Marisol would be pursued through mandamus to review. This is proper for requesting judicial review of an agency's exercise of judgment or discretion exercised in the absence of a trial-type hearing. Mandamus to review is now requested under section 7803, which reads: "The only questions that may be raised in a proceeding under this article are . . . whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." N.Y. C.P.L.R. § 7803 (McKinney 1999). This is essentially the question posed to the Marisol court, though that complaint was presented in constitutional and statutory terms.

The New York Court of Appeals has stated that "[a]rbitrary action is without sound basis in reason and is generally taken without regard to the facts." Pell v. Bd. of Ed., 313 N.E.2d 321, 325 (N.Y. 1974). In determining whether an action is arbitrary and capricious, the court found the question to be whether the action has a "rational basis." Id. at 325. This rational basis must be adjudged exclusively on grounds stated by
stention also assigns primary responsibility for managing a public agency to professionals who are accountable to the local citizens, and possess expertise in both public administration and, in the *Marisol* example, child welfare administration. Judicial review by state courts and the development of state administrative law through common law provides a check against the misuse of power by public managers in state and municipal agencies, without granting policymaking authority to generalist, unelected federal judges. Adherence to the precept of managerial responsibility and the development of a state common law of administration ensures service to the public will. Beyond this, accountability, judgment, balance, and rationality — the four elements of our precept — do most of the work, and management typically becomes a form of incrementalism.82

These notions of policy diffusion and deference to professionalism provide a strong rationale for federal court abstention. For the diffusion of innovations, such as the creation of ACS, to prove beneficial, they must be allowed to take root. As long as agencies are managed according to the precept, reform programs should be given reasonable opportunity to succeed, with a judicial check available when specific elements of such programs fail. As such, the judiciary operates between-the-branches to ensure that legislative policy interests and constitutional values are translated into implementation goals. Public administrators are uniquely situated to turn those goals into realities.

Instead of going to federal court, the *Marisol* plaintiffs should have used Article 78 to challenge the creation of ACS, and to seek review of the city’s child welfare administration procedures. There

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82. See *infra* note 143 and accompanying text.
was an interpretive act by the Mayor, the creation of an entirely new scheme to administer child welfare, and no avenues of review were available within ACS in this regard. New York courts have held that “an article 78 proceeding is the proper method for the determination of whether a statute in a specific instance has been applied in an unconstitutional manner. It is not the proper vehicle to test the general constitutionality of legislative enactments.” Consequently, an Article 78 proceeding could be used to determine whether the creation of ACS and its procedures represent an executive interpretation of state law that violates both federal and state constitutional provisions. Additionally, arbitrary and capricious review under Section 7803 can consider managerial responsibility, and state law doctrine can develop in that regard, improving the quality of the check on administrative discretion. It is our view that these aspects of Article 78 review show that the structural reform claims in Marisol are redundant. The New York courts can adjudicate all claims brought by the plaintiffs, and the federal lawsuit should have been dismissed under Burford as forum shopping.

In our view, the development of a common law around the precept of managerial responsibility is the optimal solution to this problem. In stark contrast to the pre-existing remedial structure imposed when a federal court accepts the plaintiffs’ formulation of a public agency’s ills, a common law would allow for questions of responsibility to be adjudicated over time. This is a hybrid form of what is termed “fire alarm oversight” in the political science literature regarding the legislative control of bureaucracy:

In order to avoid the high cost of formal, extensive, and systematic investigations . . . legislators have developed a system of ‘fire alarm oversight’ in which interest groups and constituents monitor administrators and inform Congress of improper, inappropriate, or unsatisfactory decisions.

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83. To wit, the mayor’s interpretation of the statutes and constitutional provisions discussed in the text accompanying supra note 8 was that an agency like ACS was required.


85. Plaintiffs charged that, among other things, ACS had violated “Articles 2, 3, 6, and 7 of the New York State Social Services Law; Articles 6 and 10 of the New York State Family Court Act; state regulations codified at 18 N.Y.C.R.R. §§ 400-484; and other state plans.” Marisol, 929 F. Supp. at 672.

In *Marisol*, the same interest groups that currently monitor ACS, such as Children's Rights, Inc., the attorney for the *Marisol* plaintiffs, will continue their watchdog role. Moreover, their claims can be specific, not embodied in a gargantuan, institutional reform class action suit, and previous administrative claims can serve as bounds for future claims. When ACS makes an unsatisfactory determination, watchdog groups will sound the fire alarm through mandamus to review that particular determination. Similar to institutional reform suits, these actions will resonate with the political branches and the press, often leading to administrative reforms. An acceptance of the precept of managerial responsibility by the courts would recognize that a common law process can create administrative law that will flesh out the contours of judgment, accountability, balance, and rationality.

Legal commentators have made conclusions consistent with our propositions. Marshall's famous maxim — ubi jus ibi remedium — every right has a remedy is a principle not always attained, rather than an ironclad rule. Such a view "readily accommodates the familiar idea that Congress may substitute one remedy for another within some generally adequate scheme of constitutional enforcement." They further argue that "[s]ince no remedial scheme will be optimal for all plaintiffs, the legislative power to provide one remedy and withhold another strongly implies that there will be situations where individual victims of constitutional violations do not receive effective redress." Nonetheless, '[u]nredressed constitutional violations may have to be tolerated, but they should not be embraced, approved, or allowed to proliferate.'

Considering this dilemma, Henry Monaghan noted over twenty-five years ago that a

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89. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Justice Marshall wrote: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for a violation of a vested legal right."
92. Id.
93. Id. at 89.
[s]urprising amount of what passes as authoritative constitutional ‘interpretation’ is best understood as something of a quite different order—a structure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.94

Remedies are not demanded at once by the Constitution, but rather are developed over time by federal courts treating past considerations as heuristics while groping for new “interpretations.” Daryl Levinson calls this tâtonnement process “remedial equilibration”:

Constitutional rights do not, in fact, emerge fully formed from abstract interpretation of constitutional text, structure, and history, or from philosophizing about constitutional values . . . . Constitutional rights are inevitably shaped by, and incorporate, remedial concerns. Constitutional adjudication is functional not just at the level of remedies, but all the way up.95

If constitutional rights are determined with regard to remedies, then remedies must consider the demands of policy implementation on public managers. To eschew consideration of these constraints is to create a constitutional common law that cannot function, for it is unrealistic to think that agencies like ACS can eliminate all rights violations emerging from judicial interpretation of the Constitution.96 State courts are closer and more accessible to state and municipal agencies, and can, as a consequence, grope toward a more realistic legal equilibrium.

This corresponds to the notion, most famously argued by Charles Lindblom,97 that bureaucracy cannot and does not have all the answers. Ipso facto, it cannot and does not have all the answers when it comes to questions of rights. If a bureaucracy operates such that a judge perceives a rights violation, the corresponding holding of that judge will not guarantee the end of that rights violation. The

96. See infra notes 107-135 and accompanying text.
violation may be inherent in the imperfections of bureaucratic operations and incapable of being changed by judicial order. The common law process is consonant with incremental policymaking and can take advantage of the learning that goes on while the agency muddles its way through. If a client does not like the way a bureaucrat processed his claim, he may sue, but only the procedural claim will be adjudicated, not its interconnection with some abstract right. This is, we think, a truer process of "remedial equilibration."

On this point, "judicial capacity" scholars argue that there are serious limits to the efficacy of judicial supervision. For example, Gerald Rosenberg argues that courts can seldom produce significant social reform because they are limited by three constraints built into the structure of the American political system. These three constraints are (1) "the limited nature of Constitutional rights," (2) "the lack of judicial independence," and (3) "the judiciary's lack of powers of implementation."

Our argument is different. Federal courts may or may not be equipped to reform human service agencies. We contend that public managers are so appointed, and they should answer to courts only on specific issues regarding implementation. Moreover, logic dictates that it is easier to examine a detail of agency operations than their totality.

99. Rosenberg, supra note 98, at 35.
100. Id.
101. Our argument also avoids any notion that public managers should be accorded deference to their "professional judgment." Consider the following. In DeShaney v. Winnebago County Department of Social Services, 489 U.S. 198 (1989), the U.S. Supreme Court held that the Due Process Clause imposes no duty on a state to provide affirmative protective services to its citizens. Joshua DeShaney was a young boy beaten by his father to the point of lasting retardation. The defendant child welfare agency had taken him into custody, and then returned him to his father for the final beating even though it received various complaints and was on notice of the father's penchant for violence.

The state had done nothing, said the court, but Justices Brennan, Marshall, and Blackmun saw something different. Once a complaint was made to the defendant agency, the job of neighbor, friend, and ordinary citizen was over, and the state was now in control of DeShaney's protection. There was no incentive for continued private monitoring of the situation. For these dissenters, the administrative scheme must work to protect DeShaney and his peers after the report, or the agency must be held liable under the Due Process Clause. Professional judgment precedent, by contrast, ensures that once a social worker made a decision in regard to the disposition of DeShaney's case, given his professional expertise and experience, he could not be held liable for negligence. DeShaney should have been protected.
and consequently, that a common law approach to these matters is sensible as it amalgamates details.

In sum, we urge that courts consider both federalism and a precept of managerial responsibility when determining whether to abstain under Burford where a public bureaucracy is being charged with mismanagement and structural reform is sought.

VI. RESPONSIBILITY: LETTING MANAGERS MANAGE

This Part argues for a judicially recognized precept of managerial responsibility.

Responsible public management is essential to governmental effectiveness and to the achievement of collective, as opposed to individual, justice. Evidence of managerial responsibility cannot be drawn solely from individual case records—the basis of claims against human services administration in institutional reform cases. We instead argue, with considerable support in the literature, that managers should be judged by how well they address the totality of their responsibilities, not by how well they serve a particular group interest. "The goal to be sought combines adequate recognition of personal rights as declared in the Constitution with effective achievement of great social programs."103

Our precept of managerial responsibility is derived from the theory of public administration, particularly from doctrines governing administrative responsibility. Our goal is to relocate judicial re-

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Our argument implies that the Wisconsin administrative scheme that discouraged continued citizen involvement, while allowing social workers to do nothing to protect DeShaney did not comport with a precept of managerial responsibility. Certainly, the architects of such a scheme should not receive deference to their professional judgment. The threshold question that came before the court was rather narrow: Had the state taken such affirmative steps necessary to place upon it a duty to protect the child? The court said that it had not, but even if it had, the remedy should not be for the court itself to ensure that this case is not repeated. Rather, it would say that a constitutional child welfare administrative scheme must not shun the public's role as this one does. If management, in complying with the ruling, fails again on this point, it is not "off the hook" on grounds of its reasonable exercise of professional judgment. Quite to the contrary, it must face challenges on the issue that eventually develop a common law of administration on that point. Abstention, working with the precept, lays the groundwork for common law tatōnnement.


103. LEONARD D. WHITE, INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION 445, 455. In a similar vein, Charles A. Beard argued, "the continuous and fairly efficient discharge of certain functions by government, central and local, is a necessary condition for the existence of any great society." Charles A. Beard, Administration, a Foundation of Government, 34 Am. Pol. Sci. Rev. 232 (1940).
view of complex agency operations to promote collective justice while protecting individual rights.

A. Theory of Responsible Administration

Public managers in a republic answer to the people through democratic institutions. Gerald Garvey has defined the paradigmatic problem of republican administration as follows: "Administrative action in any political system, but especially in a democracy, must somehow realize two objectives simultaneously. It is necessary to construct and maintain administrative capacity, and it is equally necessary to control it in order to ensure the responsiveness of the public bureaucracy to higher authority." ¹⁰⁴

Unfortunately, creating an effective balance of capacity and control is not a straightforward matter. As we shall show, that balance must be sustained by a sense of responsibility on the part of public managers that is encouraged and respected by legislatures and courts.

B. Responsibility in a Democracy

The administrative capacity essential to good government requires that administrators have power to take action in fulfilling public policy goals. At the same time, such executive authority must be responsible to the legislature and less directly to the polity. A theory of responsible administration requires, as a prerequisite, a theory of how power should be distributed among democratic institutions.¹⁰⁵ For example, such a theory must recognize the inherent tension between, on one hand, protecting individual rights, and, on the other, securing the benefits of an efficient administration.¹⁰⁶

In any such theory, the role of the courts in effecting the operative trade-off is critical, but it must not be seen as exclusively judicial. Federal judges must operate as facilitators between the executive and legislative branches, and between the state and federal governments. Their task is to ensure that this tradeoff is performed reasonably, without trampling on individual rights.

¹⁰⁵. Hyman summarized the problem at the federal level as "how to relate the federal bureaucracy and the power it possesses to the institutions and ways that are essential to democratic government." Charles S. Hyneman, Bureaucracy in a Democracy 12 (1950).
¹⁰⁶. See generally John A. Rohr, To Run a Constitution 154 (1986).
C. Serving the Vulnerable

Assuring responsible administration of public human service agencies attempting to meet the needs of society’s most vulnerable clients is especially difficult. Human service agencies, such as New York City’s Administration for Children’s Services, have attributes that greatly complicate public management and judicial review of cases and functions within their purview. The most salient of these attributes is that human beings constitute their “raw material.” Their core activities are structured to process, sustain, or change people who come under their jurisdiction.107

Several things follow from this fact. First, clients can affect, even participate in, the service that is performed.108 Second, human service provision is moral work, requiring moral judgments about the worth of clients, about the social value of the service or treatment, and about how scarce resources shall be allocated among deserving claimants.109 These are inherently controversial choices infused with concepts of justice and propriety.110 Third, human service organizations require the support of the institutional environment, especially the political environment that authorizes policies and appropriates resources. Fourth, the technologies they employ must conform to dominant cultural beliefs about what is desirable and acceptable to do to people.111 Fifth, there is an inherent indeterminacy to the means employed to reach service goals having to do with “the ability of clients to react and participate in the service technology. The reactivity of the clients and their potential capacity to neutralize the effects of the service technology means that the organization cannot take its service technologies for granted, even if they are assumed to be highly determinate.”112

These distinctive attributes of human service organizations shape their governance and the roles of their managers. The morally charged, controversial, and ambiguous nature of human service


111. Id. at 12.

112. Id. at 15.
provision virtually precludes the creation of precise standards.\footnote{113} Thus, statutes governing human service provisions are likely to be incomplete, vague, and perhaps internally inconsistent or contradictory. Child protection managers and workers, for example, are statutorily committed to both reunifying families and terminating parental rights for the sake of the child's well-being.

For these reasons, it is difficult to identify a clear line demarcating acceptable and unacceptable managerial performance. No single-valued criterion, like profitability, exists to assess managerial responsibility in a public human service agency. Nonetheless, when faced with an institutional reform lawsuit alleging managerial incompetence, a federal judge must decide whether to abstain or attempt to draw that line.\footnote{114}

D. The Shortcomings of Judicial Review

Uncertainty, ambiguity, and conflicts of interest are pervasive in human service organizations.\footnote{115} The language of statutes governing these agencies cannot cover every contingency.\footnote{116} Public managers retain discretion to act in accordance with their own judgment, with potential policy and justice implications.\footnote{117}

As a consequence of this inevitable discretion, intractable "wicked" problems arise.\footnote{118} Grounds for structural reform class

\begin{itemize}
\item \footnote{113}{On the notion of impossibility, see infra note 140 and accompanying text.}
\item \footnote{114}{While the focus of our argument is judicial review of human service agencies, our point is quite general: different kinds of organizations call for not only appropriate public management but also for appropriate judicial review if the interests of both collective and individual justice are to be served.}
\item \footnote{115}{See Hasenfeld, \textit{Nature}, supra note 107.}
\item \footnote{116}{According to Justice Felix Frankfurter,}\footnote{117}{See Evelyn Z. Brodkin, \textit{Policy Politics: If We Can't Govern, Can We Manage?}, 102 POL. SCI. Q. 571 (1987).}
\item \footnote{118}{Horst Rittel and Melvin Webber have defined “wicked problems” as those problems that are inherently ill-defined and have no solutions in the usual sense of the term, as distinct from engineering problems, which are definable, separable, and soluble. Horst W. J. Rittel & Melvin M. Webber, \textit{Dilemmas in a General Theory of Planning}, 4 POL'Y SCI. 155 (1973).}
\end{itemize}
actions are not difficult to adduce; there is ample room for a group with interests at stake to claim its own answer is the only correct one. The filing of a lawsuit reflecting such a claim is widely regarded as a form of political action undertaken when other avenues for making claims on public resources, e.g., legislative advocacy, are more costly, uncertain, or have already proven unsuccessful. Courts may be called upon to determine the appropriateness of managerial actions that allegedly violated constitutional rights. As the governmental system has grown in complexity, however, complaints in class action lawsuits allege not only specific incidents of employee misconduct but also general incompetence on the part of public managers, or even their elected superiors, sufficiently pervasive to warrant equitable structural reform.

Judicial review of administrative agencies vested with large amounts of discretionary decision making authority is inherently problematic. The rules applicable to such complex circumstances are far from obvious, and both authoritative standards of administrative competence and knowledge of the efficacy of structural remedies are generally lacking on the bench. Under such circumstances, ill-considered judicial intervention on behalf of individual rights violations due to alleged incompetence on the part of the institutional defendant may exacerbate rather than ameliorate the underlying problem through its lack of regard for the agency's statutory mandates, which commit it to achieving collective justice. Thus committed, an agency's managers may reach different answers to the underlying problem than those of the plaintiffs.

The central dilemma is apparent. The court is in the position of adjudicating a trade-off between administrative capacity to achieve collective justice in a responsible manner, on the one hand, and the

120. See infra notes 299-302 and accompanying text.
121. That the rights of a class of individuals have been violated may imply a systemic problem requiring structural reform. See generally Owen Fiss, The Civil Rights Injunction 94 (1978). See also Peter Schuck, Suing Government (1983) (arguing that damages liability against government is the most efficient solution, but sometimes cannot be achieved, giving way to a need for the structural injunction).
ability of citizens to control the institutional defendant, expressed as the prevention and amelioration of specific individual rights violations, on the other, by constraining the delegation of responsibility to public managers and workers. The court's judgment is consequential: too little control risks irresponsible conduct by arrogant technocrats threatening individual rights; too much control risks a reduction in administrative capacity to secure collective justice while protecting individual rights in an acceptable manner albeit perhaps not a manner preferred by plaintiffs.

Refusal to recognize this trade-off leads courts to regard human service agencies as quasi-judicial organizations, resulting in the proliferation of burdensome pre-existing rules, viewed by stakeholders and the public as red tape, that produce an inferior result. Kenneth Davis showed awareness of this when arguing that, whereas "discretionary justice," like our notion of managerial responsibility, may require additional rules in some circumstances, "much discretionary justice is without rules because no one knows how to formulate rules" and because "discretion is preferred to any rules that might be formulated." He goes on to argue that "for many circumstances, the mechanical application of a rule means injustice . . . . Only through discretion can . . . . equity be achieved . . . . Creativity is impossible without discretion." He argues further that

123. William Fletcher argues that since court-ordered remedial discretion in institutional suits is political in nature, it should be presumptively regarded as illegitimate. William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 YALE L. J. 635, 637 (1982). We agree, but apply our precept of managerial responsibility, rather than Fletcher's test, to overcome this presumption: "The presumption of illegitimacy may be overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default." Id.

124. By inferior result we mean a result inferior to a Pareto-superior result that might be achieved with an intervention that promotes responsible conduct by administrators based on trust.

125. KENNETH GULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 15 (1969); see also JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES (1927). Dickinson asks:

Within the field of matters which do not admit of reduction to hard and fast rules, but must be trusted to the discretion of the adjudicating body, can we say that there is a régime of law? . . . . It would be unfortunate, if it were possible, for men to commit all their decisions to minds which run in legal grooves. The needs of the moment, the circumstances of the particular case, all that we mean and express by the word 'policy,' have an importance which professional lawyers do not always allow to them.

Id. at 150-51. He further notes the possible analogy to the relationship between the court and jury, i.e., a body that exercises discretion and a body that limits discretion by rule. Id.

126. DAVIS, supra note 125, at 19-20.
most difficult creative thinking is usually introduced through executive or administrative solutions of specific problems. What happens over and over is that a legislative body sees a problem but does not know how to solve it; accordingly, it delegates the power to work on the problem . . . Then the delegate, through case-to-case consideration, where the human mind is often at its best, nibbles at the problem . . . [which may open] the way for perspective about the whole big problem, and large solutions sometimes emerge.127

Observing judicial suspicion of public administration, James Q. Wilson posited that courts may fail to grasp how hard it is to solve organizational problems via court order:

Judges see bureaucrats at a distance and through the lenses of conventional stereotypes [or through the eyes of plaintiffs]. From a distance, a government agency is a machine designed to achieve a goal. The judge’s job is to start the machine, change the goal, or both . . . [But] agencies are at least as complex and hard to understand as an exotic and distant native culture that a traveler has entered for the first time . . . If they wish to help manage agencies, judges will have to learn about agencies and their management.128

Judges have little incentive to become experts on bureaucracy, however, and litigation is too often regarded as a game which the better lawyers will win129; more emphasis is placed on “spinning” the facts than actually trying to educate the court.130 This can lead to the imposition of inadequate or even counterproductive solutions because the court has an inadequate basis for understanding the facts. As John Dickinson noted:

A sufficient excuse for distrust of the operation of law in fields of clashing social opinions is afforded by actual experience of the failures of the law in these fields, or what is worse, by its occasional perversion into an instrument of injustice . . . [by, on

127. Id. at 20.
129. This is not inherently bad, though, since the adversary system is arguably fine in ordinary adjudication. Part of the argument between supporters and opponents of institutional reform litigation focuses upon whether institutional reform is an extraordinary type of judicial involvement. Eisenberg and Yeazell argued that it is rather routine among court duties in the 1980s, while a more recent conservative, John Yoo, has countered that it is certainly not ordinary and violates any reasonable interpretation of the framers’ intent toward judicial power. John Choon Yoo, Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts, 84 Cal. L. Rev. 1121, 1151-61 (1996).
130. Wilson, supra note 128.
the one hand] rigid and artificial mechanical application of rules and concepts without regard to their intent and meaning, or to the facts to which they are applied; and, on the other, an application of the uninformed personal bias of judges in place of that carefully reasoned development of opposing considerations which the novelty of the cases calls for.\textsuperscript{131}

In other words, the casualty of ill-advised adjudication is collective justice.\textsuperscript{132}

Even when judges are intent on discovering the underlying reasons for organizational problems and learning the true facts, the prospect of establishing a satisfactory remedy remains problematic when there are no right answers, no one best way to manage, no essential facts or clear-cut criteria by which the appropriateness of agency decisions can be determined.\textsuperscript{133} In such cases, of which Marisol surely is one, agency managers may reasonably argue that they should be granted, if not the presumption of good faith, the opportunity to prove themselves responsible when coping with the demands of administration.

How might judges enforce responsibility in the management of a human service agency, where case-by-case analysis is prone to mis-

\textsuperscript{131} Dickenson, supra note 125, at 216 (quoting Frank J. Goodnow, Principles of The Administrative Law Of The United States 9 (1905) on the differences between judicial officers and administrative officers). It is that judicial officers determine applicable law given the facts. Administrative officers act often when it is not the result of any controversy, and do not depend on asking only what the law is, but also whether it is wise to act.

\textsuperscript{132} In a related vein, for a criticism of the shortcomings of lawyers as administrators, see Alexander W. Lawrence, The Use and Abuse of Law and Lawyers in Administration, 2 J. Pub. Admin. 297-307 (1924). See also Morris Fiorina, Legislative Choice of Regulatory Forms: Legal Process of Administrative Process, 39 Pub. Choice 33-66 (1982); Glen O. Robinson, Commentary on 'Administrative Arrangements and the Political Control of Agencies': Political Uses of Structure and Process, 75 Va. L. Rev. 483, 485 (1989) (citing Aramson et al., A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 21-37 (1982)). Robinson argues that judicial review will thwart agency efforts to secure particular political outcomes anticipated by an enacting coalition. He notes that the courts' difficulty in applying the substantial evidence standard to policy judgments has led to a convergence of this standard with the arbitrary and capricious standard. Id. at n.37. See also DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Va. L. Rev. 257, 262-76 (1979).

\textsuperscript{133} Ellen Schall, Notes from a Reflective Practitioner of Innovation, in Innovation in American Government: Challenges, Opportunities, and Dilemmas 360-77 (Alan A. Altschuler and Robert D. Behn eds., 1997). Leonard White cites instances in which "valuation" or issues of "opinion" or of values may lie beyond "facts" that may be evaluated by courts, e.g., "does a child need each year two pairs of shoes or three at the bare edge of existence" and "what is a fair amount of insurance for a working man with a family of three children," i.e., all involving judgments of "what ought to be." Leonard D. White, Introduction to the Study of Public Administration 456 (1935).
taking the trees for the forest, the case for the caseload? Even the most capable public managers in well-run agencies (including those under court supervision) cannot preclude harmful outcomes in every case under their jurisdiction; clients and endogenous factors can defeat case workers' best efforts. The only reasonable standard for evaluating agency management is diligent and reliable execution of the tasks for which the agency is answerable to controlling legal authority. This proposition was stated in 1927 by John Dickinson:

How far legal rules are capable of development to govern... adjudications is not primarily dependent on the question of whether or not an issue of social policy is involved, but on the possibility of isolating facts pertinent in all the cases which may form the basis for a rule. When this possibility is not present... rules are out of the question, and all that can be done is to entrust a fact-finding body with the application of a standard, and hold that body within the bounds of reason."\(^{134}\)

Thus we must inquire how such a standard might best be established in practice. More particularly, how might judges determine whether an agency has employed appropriate methods of decision making and whether the methods were properly executed?\(^{135}\)

### E. “Muddling Through”

Any democracy requires responsible administration. We argue that judges and public administrators have a mutual interest in establishing a precept of managerial responsibility enabling sufficient governmental capacity to secure collective justice. Such a precept should incorporate four elements: accountability, judgment, balance, and rationality. Taken together, these four elements constitute a conceptually coherent standard for public administration. Judges should take this precept into account when determining whether to abstain from hearing institutional reform cases involving human service agencies.

That judicial intervention in human service agencies is sometimes required is beyond dispute. Without a standard for responsible administration, public bureaucracies can, of course, do great

\(^{134}\) Dickinson, supra note 125, at 215.

harm.\textsuperscript{136} Long ago, Charles Hyneman enumerated these harms as follows:

1) administrative officials and employees may interfere with or prejudice elections;
2) they may misinform the people about the issues that confront the public, about how these issues may be dealt with, and about what is being done to meet them;
3) they may inaugurate and pursue policies of government that are positively contrary to the public will;
4) they may fail to take the initiative and supply the leadership that is required of them in view of their relation to particular sectors of public affairs; and
5) they may, by sheer inefficiency in their operations, destroy popular faith in democratic government.\textsuperscript{137}

Said Don Price of administrative expertise, "[T]he expert may come to believe that his science justifies exceeding his authority."\textsuperscript{138} Public officials may be unwilling or incapable of complying with governing statutes. They may become defiant or deliberately indifferent to lawful mandates, and their actions may be illegal.\textsuperscript{139} They may be unqualified to perform assigned tasks.

More often than not, however, circumstances are less sinister. Managerial positions in human service agencies often verge on being impossible in several senses.\textsuperscript{140} To satisfy or placate political constituencies, legislatures often create vague, inconsistent, or virtually unworkable statutes. Legislatures may choose to "shift[ ] high risk choices to the agency, leaving legislators free to assign blame if the outcome is unfavorable to their interests."\textsuperscript{141} As Terry Moe puts it:

\begin{itemize}
\item \textsuperscript{136} Literature examining the power of administrative organizations is generally critical. See, e.g., \textsc{Ernest Freund}, \textit{Administrative Powers Over Persons and Property} (1928); \textsc{Dept' of Justice}, \textit{A Final Report of the Attorney General's Committee on Administrative Procedures}, S. Doc. No. 77-8 (1941).
\item \textsuperscript{137} \textsc{Hyneman}, supra note 105, at 26.
\item \textsuperscript{138} \textsc{Don K. Price}, \textit{The Judicial Test, in Elements Of Public Administration} 475-99 (Fritz Morstein-Marx ed., 1959).
\item \textsuperscript{139} \textsc{Davis}, supra note 125, at 12ff; see also \textsc{Schuck}, supra note 121, at 1-13.
\item \textsuperscript{140} See generally \textsc{Erwin C. Hargrove} & \textsc{John C. Glidewell}, \textit{Introduction to Impossible Jobs in Public Management} (Erwin C. Hargrove & John C. Glidewell eds., 1990). Their dimensions of impossibility include the legitimacy of clients, the intensity of conflict among agency constituencies, public confidence in professional authority, and strength of the agency myth. \textit{Id.} at 5ff.
\item \textsuperscript{141} \textsc{Fiorina}, supra note 132; \textsc{Robinson}, supra note 132 at 485. In technical terms, impossibility refers to the logical impossibility of simultaneously satisfying several criteria within the constraints of the problem. See, e.g., \textsc{Gary Miller}, \textit{Managerial Dilemmas} 129-30 (1992).
\end{itemize}
INSTITUTIONAL REFORM LITIGATION

A bureaucracy that is structurally unsuited for effective action is precisely the kind of bureaucracy that interest groups and politicians routinely and deliberately create. . . . [B]ecause they are forced to design bureaucracy through a democratic process, their structural choices turn out to be very different indeed from those intended to promote effective organization.  

Inadequate resources may be appropriated, unreasonable workload requirements may be imposed, or mandated missions may be defined so as to be literally unachievable.

Public managers must nonetheless do the best they can under difficult, if not impossible, circumstances, even when that means "muddling through" or coping.  

It is far easier to distinguish between a sinister manager and a muddling manager than it is to understand the myriad constraints on effective management that make muddling or coping the essence of responsibility. A basis for making this distinction is needed. A precept of managerial responsibility must be rooted in the specific history of the administrative state and administrative law in the United States, i.e., in precedents established in administrative theory and practice.

F. Administrative Responsibility in American Government

The American administrative state has been marked by successive epochs of new public purposes and new administrative forms to carry them out. Administrative law has evolved in response to complaints alleging abuses of individual rights under these new administrative arrangements. Continued evolution of the administrative state will generate new types of complaints alleging abuse of


144. The terms accountability, responsibility, and compliance are used by different sources to more or less refer to the same thing. Wilson, supra note 128, argues that managing compliance means inducing employees not to shirk or minimizing principal-agent problems. Hyneman, supra note 105, makes the following bibliographic note that issues of direction and control of the administrative state are generally discussed under the heading, "administrative responsibility." He cited as the best sources on the topic: Carl J. Friedrich, Constitutional Government and Democracy (1946); Frontiers of Public Administration (John Gaus, Leonard White & Marshall Dimock eds., 1936); George A. Graham, Essentials of Responsibility, in Elements of Public Administration 457-74 (Fritz Morstein-Marx ed., 1959); David M. Levitan, Responsibility of Administrative Officials in a Democratic Society, 61 Pol. Sci. Q. 562 (1946).
rights and courts will impose new equitable remedies. At issue is whether judicial intervention will enhance or diminish the legitimacy of the managerial role in government.

1. *The Pre-Bureaucratic State*

In its first century, the American state could be termed pre-bureaucratic. Administrative officers, many of them elected, functioned independently of executive authority with funds directly appropriated to their office. President Andrew Jackson initiated the principle of appointments based on patronage, thus inaugurating the spoils system that governed nineteenth century selection of administrators. Legislators, political parties, and the courts exercised haphazard oversight of administration. With respect to the capacity and control of the pre-bureaucratic state, Leonard White said:

> So long as American administrative systems remained decentralized, disintegrated, and self-governmental and discharged only a minimum of responsibilities, the necessity of highly developed machinery for its control was unknown. Administration was weak and threatened no civil liberties; it was unorganized

145. Stephen Skowronek called it a “state of courts and parties.” STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATURAL ADMINISTRATIVE CAPACITIES 1877-1920, at 25 (1982). “In Martin Van Buren’s master scheme,” said Skowronek, referring to the architect of the American party system as we know it, “American government could be made to work only by two constituent parties competing across the major sectional divisions of the nation.” Id. at 26. The parties’ alter ego, and an important check on their power, was the judiciary: “Courts are naturally passive as instruments of government, and they are radically particularistic in decision making . . . [providing] essential counterpoise to the all-consuming electoral machines of America’s party state.” Id. at 27. It was in this environment that the federal spoils and patronage system was born. Id.

146. CHARLES E. MERRIAM, AMERICAN POLITICAL IDEAS: STUDIES IN THE DEVELOPMENT OF AMERICAN POLITICAL THOUGHT, 1865-1917, at 7 (1926) (noting “the . . . unqualified adherence to the practice of popular election of a very large number of officials, most with administrative duties”).

147. Perhaps it was actually Jefferson who initiated the practice. See 2 E.N. GLADDEN, A HISTORY OF PUBLIC ADMINISTRATION 308-09 (1972). Criteria for executive appointments prior to the Jacksonian era were “respectability,” political loyalty, and, after Jefferson, representativeness, to insure that a unitary political philosophy did not dominate administration. See id. After Jackson, ordinary citizens were considered qualified for public office in accordance with their political loyalties. LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY (1965) [hereinafter WHITE, THE FEDERALISTS]; LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY (1954) [hereinafter WHITE, THE JACKSONIANS].

148. LEONARD WHITE, TRENDS IN PUBLIC ADMINISTRATION 143 (1933) (noting that “there is no point which serves as a center to the radii of the administration”). As a result, said White, “responsibility, both of a civil and public order, was . . . determined and enforced by the courts, not by order of a chief executive.” Id.
and possessed no power of resistance; it was elective and quickly responsive to the color and tone of local feeling.\(^\text{149}\) In other words, there was no political control problem in the pre-bureaucratic state.

2. The Administrative State

Because of its pronounced potential for graft and inefficiency, the spoils system was challenged by those seeking efficient administration of public services.\(^\text{150}\) Citing precedents in Great Britain, France, and Germany, a growing civil service reform movement advocated merit as a basis for appointment to public office and tenure as a way to preclude political reprisals by elected officials.\(^\text{151}\)

The Pendleton Act of 1883 initiated the inexorable diffusion of merit system principles throughout all levels of government.\(^\text{152}\) Its goal was an administrative capacity sufficient to ensure competent management of expanding governmental responsibilities.\(^\text{153}\) Constructing administrative capacity became the project of the Progressive movement from the turn of the century until about 1920.\(^\text{154}\)

The creation of a civil service, comprising technically qualified individuals insulated from political rewards and reprisals, was a

\(^{149}\) White, \(\textit{supra}\) note 133, at 418.

\(^{150}\) Bernard S. Silberman, \textit{Cages of Reason: The Rise of the Rational State in France, Japan, the United States, and Great Britain} 250-68 (1993); Skowronek, \(\textit{supra}\) note 145, at 47-84.

\(^{151}\) The creation of a merit system would also relieve pressure on the President and members of Congress, for whom the burden of filling the growing ranks of federal employees according to patronage practices was increasingly onerous and controversial; President Garfield had been assassinated by a disappointed office-seeker. See Skowronek, \(\textit{supra}\) note 145, at 46-68; see also Ronald D. Johnson & Gary D. Libecap, \textit{The Federal Civil Service System and the Problem of Bureaucracy: The Economics and Politics of Institutional Change} (1994).

\(^{152}\) Pendleton Act, ch. 27, 22 Stat. 403 (1883) (codified at 40 U.S.C. § 42). Two decades later, fifty percent of federal employees were selected and evaluated by the merit system.

\(^{153}\) Its premises were not challenged at the federal level until President Carter's 1978 civil service reforms. Of the Pendleton Act, Paul Van Riper has said that "[t]he new reform [which recognized the importance of individual capacity and of ability] laid the foundation for the development of that technical expertise crucial to the operation of the modern state." Paul Van Riper, \textit{History of the United States Civil Service} 111-12, 553 (1958).

seminal development in public management. A merit system shifted the emphasis in public administration from popular representation to neutral competence in the performance of official duties. Professional administration made it feasible for large, complex government organizations to provide economic regulation, national security, public infrastructure development, maintenance of public order, and social welfare.

Complementing the doctrine of neutral competence in administration was the idea of "scientific management." Following the prescriptions of Frederick Taylor and Henri Fayol, formal responsibility for administration was to be divided between managers and workers. Public management was to be based

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155. To ensure responsibility in both regulatory and service delivery activities, progressive administrative reforms included restrictions on the political activities of public employees; the spread of the city management model of municipal administration; the creation of public authorities for the management of public infrastructure, such as ports and parks; the consolidation of bureaus into comprehensive administrative departments; the regulation of economic activity through independent commissions; and the institution of the executive budget and other forms of "overhead" administrative capacity, all reflecting a preference for politically neutral, scientific, and technical competence in the administration of public services in support of a harmonious, orderly society. ROSENBLOOM, supra note 154, at 91.

156. SILBERMAN, supra note 150, at 263.

157. Woodrow Wilson had called for "a science of administration which shall seek to straighten the paths of government, to make its business less unbusinesslike, to strengthen and purify its organization, and to crown its duties with dutifulness." Woodrow Wilson, The Study of Administration, 2 Pol. Sci. Q. 485 (1887). James Fesler and Donald Kettl note that the article was not widely read until it was reprinted in 1941. JAMES W. FESLER & DONALD F. KETTL, THE POLITICS OF THE ADMINISTRATIVE PROCESS (1991).

158. See FREDERICK TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911). Taylor's work was concerned primarily with the organization of work. Henri Fayol extended the notion of scientific management to the function of management. HENRI FAYOL, INDUSTRIAL AND GENERAL ADMINISTRATION (1930). Fayol's work was, in turn, to influence Gulick. See Luther H. Gulick, Notes on the Theory of Organization, in PAPERS ON THE SCIENCE OF ADMINISTRATION (Luther H. Gulick and Lyndal F. Urwick eds., 1937). See also FREDERICK CLEVELAND & ARTHUR E. BUCK, THE BUDGET AND RESPONSIBLE GOVERNMENT (1920); HAL G. RAINEY, UNDERSTANDING AND MANAGING PUBLIC ORGANIZATIONS (1991); ROY G. Radner, Decentralization and Incentives, in INFORMATION, INCENTIVES, AND ECONOMIC MECHANISMS: ESSAYS IN HONOR OF LEONID HURWICZ 3-47 (T. Groves, R. Radner, & S. Reiter eds., 1987). According to Dwight Waldo, "[A]bout 1910[,] scientific management began to be introduced into some branches of public administration . . . . Perhaps as much as any other one thing, the 'management' movement has molded the outlook of those to whom public administration is an independent inquiry or definable discipline." WALDO, supra note 154, at 12. Skowronek adds that state building of that era represented a "drive toward administrative rationality grounded in scientific principles of public administration." SKOWRONEK, supra note 145, at 286.
on scientific principles of organization, administration, and management. 159

The creation of a "permanent government" staffed by professional civil servants whose appointments were based on their qualifications and who, in time, came to be protected by tenure raised a new issue. 160 How might citizens, legislators, and judges be assured that the operations of such a bureaucracy reflected the public will? The Progressives' answer was a strong elected executive whose power over administration would be patterned after the chief executive officers of the business world. 161 In 1911, President William Howard Taft's Commission on Economy and Efficiency began to formulate principles that would make the president head of administration: public law, unified executive power, a rational budget process, formal organization, and efficiency in administration. 162 The Commission's work eventually led to Budget and Accounting Act of 1921, a watershed in the establishment of a new bureau-

159. In his 1927 monograph, W. F. Willoughby, in the spirit of scientific management, asserted the task of administrators to be establishing an appropriate formal organization, thus insuring adequate structural constraints on the administrator. WILLIAM F. WILLOUGHBY, PRINCIPLES OF PUBLIC ADMINISTRATION, WITH SPECIAL REFERENCE TO THE NATIONAL AND STATE GOVERNMENTS OF THE UNITED STATES (1927). See also MARSHALL E. DIMOCK, MODERN POLITICS AND ADMINISTRATION: A STUDY OF THE CREATIVE STATE (1937); PAPERS ON THE SCIENCE OF ADMINISTRATION ( Luther H. Gulick & Lyndal Urwick eds., 1937); Leonard D. White, The Meaning of Principles in Public Administration, in THE FRONTIERS OF PUBLIC ADMINISTRATION (John M. Gaus, Leonard D. White, & Marshall E. Dimock eds., 1936). Willoughby emphasized an "institutional" (or what we would today term a "structural") approach to administration in which "the emphasis is shifted from legal rules and cases to the formal framework and procedures of the administrative machine." WILLOUGHBY, supra, at 8.


162. Prominent members included early leaders in public administration Frank J. Goodnow, Frederick Cleveland (head of the Bureau of Municipal Research), and W. F. Willoughby. JACK H. KNOTT & GARY J. MILLER, REFORMING BUREAUCRACY: THE POLITICS OF INSTITUTIONAL CHOICE 84 (1987).
ocratic politics. Congress created parallel sets of controls pitted against each other,\textsuperscript{165} for example, a Bureau of the Budget within the executive branch, and a Bureau of Efficiency and General Accounting Office, under Congressional control.\textsuperscript{164} These inconclusive new arrangements "epitomized America's turn-of-the-century leap from the party state, with its much maligned spoils system, to an institutional stalemate, with administrators themselves being asked to make policy decisions in a political system defiant of authoritative controls."\textsuperscript{165}

The accretion of structures and processes comprising the emerging administrative state was labeled "the bureaucracy."\textsuperscript{166} As the administrative state evolved, the courts were confronted with issues that coalesced into a distinct new field of American legal practice: administrative law. Nineteenth century judges tended to endorse \textit{laissez faire} principles and the social and economic status quo,\textsuperscript{167} rather than to countenance discretionary interventions by public officials. Federal courts were initially hostile to the exercise of discretion by these new agencies, believing such discretion to be inherently arbitrary and subject to graft and corruption.\textsuperscript{168}

The first cracks in the judicial façade of hostility to administrative discretion came when the Supreme Court insisted that Congressional delegation of authority be accompanied by sufficient specific standards to limit the scope of agency discretion.\textsuperscript{169} When regulated businesses sought to quash the discretion of regulatory

\begin{itemize}
\item \textsuperscript{163} Skowronek, \textit{supra} note 145, at 207-08.
\item \textsuperscript{164} Id. at 208.
\item \textsuperscript{165} Id. at 209.
\item \textsuperscript{166} In the 1926 first edition of his textbook, Leonard White referred to the "forms and methods" of centralization and integration of governmental function, including federal grants-in-aid to the states. His 1939 revised edition featured lengthy discussion of structure and organization and forms of administrative action, focusing on departments and their bureaus. Leonard D. White, \textit{Introduction To The Study Of Public Administration} (rev. ed. 1939). Joseph Rosenfarb referred to "the administrative bureau or tribunal combining the . . . executive, legislative, and judicial processes" as the only administrative form that could "perform the tasks entrusted to modern government." Joseph Rosenfarb, \textit{Freedom And The Administrative State} 206 (1948).
\item \textsuperscript{167} Id. at 9. See also Lochner v. New York, 198 U.S. 45 (1905); Chester A. Newland, \textit{Faithful Execution of the Laws, Rule of Law, and Autonomy of Public Administration}, in \textit{Handbook Of Public Law And Administration} (Phillip J. Cooper & Chester A. Newland eds., 1997).
\item \textsuperscript{169} Ernest Gellhorn & Ronald M. Levin, \textit{Administrative Law And Process} 13 (4th ed. 1997); see also Buttfeld v. Stranahan, 192 U.S. 470 (1904).
\end{itemize}
agencies, such as the Interstate Commerce Commission and the Federal Trade Commission, federal and state courts responded by beginning to create substantive administrative law. This emerging body of law had four main tenets:

1. The legislature must create rules and standards limiting agency discretion when delegating the power to sanction private parties;
2. Agency procedures must assist in complying with these directives;
3. Judicial review of (1) and (2) must be available; and
4. The agency must develop a record to facilitate judicial review.

The emergence of the administrative state created considerable confusion concerning administrative responsibility. At the federal level, Steven Skowronek concludes that

[as] the American state was being fortified with an independent arm of national administrative action, it was also becoming mired in operational confusion. . . . The national administrative apparatus was freed from the clutches of party domination, direct court supervision, and localistic orientations only to be thrust into the center of an amorphous new institutional politics.

Issues relating to control of the regulatory state divided President and party, and left administrative officials without a clear definition of political responsibility. With respect to judicial review of administrative decisions, Skowronek argues that although "[m]odern American state building shattered an outmoded judicial discipline . . . it failed to reconstruct a vital role for the judiciary in regulating the new political economy."
3. The Welfare State

The dilemmas of the administrative state were exacerbated during the long tenure of President Franklin D. Roosevelt. Roosevelt and his Congressional allies aggressively expanded the power of the elected executive, asserted the hegemony of the federal government over state and local authorities, and created "the welfare state" by providing Social Security and other benefits.

For those in both public administration and administrative law, the New Deal produced a rethinking of the state's role vis-a-vis the social and economic status of its citizens. Administrative law was under pressure to recognize the legitimacy of new social programs, but change came only with great difficulty and a "court-packing plan" that brought sympathetic justices to the Supreme Court. Nevertheless, by the end of the 1930s, many legal scholars who had once supported a curtailment of judicial review to speed along social programs urged a standardized court role.

In conceptualizing a role for the courts, Judge Linde made an observation of special pertinence to public human service organizations:

174. Participants of the debate included lawyers like Dean Roscoe Pound, who were primarily concerned with the quasi-judicial functions of government, and New Deal supporters, who stressed the importance of policy making. See Price, supra note 138.

175. David H. Rosenbloom, 1946: Framing a Lasting Congressional Response to the Administrative State, 50 ADMIN. L. REV. 173 (1998). In a foreshadowing of the managerialism that was to take hold following World War II, Max Lerner argued that "the burden of administrative innovation has fallen on the federal agencies." Max Lerner, The Burden of Government Business, in PUBLIC MANAGEMENT IN THE NEW DEMOCRACY 3-13 (Fritz Morstein-Marx ed., 1940). The "essentials of public management" were identified as information, leadership, teamwork, and administrative coordination. Id. at v. He called attention to "the assumption by public management of social tasks that would otherwise have been left unperformed." Id. The administrative revolution involved "the creation of new administrative forms to meet new governmental objectives," "the idea of planning," and "a new attitude toward the government service," by which he meant the disappearance of fear at "the idea of a trained administrative elite to carry the burden of government business." Id. at 7-8.


177. See generally JAMES LANDIS, THE ADMINISTRATIVE PROCESS 152-55 (1938).
When social services use both federal and local funding, agencies at both levels often have broad authority to impose requirements enforced only by loss of eligibility, which often is more drastic than punishment. Block grants replace categorical programs for the very purpose of delegating the power to spend federal funds with wide policy options and few federal requirements. Where are the claims that such transfers of program authority are excessive delegation?\textsuperscript{178}

The reason Congress grants considerable discretion to public managers when performing a function that “seems . . . to call for professional competence,”\textsuperscript{179} according to Judge Linde, is historical: executive power preceded parliamentary government and thus provides a baseline for performing public functions.\textsuperscript{180} Public management is a “residue after power to regulate private affairs is wrested from autocratic government.”\textsuperscript{181}

Influenced by the New Deal, public administration scholarship also began focusing more carefully on the issues of discretion and accountability. Marshall Dimock enunciated an expansive view of the public manager's role that anticipated contemporary developments in public management theory. He observed that “[t]hose 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.”\textsuperscript{182} Yet discretion is, at minimum, a double-edged sword. Dimock noted that “[t]he important problem is the manner in which discretion is exercised and the safeguards against abuse of power which are provided.”\textsuperscript{183} In other words,

\textsuperscript{179} \textit{Id.} at 832.
\textsuperscript{180} \textit{Id.} at 834.
\textsuperscript{181} \textit{Id.} Judge Linde notes “diverse structures of decision and consent” in public administration, including delegations to non-departmental entities and even to private contractors, purposeful insulation from political direction, and extensive variation across the states in the organization and separation of powers. \textit{Id.}
\textsuperscript{182} Dimock, \textit{supra} note 168, at 127. \textit{See also} Michael Lipsky, \textit{Street-Level Bureaucracy: Dilemmas of the Individual in Public Services} (1980); Brodkin, \textit{supra} note 117.
\textsuperscript{183} Marshall Dimock, \textit{The Rôle of Discretion in Modern Administration}, in \textit{The Frontiers of Public Administration} 45-65, 60 (John Gaus, Leonard White & Marshall Dimock eds., 1936). The exercise of discretion is far from straightforward, argued Pendleton Herring: “The bureaucrat . . . does not suffer so much from an inability to execute the law unhampered as from an uncertainty in direction. Where is the official to look for guidance on the broad plain of public interest? He is hemmed in by the immediacy of his own tasks. Within the system of which he is but a
discretion must be exercised responsibly. It was becoming clear, in fact, that the sword of responsibility has many edges. Observed John Gaus:

We developed a kind of triple responsibility in our administration. Whereas responsibility to the people is enforced through elections, and to the courts through judicial review, secured through various forms of procedure, responsibility to the legislature ... is nevertheless enforced through financial measures and control of the establishment and organization of administration by statutes, through legislative investigations and through the confirmation of appointees.184

Within public administration, the frequently expressed argument that the new administrative state required a different approach by the courts became even more compelling under the New Deal. "In general," Don Price argued, "court review of administrative decisions and orders is least useful on those aspects of a case that require discretion, the selection of one choice among several with nearly equal advantages, or call for technical or scientific qualifications."185

If not the courts, or the electoral institutions, then who or what would ensure responsibility? Within public administration, this issue came to a head in the classic debate between two European-born scholars of American institutions, Carl Friedrich and Herman Finer.186 Finer argued that, in a democracy, responsibility can only be ensured through external control:

Are the servants of the public to decide their own course, or is their course of action to be decided by a body outside them-

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selves? My answer is that 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. [The administrative state must confront] the dual problem of securing the responsibility of officials, (a) through the courts and disciplinary controls within the hierarchy of the administrative departments, and also (b) through the authority exercised over officials by responsible ministers based on sanctions exercised by the representative assembly.¹⁸⁷

Friedrich, in contrast, took a dim view of the ability of courts and legislatures to control administration:

[N]o mere reliance upon some traditional device, like cabinet dependence upon majority support in parliament, or popular election of the chief executive can be counted upon to render the best public services of a modern government responsible . . . . At best, responsibility in a democracy will remain fragmentary because of the indistinct voice of the principal whose agents the officials are supposed to be: the heterogeneous masses composing the electorate.¹⁸⁸

But, he said, democratic responsibility could be approximated, if officials have the right attitude toward their work. We have a right to call a policy irresponsible

if it can be shown that it was adopted without proper regard to the existing sum of human knowledge concerning the technical issues involved; we also have a right to call it irresponsible if it can be shown that it was adopted without proper regard for existing preferences in the community, and more particularly its prevailing majority. Consequently, the responsible administrator is one who is responsive to these two dominant factors: technical knowledge and popular sentiment. Any policy which violates either standard, or which fails to crystallize in spite of their urgent imperatives, renders the official responsible for it liable to the charge of irresponsible conduct.¹⁸⁹

The check on abuse of administrative discretion, in Friedrich's view, is professionalism. Similarly, Paul Van Riper argued that "professionalism can often keep administrative discretion within bounds more severe than a legislature would dare to prescribe." Even if professionalism is not a substitute for either minute legislative control or judicial review, the argument is persuasive that it contributes significantly to responsible administration, and neither legislators nor judges should want either advertently or inadvertently to preclude its exercise.

One solution, "personnel" and "procedural elements," came to be recognized as one of the best safeguards against the arbitrary exercise of administrative discretion. Building on Friedrich and, implicitly, constitutional due process, Dimock suggested an additional test: have officials followed reasonable procedures? Are public managers formally qualified, and did they follow procedures that preclude the abuse of power? Friedrich advocated sound personnel administration, "tight fiscal controls, and a strong sense of professional pride and craftsmanship."

The issue of administrative responsibility was not to be settled by academic debate, however. In the face of the rapidly growing role of the federal government in society and the economy, the courts, the President, and the Congress began vying, "almost frantically" in the view of Bernard Schwartz, for control of the powerful resources of administration. Contemporary Supreme Court rul-

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190. According to Paul Van Riper, the idea that "professional standards and scientific objectivity become measures of administrative action, relies primarily on an internalized and voluntary pattern of behavior." Van Riper, supra note 153, at 550. Friedrich, supra note 188, at 413, argued that specialists with a passion for impartiality and objectivity will know when to shrink from arbitrary and rash decisions, awaiting the expression of the "will of the people."


194. Friedrich, supra note 188, at 413.

ings impressed observers as attempts to "nullify the New Deal."\textsuperscript{196} Protecting its own interests, Congress enacted the Hatch Acts of 1939\textsuperscript{197} and 1940,\textsuperscript{198} which forbade civil servants from engaging in political activity, thus curbing the power of political executives over the rapidly growing federal workforce.

The issue of executive control of administration came to a head in the period surrounding the enactment and veto of the Walter-Logan Bill in 1939.\textsuperscript{199} Dean Roscoe Pound had argued that administrative agencies are under none of the safeguards that characterize judicial proceedings, especially when engaged in adjudication and acting as prosecutor and judge in the same case.\textsuperscript{200} Pound thus advocated for stringent procedural safeguards. In contrast, supporters of the New Deal urged that, in the absence of relevant standards, narrow procedural safeguards and private law values were an inadequate basis for defining administrative jurisdiction and responsibility.

Inspired by anti-New Deal sentiment, Congress enacted the Walter-Logan bill, which established "a single rigid method for the issuing of regulations."\textsuperscript{201} President Roosevelt vetoed it, calling it the result of "repeated efforts by a combination of lawyers who desire to have all the processes of government conducted through lawsuits and of interests which desire to escape regulation."\textsuperscript{202} However, he responded to the sentiment behind the bill by appointing the Attorney General's Committee on Administrative Procedure to study procedural reform of administrative law. The Governor of New York appointed Robert Benjamin to do the same thing. The resulting reports "agreed that the courts could not do the job the administrative agencies were doing, and that the administrative agencies themselves could not do it if anyone made them imitate the courts."\textsuperscript{203} Academic literature supported this view.\textsuperscript{204}

\textsuperscript{196} Rosenbloom, \textit{supra} note 154, at 15.
\textsuperscript{198} Hatch Act of 1940, ch. 640, 54 Stat. 787.
\textsuperscript{199} H.R. 6324, 76th Cong. (1939).
\textsuperscript{201} Price, \textit{supra} note 138, at 484.
\textsuperscript{202} Breyer \textit{et al.}, \textit{supra} note 170, at 22.
\textsuperscript{203} Id. at 485.
\textsuperscript{204} See generally Jerome Frank, \textit{If Men Were Angels} (1930); see also Walter Gellhorn, \textit{Federal Administrative Proceedings} (1941); Landis, \textit{supra} note 177. According to John Rohr, the AGR was "trying to curb administrative agencies without destroying the integrity of the administrative process. The Walter-Logan Act
By World War II, then, modernization had given rise to a new politics, a new governance, a new public management, and a new dilemma: reconciling the growing need for administrative capacity with the increasingly controversial need for democratic control. Control of bureaucracy moved to the center of American politics. Paul Appleby stated that “[p]erhaps there is no single problem in public administration of moment equal to the reconciliation of the increasing dependence upon experts with an enduring democratic reality.”

At the beginning of chapter twenty of his 1926 textbook, Leonard White placed two epigrams:

“Increased administrative powers call for increased safeguards against their abuses, and as long as there is the possibility of official error, partiality or excess of zeal, the protection of private right is as important an object as the effectuation of some governmental policy.” Ernest Freund

“What needs emphasis is no longer the inherent natural rights of the individual, but the importance, indeed the necessity, of administrative efficiency. For upon administrative efficiency de-

205. PAUL APPLEBY, MORALITY AND ADMINISTRATION IN DEMOCRATIC GOVERNMENT 145 (1952). PENDLETON HERRING, supra note 183, at 386, observed that “[l]aws are now more and more frequently formulated in the administrative offices ... This shift makes a responsible bureaucracy all the more urgent.” Frederick Mosher has nicely summarized the structural difficulty of balancing capacity with accountability in the modern government that the New Deal represented. FREDERICK C. MOSHER, DEMOCRACY AND THE PUBLIC SERVICE (1968). He said: “[r]eliance on popularly elected representatives is one step removed from direct participative democracy. A second step occurs when officers so chosen select and delegate powers to other officers, appointed and removable by them ... A third step away from direct democracy is taken with the designation of personnel who ... are protected from removal on political grounds.” Id. at 3. He states the central and underlying problem as this: “how can a public service so constituted be made to operate in a manner compatible with democracy?” Id. Or, more succinctly, “How does one square a permanent civil service ... with the principle of government ‘by the people’?” Id. at 5.
pends the effectiveness of that social control without which healthy development in existing conditions is impossible." Frank J. Goodnow.

Thus, he implied, the issue had already been joined: how shall we balance individual justice (control) and collective justice (capacity)? By the end of the New Deal, the terms of the debate were essentially the same in both administrative law and public administration. In 1940, James M. Landis identified the crucial issues in administrative law as, first, the subjection of the federal bureaucracy to a general administrative procedures statute and, second, the proper scope of judicial review. In the same year, Fritz Morstein Marx, defining administrative responsibility as "the restraint of power, made concrete through sharp delimitations and the counterpoise of constitutionally guaranteed rights of the individual," argued that Constitutional boundaries "must retain a considerable degree of flexibility lest the institutional order become so rigid that it cannot accommodate the pressures of social change."

The question facing both public administration and administrative law had become increasingly urgent: in a federal administrative state of separated powers, how can responsible administration be ensured? With respect to the increasingly significant public responsibilities governed by "competing social forces," how can a system of administrative law combined with judicial review operate in such a way that their combined effect is to sustain rather than undermine the managerial professionalism and trust now widely recognized as essential to collective justice?

4. Reinventing Governance

If issues of administrative responsibility had seemed clearly drawn in 1940, the intellectual environment has become more fragmented and unfocused since. The question of ensuring managerial responsibility has meandered across contested and increasingly


208. Id. at 222-23. In his view, judicial surveillance had not strengthened administrative responsibility; "it had rather the opposite effect." Id. at 232. Nor were legislative enactments definitive: "neither the statute nor the budget can attempt to outline specifically the path of administrative action." Id. at 247. Administrative responsibility, Morstein Marx concluded, "develops best in an atmosphere of professionalism," i.e., of a neutrality toward partisan objectives which is the reverse side of a dedication to the public interest. Id. at 250.

209. See DICKINSON, supra note 125, at 218.
partisan ideological terrain with little compelling intellectual guidance.

Under assault within political science and heavily influenced by behavioralism, public administration abandoned the logic of scientifically managed bureaucracy. Emphasis moved away from institutions toward public managers as decision makers and political actors. The pre-New Deal "New Management" has been transformed into the increasingly popular notion of a customer-focused "New Public Management" and its variants. Contributing to this trend has been the fact that attitudes towards government have shifted toward skepticism. The public and its elected representatives no longer view the administrative state and its bureaucracy as the preferred mechanism for reconciling the need for governmental capacity with the correlative need to ensure its accountability to the public.

5. From the APA to Chevron

In 1946, an emboldened Congress enacted a series of laws, including the Administrative Procedure Act ("APA") that tied the administrative state more tightly to American democratic constitutionalism. As an unintended consequence, these postwar enactments ratified the hegemony of the welfare state, heightening the bargaining between legislators and administrators, a process subject to legislative oversight that ranged in character from conscientious to promiscuous and opportunistic.

210. Pioneered at the University of Chicago, behavioralism championed a move from the study of socio-political institutions to individual behavior. See Barry D. Karl, Charles E. Merriam and The Study Of Politics 199 (1974).

211. See White, supra note 133.


213. Garvey, supra note 104.


215. Rosenbloom, supra note 154, at 15. See also Rosenbloom, supra note 175. The APA provided for public notification and the opportunity to comment on proposed administrative rules; due process protections in administrative adjudications; and court interventions in the event that agency actions are found to be arbitrary or capricious, to constitute abuses of discretion, to exceed jurisdiction or authority, to violate procedural requirements, and action unsupported by substantial evidence or unwarranted by the facts.

216. Rosenbloom, supra note 154, at 20. Leonard White observed in 1948, two years following the enactment of the APA, that "it is actually impossible to state any general conclusions as to the actual extent or limits of court review of official deci-
Expansion of administrative authority at all levels of government in the last half century has heightened concern for protecting citizens against abuses of administrative discretion. For example, concern began to focus on the legal position of the individual dependent upon government largesse. Largesse was initially held to be a privilege insulated from the requirements of due process. In 1970, the Supreme Court in *Goldberg* introduced the concept of entitlement, which is "more like 'property' than a 'gratuity'" and, as such, is fully protected by procedural due process.\^217

Over the next thirty years, a dramatic increase in the number and size of government bureaucracies invited an outpouring of lawsuits based on constitutional guarantees found during the "rights revolution." Federal courts began articulating numerous constitutional protections for individuals interacting with the administrative state. Protection was thought necessary from actions of the state. The legal concept of standing was liberalized to permit a wide range of actions against government agencies. The legislature began incorporating measures into organic statutes that ensured the "representativeness" of bureaucracy, in effect establishing interest-based political property rights in public administration.\^218 President Roosevelt's concern in the Walter-Logan debates that governance might be performed at the bar seemed more real than ever.

Administrative law itself has tended to skirt challenges to the legitimacy of the managerial role in human service agencies from rights-based litigation, however. Debates over non-delegation and administrative discretion have questioned how to decide individual cases, not how to ensure collective justice.\^219 Although acknowledgments.\^216 LEONARD D. WHITE, INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION 577 (3d ed. 1950). The Administrative Procedures Act was a compromise between New Dealers who had engineered the veto of the Walter-Logan Bill in 1940 and the Attorney General's commission that made its report in 1941. This compromise was respected by the courts interpreting the ADA. See LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965). Price observes that fears concerning APA rigidity proved unfounded and that the debate became less dogmatic as liberals came to fear administrative decision making in rights issues and conservatives began to distrust the courts as protectors of their interests. Price, supra note 138.


219. Judge Linde, supra note 178, at 829, notes that "Professor David Schoenbrod, a recent proponent of a strong nondelegation doctrine, explicitly confines his argument to the enactment of 'rules of private conduct' and excludes the pursuit of governmental programs by managing public funding or property." Excluded from Kenneth Davis's 1969 essay on discretionary justice, for example, were "broad policy-
edging policy-making that takes the form of "generalizations that go beyond particular cases" and determinations "thought to be unique or nonrecurring so that generalization is inappropriate," theorists of administrative law have tended, now as before World War II, to ignore these aspects of governance.

A watershed in administrative law bearing on these issues appears to have been inadvertent. In *Chevron U.S.A. v. Natural Resources Defense Council*, the Supreme Court finally established that, in the absence of clear legislative direction, an administrative agency "could legitimately adopt any plausible interpretation of a statute it was charged with enforcing." Absent a clear expression of legislative intent, the role of the courts was to determine the plausibility or reasonableness of agency interpretations, not their correctness. At last, the Court appeared to recognize the impropriety of using traditional methods of statutory interpretation in those ubiquitous matters in which, in effect, there is no law to find.

The controversies created by the *Chevron* doctrine recall debates over the Walter-Logan bill. Bernard Schwartz argues that *Chevron* "upsets the balance in our administrative law" by risking "undue deference to self-expansion of an agency's jurisdiction." Cass Sunstein has argued that "the notion that administrators may interpret statutes they administer is inconsistent with separation-of-powers principles." Such principled objections to the *Chevron* doctrine do not, however, address the technical, procedural, and ethical dilemmas inherent in fulfilling the sovereign will, given concrete expression in statutes, to address wicked problems in a responsible way through the imperfect personnel and administrative technologies of the administrative state.

The central tension between the extent to which public officials are granted discretion to perform their duties within a legislated

making, as distinguished from deciding individual cases" and "social justice, that is, justice for segments of the population, as distinguished from justice for individual parties," *Davis*, supra note 125, at 6. He further notes: "Discretionary justice obviously overlaps with policy-making, because the central part of each is a determination of what is desirable, but the two concepts are nevertheless quite different. All policymaking, by its intrinsic nature, is discretionary, but only a part of it has to do with justice." *Id.*

220. *Id.* at 7.
framework, on the one hand, and the control by law of bureaucratic discretion, on the other remains.\textsuperscript{226} Myriad decisions about particular matters of public policy "have so much potential for adversely affecting individual interests that it seems undesirable to leave them entirely to the discretion of a handful of government officials."\textsuperscript{227} When, then, is discretion appropriate?

In its broadest sense, discretion exists when no single correct choice is imposed on administrators, allowing them to base decisions on policy considerations. But the law typically enacts mechanisms for supervising and evaluating the exercise of discretion. Shapiro states that "there is a general tendency to narrow the boundaries of discretion over time, partly by substituting rules for discretion and partly by introducing various devices that permit at least an ex post auditing of the prudence of the decisions reached."\textsuperscript{228} These mechanisms\textsuperscript{229} are numerous: establishing professional qualifications for office holders; requiring statistical post-audits; supplying budgetary authority; enacting statutes, including statutes to correct judicial discretion; creating procedures to insure greater public observation of private, informal action by public officials; and permitting discretion to waive rules or make exceptions, a form of discretion difficult to protect from abuse. For Shapiro, "[t]he attempt to control discretion while purportedly leaving 'political' or 'policy' choice unfettered has largely taken the form of piling up procedural requirements."\textsuperscript{230}

This approach, termed legal idealism by Jerry Mashaw,\textsuperscript{231} offers a coherent normative rationale for the particular forms that governance can assume: insuring the legitimacy of official actions through the formal control of bureaucratic discretion, where legitimacy is defined by judicial doctrines and canons. It is significant

\textsuperscript{226} Martin M. Shapiro, HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW 501 (David H. Rosenbloom & Richard D. Schwartz eds., 1994).
\textsuperscript{227} Id. at 507.
\textsuperscript{228} Id. at 504.
\textsuperscript{229} The term "mechanism" is also used by economists to characterize specific techniques, such as contract design when adverse selection is the issue, procedures for disclosure of information, rules governing decision making, and the like that are intended to achieve particular results or results that have desirable properties. See generally David M. Kreps, A COURSE IN MICROECONOMIC THEORY (1990); Terry M. Moe, The Politics of Structural Choice: Toward a Theory of Public Bureaucracy, in ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 116-53 (Oliver E. Williamson ed., 1990). Mechanism is thus synonymous with the term "instrument."
\textsuperscript{230} Shapiro, supra note 226, at 506.
that this rationale is the stock in trade of legislators who have been trained as lawyers. But the very real challenge to the prospects for responsible administration is ignored. Sociologist James Coleman argued that a “bureaucratic personality” results when “[r]igidity and attention to rules are pursued by a bureaucrat as a policy that is safe, because, whatever the outcome, he is protected by having followed the rules; an action against the rules but having a better outcome for the organization would expose the bureaucrat to loss of position or other discipline if it was not successful.”

Staffing the administrative state with only bureaucratic personalities surely cannot be the goal of any branch of government.

6. **From Management as Science to Management as Craft**

Self-assured at the height of the New Deal, public administration was maneuvered into a defensive posture by developments in administrative law, social science, and public attitudes. A seeming casualty, adumbrated by the Friedrich-Finer debate, was the heretofore coherent logic of managerial responsibility. Public administration began offering a wide menu of approaches to managerial responsibility, each suffering from conceptual vagueness.

Emmette Redford summarized the pre-war logic in his 1958 book, *Ideal and Practice in Public Administration.* He argued that although administration is circumscribed by law, discretion is vital to its performance. Discretion, according to Redford, is necessary in administration, because law is rigid, and policy must be made pragmatically. Integrated and hierarchical structures, he argued, are essential to ensuring that bureaucracy is subject to control from outside. In other words, exercising authority over subordinates is not anti-democratic but the opposite.

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233. See supra notes 175-209 and accompanying text.


235. *Id.* at 43.

236. *Id.* at 79.

237. *Id.* at 89; Redford noted Finer’s view that Congress should control bureaucracy “to the most minute degree that is technically feasible” but prefers Charles Hyneman’s contrary view that Congress “should not define and describe a governmental undertaking in such detail that administrative officials are rendered incapable of achieving the major objectives toward which the legislation is directed.” Hyneman, *supra* note 105, at 85.
Though the concept of public will or public interest has always been central to public administration,\textsuperscript{238} scholars began elaborating on its overriding normative importance to managerial behavior. For example, John Rohr urges that “[a]dministrators should use their discretionary power in order to maintain the constitutional balance of powers in support of individual rights.”\textsuperscript{239} Robert Denhardt urges administrators to commit themselves to “values that relate to the concepts of freedom, justice, and the public interest.”\textsuperscript{240} Gary Wamsley argues that

\[
\text{[t]he 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.}\textsuperscript{241}
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Such views imply that administration represents the practice of a secular religion rather than a professional craft obedient to the panoply of democratic institutions.\textsuperscript{242}

A pragmatic view of administrative morality is that of Frederick Mosher. The threats to objective responsibility, Mosher suggests, are not in politics, as others imply, but in “both professionalization and unionization with their narrower objectives and their foci upon the welfare and advancement of their members.”\textsuperscript{243} As for representativeness, “who represents that majority of citizens who are not in any [represented group or interest]?”\textsuperscript{244} Mosher argues that “[t]he harder and infinitely more important issue of administrative morality today attends the reaching of decisions on questions of public policy which involve competitions in loyalty and perspective between broad goals of the polity . . . and the narrower goals of a group, bureau, clientele, or union.”\textsuperscript{245}

\begin{itemize}
  \item \textsuperscript{238} See generally Goodnow, supra note 131.
  \item \textsuperscript{239} Rohr, supra note 106, at 181.
  \item \textsuperscript{240} Robert B. Denhardt, The Pursuit of Significance: Strategies for Managerial Success in Public Organizations 20 (1993).
  \item \textsuperscript{241} Gary L. Wamsley, Introduction to Refounding Public Administration 19-29, 26 (Gary L. Wamsley et al. eds., 1990) (emphasis added).
  \item \textsuperscript{242} Of the views that responsibility defined as political accountability, Paul Van Riper noted that “our traditional tendency has been to deplore its existence.” Van Riper, supra note 153, at 549. He notes further, “such an approach is futile unless accompanied by a simultaneous willingness to abolish many of the functions now performed by the federal government.” \textit{Id.} at 549.
  \item \textsuperscript{243} Frederick C. Mosher, Democracy and the Public Service 209 (1968).
  \item \textsuperscript{244} Id.
  \item \textsuperscript{245} Id. at 210.
\end{itemize}
Within mainstream scholarship, however, the emphasis appeared to shift from "administration" to "public," from politics to institutionalism, from the department or bureau as the unit of analysis and administration as design and maintenance of functional organization, to the manager as a natural person, and to management as craft, as purposeful, policy-oriented behavior.\textsuperscript{246} Retreating from universalistic, "scientific" principles of management, administrative scholarship has paid increasing attention to the consequential differences between public and private management. It is within this context that the actor-focused idea of public management as craft has emerged.\textsuperscript{247}

Such shifts of emphasis have the unintentional effect of facilitating our ability to address the issue of managerial responsibility as it tends to be viewed by the courts. Managerial actors, their behavior, their motivations, and their liability have moved to the foreground of public administration. The formerly abstract concepts of discretion and responsibility have become increasingly concrete, identified with particular actors and functions, depicting behavior susceptible to judicial review.

The scaffolding of a separation between politics and policy, on the one hand, and administration on the other has been torn down.\textsuperscript{248} Paul Appleby defined public administration as "that intermingling of policy-making and management which occurs below the levels of legislative, judicial, and popular-electoral policy determinations."\textsuperscript{249} He discussed executive work as what to do and how to do it. In an extended discussion of administrative responsibility, he argued that "[r]estraints upon the exercise of authority are in some respects managerial," by which he meant concerned with effectiveness and pragmatic accountability to political institutions and processes.\textsuperscript{250}

\textsuperscript{246} See generally Garvey, supra note 104; WALDO, supra note 154; Roscoe C. Martin, Paul H. Appleby and his Administrative World, in PUBLIC ADMINISTRATION AND DEMOCRACY: ESSAYS IN HONOR OF PAUL H. APPLEBY 1-14, 9 (Roscoe C. Martin ed., 1965).

\textsuperscript{247} See Laurence E. Lynn, Jr., PUBLIC MANAGEMENT AS ART, SCIENCE, AND PROFESSION 34-40 (1996), for additional discussion of the emergence of contemporary perspectives on public management.

\textsuperscript{248} PAUL H. APPLEBY, POLICY AND ADMINISTRATION 24 (1949). "The intermingling of policy and administration in our government is not new," said Paul Appleby. \textit{Id}. "It is more visible because both policy and administration are more visible; both have to do with many more things." \textit{Id}.

\textsuperscript{249} \textit{Id}. at 25.

\textsuperscript{250} APPLEBY, supra note 205, at 239. An Inter-University Case program was created in 1951, and in 1952, Public Administration and Policy Development: A Case Book, edited by Harold Stein, was published in order to permit students "to study
An intellectual development that was to have seminal importance was the appearance in 1938 of Chester Barnard’s *The Functions of the Executive*, which laid the groundwork for new perspectives on managerial responsibility. As Frederick Mosher interpreted him, Barnard “defined administrative responsibility as primarily a moral question or, more specifically, as the resolution of competing and conflicting codes, legal, technical, personal, professional, and organizational, in the reaching of individual decisions.” The notion of the manager as a morally responsible decision maker was to influence the thinking of Herbert Simon, whose 1947 book *Administrative Behavior* and textbook (with Victor A. Thompson and Donald W. Smithburg) became classics of post-war public administration literature that have influenced generations of public administration scholarship. With Barnard as a model, subsequent literature of public administration began to pay closer attention to the function and role of agency management, to the pre-conditions for managerial effectiveness, and to the issue of managerial responsibility in the democratic state.

*some of the characteristic modes of behavior of public administrators . . . as they go about their task of making decisions.* Public Administration and Policy Development: A Case Book ix (Harold Stein ed., 1952). A historical account of the use of teaching cases in public administration appears at id. at xxxviii-xliv.

251. Chester I. Barnard, The Functions Of The Executive (1938). See also Paul Appleby, Policy and Administration 250 (1949) (noting that “[t]he centralization of responsibility, which Americans seem to fear, permits and requires the delegation of responsibility and the magnifying of the moral forces by which, primarily, I think, bureaucracy can be controlled” (quoting Barnard, supra)). According to one scholar, Barnard’s goal was “to legitimize the new American managerial class.” William G. Scott, Barnard, Chester I., in 1 International Encyclopedia Of Public Policy And Administration 170 (Jay M. Shafritz ed., 1998).

252. Mosher, supra note 205, at 210. See also Barnard, supra note 251, at ch. XVII.


255. Scott, supra note 251, at 171.

256. In *Morality and Administration in Democratic Government*, Paul Appleby argued that traditional protections against immorality in administration, checks and balances, decentralization, federalism, and others, are less than effective, even negative. Appleby, supra note 205. Advocating exposing more areas of administration to general political responsibility and hierarchy, not as a basis of authority (on which he cites Barnard as having similar view, id. at 205, but as “a means to broaden the perspective for, and the responsibility of, decision.” Id. at 212. Both Appleby and Mosher feared career systems and expertise as threats to moral administration. In Rowland Egger’s interpretation, Appleby saw the crux of responsibility as beginning at the point at which statutory authorities, policy directives, and standard operating procedures confront the notion of the public interest. Rowland Egger, Responsibility in Administration: An Exploratory Essay, in Public Administration And Democ-
In his 1954 book, *Management in the Public Service*, for example, John Millett argued that

> [t]he challenge to any administrator is to overcome obstacles, to understand and master problems, to use imagination and insight in devising new goals of public service. No able administrator can be content to be simply a good caretaker. He seeks rather to review the ends of organized effort and to advance the goals of administrative endeavor toward better public service.\(^{257}\)

But, Millett continues,

In a democratic society this questing is not guided solely by the administrator's own personal sense of desirable social ends. The administrator must convince others as well. He must work with interest groups, with legislators, with chief executives, and with the personnel of his own agency to convince them all that a particular line of policy or program is desirable.\(^{258}\)

The concept of administrative rationality received a new dimension with the advent of the policy analysis as an administrative technology in the 1960s and early 1970s.\(^{259}\) Opportunistically assembling rudiments of authority, knowledge, technical skill and application accumulating with the emergence of the modern administrative state, well-positioned Federal executives forged new structural links between research-based knowledge and policy making.\(^{260}\) The advent of policy analysis as an administrative tech-

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\(^{258}\) Id.


\(^{260}\) The deliberate use of scientists and science-based information to inform public policy making and implementation is hardly a recent phenomenon. See Laurence E. Lynn, Jr., *Policy Analysis in the Bureaucracy: How new? How effective?*, 8 J. POL’Y ANALYSIS & MGMT. 373 (1989). Previously, however, such uses had been more or less restricted to particular instances and were not necessarily a normal feature of policy making. The movement to bring "policy sciences" to bear on policy making began to take form in 1951, initiated by Harold Lasswell and his colleagues. See, e.g., *The Policy Sciences* 4 (Daniel Lerner & Harold D. Lasswell eds., 1951) (describing
nology was the culmination of two trends originating during the Progressive era: movements toward management by qualified managers and experts and toward the centralization of administrative power in executive offices.

7. Where Mighty Forces Contend

As the rights revolution of the 1960s and 1970s gained force, public administration became infused with policy making. "Public administration is policy-making," argued Paul Appleby. However, he said,

[I]t is not autonomous, exclusive or isolated policy-making. It is policy-making on a field where mighty forces contend, forces engendered in and by the society. It is policy-making subject to still other and various policy-makers. Public administration is one of a number of basic political processes by which this people achieves and controls governance . . . . The requirement is for . . . a pattern [of responsibility] subtle, flexible, and differentiated in its attenuations but firm at its axis, a pattern notably at its axis and variously at its attenuations involved in the larger pattern of politics and governance."

the importance of integrating scientific methods into the study of policy-making). Academic social scientists had begun to address the needs of democratic states for systematic information to inform their deliberations, albeit with a far different purpose in mind than facilitating bureaucratic decision making.

261. Laurence E. Lynn, Jr., A Place at the Table: Policy Analysis, Its Postpositive Critics, and the Future of Practice, 18 J. POL’Y ANALYSIS & MGMT. 411 (1999). The term “administrative technology” refers to such replicable methods as merit-based personnel selection, executive budgeting, the administrative department or bureau, regulation and rule making, the executive order, the categorical program, formula grants and block grants, the administrative procedures act, performance audits, and policy analysis.

262. This new movement brought together knowledge derived from recent developments in systems, management, design, and economic sciences on behalf of responsibility in administrative leadership and efficiency in resource allocation: tools for managing complexity, identifying and solving problems, and allocating resources for maximum effect. Such tools were thought likely to be most effectively wielded by administrators with discretion to propose, decide on, and implement actions to be taken by others in pursuit of the goals of public policy. As an administrative technology, the proper role of social-science-based policy analysis is improving the basis on which policy decisions are made, whether by legislators, executives, or administrators, by employing theory, empirical knowledge and analytic craftsmanship to clarify issues, alternatives, and consequences in a precise and dispassionate way, a role no one else in politics is likely to perform. See Laurence E. Lynn, Jr., Managing Public Policy 171 (1987).

263. Appleby, supra note 248, at 170.

These forces contend, moreover, not only at the highest levels of administration but at its working levels as well.

How can the courts play a more constructive role in promoting managerial responsibility essential to good government in our constitutional order, where mighty forces contend? A professional precept of managerial responsibility appropriate for the exercise of administrative discretion is to found not in abstract ethical or moral doctrines but in the reflections and interpretations of American administrative experience we have just reviewed.

G. A Precept of Managerial Responsibility

The idea that public administration must be responsible is a shining thread in the literature of public administration. For Frederick Mosher, "[r]esponsibility may well be the most important word in all the vocabulary of administration, public and private."265 Responsibility, he said, "would seem to me to be the first requisite of a democratic state."266 How do we know responsible public administration when we see it?

To Mosher, responsibility has two shades of meaning. The first is objective responsibility - policies, as the expressed will of the people, are to be carried out whether the administrator likes them or not. This kind of responsibility is essential to reliable, predictable governance. The second is subjective responsibility — identification, loyalty, and conscience which introduces the inevitability of competition and conflict among responsibilities.267 Responsibility, in other words, has both external and internal dimensions. The responsible administrator is guided both by politics and by professionalism. Although public management doctrine has evolved

266. Frederick C. Mosher, Public Administration Old and New: A Letter from Frederick C. Mosher, 2 J. PUB. ADMIN. RES. & THEORY 201 (1992). Among Morstein Marx's four essentials of administration is responsibility. Morstein Marx, supra note 207, at 43. In Chapter 3, "The Essentials of Administration," he lists four: "(1) the essential of rationality, (2) the essential of responsibility, (3) the essential of competence, and (4) the essential of continuity." Id. at 34. Responsibility has several aspects: institutional, public, and personal. Id. Competence comprises education, training, and experience. Continuity is associated with stability and with the status of the civil service, legal and otherwise. Id. "In structures as elaborate and hence as rich in opportunities for obstruction as is large scale organization," he argues, "control could not accomplish co-ordination in the interplay of human wills." Id. Control requires as well "well-formed habits of deference sustained by reason." Id.
267. Mosher, supra note 205, at 7-8. Modern developments in professionalism and specialization have led Mosher to side with Friedrich, supra note 183, at 63-64. Mosher notes that subjective responsibility is addressed by how well bureaucracy represents the public interest.
from its Progressive and New Deal foundations to the more behaviorally-oriented versions of recent years, the indicators of responsible public management necessarily reflect the continuing effort to reconcile the sophisticated demands for organization and performance of the modern state with the Madisonian ideal of constitutionally-constrained executive power: to reconcile capacity with control, administrative discretion with a political and legal check on its exercise.

We argue that responsible public management entails four qualities: (1) accountability, (2) judgment, (3) balance, and (4) rationality. These qualities collectively constitute a precept of managerial responsibility. Responsible public administration must incorporate such a precept at every level of managerial responsibilities.

In the remainder of this section, we show how these elements of responsibility are derived from professional scholarship and practice.

1. Accountability

Accountability can be defined as those methods, procedures, and forces that determine what values are reflected in administrative decisions. This formulation is our point of departure for adducing accountability—an external dimension—as a quality of responsible management.

Judicial decisions, statutes, and administrative rules and guidelines are the three principle formal controls over the values reflected in administration. Accountability is complicated by the fact that all three branches compete for control of administration. As a result, accountability in human service agencies has become as complex as that of any agency in the administrative state. Large

268. Maas and Radway, supra note 13, advanced the following criteria: responsibility for exercising discretion in the formulation as well as 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.


numbers of "street level" employees and private contractors provide services at dispersed locations under burdensome, often conflicting statutory, executive, and judicial mandates, and under the pressure of competing, often urgently expressed citizen interests and values.\textsuperscript{271}

The density of such controls and interests may be thought to ensure democratic control of administration. It is easy to show, however, that in regimes with multiple, complex goals, principals lose control of agents, who are able to redeploy their efforts among various goals in accordance with their own interests without being held to strict account by any one of them.\textsuperscript{272} 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."\textsuperscript{273} The internal dimension of values also comes into play.

In general, no regime of rules can eliminate possibilities for self-interested behavior by subordinate officials.\textsuperscript{274} Nonetheless, "[m]anagement guided by [the value of responsible performance] abhors the idea of arbitrary authority present in its own wisdom and recognizes the reality of external direction and constraint."\textsuperscript{275} Charles Hyneman argued, "I am sure that the administrative official cannot obtain from the political branches of the government all of the guidance he needs."\textsuperscript{276} But, Hyneman insisted, the other methods for obtaining guidance must supplement, not replace or supplant, political direction: "[t]he American people have authorized nobody except their elected officials to speak for them."\textsuperscript{277} Emmette Redford called external guidance "directive activity," i.e., activity that establishes purposes, organizations, and rules of administration. Directive activity involves "setting the preconditions of administration on the basis of some measure of [political] consensus on what will be expected of it."\textsuperscript{278}

Directive activity is definitive when the intent of positive law is clear. When it is ambiguous or incomplete, the public manager

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\begin{itemize}
\item\textsuperscript{271} See Lipsky, supra note 182; Hargrove and Glidewell, supra note 140.
\item\textsuperscript{273} Simon, Thompson & Smithburg, supra note 254, at 539.
\item\textsuperscript{274} Miller, supra note 141.
\item\textsuperscript{275} Millett, supra note 257, at 403.
\item\textsuperscript{276} Hyneman, supra note 105.
\item\textsuperscript{277} Id.
\item\textsuperscript{278} Emmette S. Redford, Democracy In The Administrative State 193 (1969).
\end{itemize}
must exercise judgement concerning what the public interest and professionalism may require.

2. Judgment

After all directive activity is taken into account, administrators have considerable freedom to make decisions based on their own ethical promptings. No mechanisms for enforcing administrative responsibility can extinguish the element of judgment from public management. The formal establishment of accountability intentionally leaves a significant residual of discretion to public officials. Citizens, elected officials, and the courts, however, are entitled to assurance that officials use good judgment in exercising that discretion.

To minimize the consequences of poor judgment, constitutional separation of powers guards against the undue influence of any single branch. When administrative agencies possessed little significant power, as in the pre-bureaucratic state, their possible abuses aroused little concern. With the emergence of the modern administrative state, a new issue arose: what if there is too little power in the hands of agencies legally obligated to ensure collective justice? The need for administrators to exercise discretion not constitutionally furnished gives rise to the enduring issue of assuring good judgment in policy making and implementation. Says Schuyler B. Wallace: “the exact degree of autonomy which should be granted to each operating unit, the work of which is neither purely routine nor quasi-judicial in nature, will and should be determined by reference to the primary purpose of Congress in establishing the unit, or by reference to some ideal purpose more comprehensive

279. Simon, Thompson & Smithburg, supra note 254, at 539.
280. Game theoretic analysis of interactions between political actors within a given regime of rules and payoffs reveals the existence of multiple equilibria. Discretionary actions by these actors select the actual equilibrium.
281. “The ultimate act of discretion,” says Redford, “is often in the decision whether to follow or not to follow an existing standard . . . . [A]dministration may be in a good position to use discretion in the modification and refinement of rules so that justice may be particularized.” Redford, supra note 234, at 44, 47. Cornelius Kerwin argues that “Once all the sources of agencies’ legal authorities and obligations are accounted for, a framework [is needed to] take account of the means by which agencies come to understand what these legal responsibilities require them to accomplish. Three of the most important decisions that administrators make are (1) What must be done? (2) What is the priority order of the tasks to be performed? (3) What activities will be delayed or removed entirely from the agenda?” Cornelius M. Kerwin, Public Law and Public Management, in Handbook of Public Law and Administration 30 (1997).
than that of Congress." Colin Diver has recognized the importance of judgment in the context of judicial review. He argues 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." Responsible judgment is more likely to result, and the rigidity of the bureaucratic personality is least likely to become troubling, when public managers are assumed to be capable of exercising it within the domain of their legislative mandates.

Beyond being accountable to directive activity, then, responsible public management means exercising good judgment. That judgment has been exercised in the absence of definitive rules is not a sign of regime failure. It is a sign, rather, that administrators recognize and accept their responsibilities. The questions then become, how shall we determine whether administrators have exercised good judgment? By what criteria might the appropriateness of administrative judgment be assessed?

3. Balance

Public administrators, as has been shown, have multiple principals whose direction may be less than definitive. These realities argue for a process of balancing contending interests, what Kenneth Davis calls "a democratic element," in the exercise of administrative judgment. Administrators, argues Morstein-Marx, 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." Said Arthur Macmahon, "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


283. Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 593 (1985). Paul Appleby reaches a similar conclusion from a different premise. He states, "[a] governmental organization characterized by internal considerateness is likely to be more considerate of citizens with which it deals than is a governmental agency conducted within itself on authoritarian lines." Appleby, supra note 205, at 97.

284. Davis, supra note 125, at 24.

of balancing bias into one law or another.”

The act of striking a balance is termed “adjustive activity” by Emmette Redford: “In the concept of administration as adjustive activity, administration is an extension of the political process of adjustment among interests.”

To achieve balance, Marshall Dimock has argued,

"Public administration,” he continues,

is not merely an inanimate machine, unthinkingly performing the work of government. If public administration is concerned with the problems of government, it is also by the same token interested in fulfilling the ends and objectives of the state. Hence, public administration, in its larger sense, involves those considerations once encompassed by the term political economy. Public administration is planning.

Thus, in all but the most routine tasks, there is no “one right answer” to the problems with which administrators must deal. They must strike a balance among competing interests, values, and interpretations of fact.


287. Redford, supra note 278, at 188. He further notes, “usually, as Herring recognized, policy making will go beyond mere identification and involve some balancing of group interests involved “ Id. at 111. He quotes Arthur Macmahon as having referred to the fact that much of our legislation shows a ‘balancing bias’ and that administrators must carry out such legislation.” Macmahon, supra note 286, at 47.

288. Dimock, supra note 168, at 8, 9.

289. Id. at 11-12. Later, Morstein Marx argued that administration requires “a profitable blend of judgments, political and professional, staff and line, general and special.” Morstein-Marx, supra note 144, at 286.

290. Carl Friedrich, noting that “responsibility is measured in terms of service to interests determined by the preferences” of others and that interests will differ, expressed the challenge as follows: “How are we, then, to solve this problem of holding the several interests together and giving them a common direction, of integrating them into a more or less consistent whole?” Friedrich, supra note 188, at 398.
ing perspectives for bettering ‘the public good’ in complex, highly diverse, competitive, and inequitable environments.”

4. Rationality

Marshall Dimock referred to discretion as “the liberty to decide between alternatives,” i.e., as tantamount to, or as requiring, rationality. To be responsible, judgment as between alternatives necessarily must be logical or rational as well as balanced. A rational action is one that is logical in the following sense: the relationship between goals and the means for achieving them in the mind of the manager corresponds to the relationship between goals and means for achieving them in reality (or as might be confirmed by independent analysis).

How might decisions be reached in order for them to be considered rational? A rational choice among alternatives reflects a careful consideration of objectives, the means for achieving them, and the relative merits of those means. In other words, rational decision-making is done 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.”

Due to the strictures placed on rationality in the study of economics, rationality in human affairs has been widely construed, primarily by its denigrators, as requiring quite unrealistic information

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292. Dimock, supra note 144, at 46.

293. Rationality has numerous aspects or meanings: the pursuit of purpose (administration itself is a means to an end); source of cohesion (as opposed to “countless clusters of personal influence”); application of knowledge; application of reason; as a gatherer of intelligence. Morstein Marx concedes that “ultimately, [rationality] is controlled by its conscious premises or its unconscious predispositions.” Id. at 40. He cites as examples the British and French administrations and any colonial administration. But he also sees institutionalized rationality as “putting proposed policy to the acid test of cause-and-effect relationships.” Id. at 42.


processing and computational capabilities. Marshall Dimock, fore-
shadowing the policy analysis movement, identified an alternative
approach he called “theory and invention.” Its purpose “is largely
to uncover false assumptions and to invent new ideas and ways of
doing things for the administrator.”296 Later, Carl Friedrich argued
that we have a right to call a policy irresponsible, i.e., irrational, “if
it can be shown that it was adopted without proper regard to the
existing sum of human knowledge concerning the technical issues
involved.”297

Rationality in the context of public management refers to institu-
tional, or collective, rationality, rather than individual rationality,
because, as economist Kenneth Arrow has shown, the rational
preferences of individuals, such as an organization’s employees,
cannot be aggregated into rational group choices.298 The policy
analysis approach to rationality enables the public manager to cope
responsibly with what the philosopher Nicholas Rescher has called
“the predicament of reason,” or “the irresolvable tension between
the demands of rationality and its practical possibilities” owing to
the inadequacy of available information and, one might add, the
incompatibility of alternatives.299 “It is the course of reason,”
Rescher argues, “to aim at the absolute best, but nevertheless to settle for the best that is realistically available in the existing cir-
cumstances.”300 And we must recognize the discomfiting fact that
“the best we can do under the circumstances may eventuate as
quite the wrong thing.”301

296. Marshall E. Dimock, The Meaning And Scope Of Public Administration, in
The Frontiers Of Public Administration 1-12 (J. Gaus, L. White & M. Dimock
eds., 1936).

297. Friedrich, supra note 160, at 12. Dwight Waldo characterizes scientific man-
agement more reasonably as “the substitution of the laws of situations for individual
authority, guess and whim.” Waldo, supra note 154, at 52.

298. This finding is known as the Arrow Impossibility Theorem. See Kenneth J.
Arrow, Social Choice And Individual Values (2d ed. 1963); Kenneth J. Ar-
row, The Limits Of Organization (1974). For James Q. Wilson, “[t]here is not one
bureaucracy problem, there are several, and the solution to each is in some degree
incompatible with the solution to every other.” James Q. Wilson, The Bureaucracy
Problem, 6 Pub. Int. 4 (1967).

300. Id. at 169.
301. Id. Douglas Besharov, former New York City prosecutor, founding director of
the National Center on Child Abuse and Neglect, author of the official Commentaries
to the New York child welfare reform laws, which he helped draft, and a member of
New York City’s Accountability Review Panel, said the following in an interview:
Q. Are a certain number of wrong decisions inevitable no matter how well
the system is working?
4. Alternatives to a Precept of Managerial Responsibility

We argue that a precept of managerial responsibility incorporating the foregoing four dimensions of public management derived from theory and practice will improve democratic governance and that courts owe it deference in the interest of collective justice. But are there alternatives to this particular avenue to better government?

Numerous answers to this question might be suggested. Some emphasize external considerations: rules and procedures were followed or duly appointed officials executed the will of the enacting coalitions that created the agency's statutory framework. Others emphasize internal considerations: expertise, i.e., an explicit normative standard of judgment, was applied or demonstrably qualified officials relied upon their intuition and experience in making determinations. Carl Friedrich identified five mechanisms for enforcing administrative responsibility in the modern state: promotional measures that rely on the psychology of encouragement; disciplinary measures that rely on the psychology of discouragement; financial measures of control and audit of expenditures, based on "the rule of anticipated reactions"; judicial measures based on civil and criminal law; and the spirit of craftsmanship or sound professionalism, "of a thing well done," which refers to standards of objective achievement" or "the necessity of justifying the choice" to one's professional peers.

Reflecting both the directive and adjustive aspects of public management, this enumeration of possible solutions is reasonable. However, it begs the question of the formal role of the courts in


Policy analysis, now widely practiced both formally and informally throughout government at all levels, is an approach to aiming at the best outcomes while at the same time understanding what is realistically achievable under the circumstances. That is, it is an element of institutional rationality and, as such, an aspect of competent administration.

302. Edley, supra note 135, at 3 refers to three paradigmatic methods of decision making: adjudicatory fairness, politics, and scientific expertise.

303. Friedrich, supra note 188, at 402, 412. Concerning the fifth standard, that of professionalism, he draws the analogy to the judiciary: "judges have to account for their action in terms of a rationalized and previously established set of rules." Id. at 412.
assessing managerial responsibility when confronting apparent conflicts between individual and collective justice. Some combination of these various mechanisms is almost always evident. The question is whether their use coheres into a precept of managerial responsibility sufficiently compelling to warrant judicial deference.

Knott and Miller suggest structural solutions to the problem of administrative responsibility. They call attention to proposals by Martin Landau,304 Jonathan Bendor,305 and Vincent Ostrom,306 who argue, respectively, for redundancy, competition, and Madisonian checks and balances. Knott and Miller conclude, however, that "there is no structure whose neutrality, expertness, or other characteristics can automatically legitimize the policy choices it makes . . . an institution is justified by its outcomes, rather than the other way around."307 Judging the responsibility of public management by its outcomes in the case of human service agencies, however, fails to comprehend the uncertainties inherent in working with human beings and inappropriately assigns the risks associated with achieving both individual and collective justice. Such a basis for judgment invites the kinds of abuses of judicial intervention enumerated above and a risk adverse management that is inimical to the elements of managerial responsibility incorporated in our precept.

Finally, Gerald Garvey suggests a number of measures, including the "release of creativity" and the ideas of the human relations school and, as well, mobilizing economic incentives by emphasizing the notion of citizen as customer and embracing new public management notions of market-like discipline.308 Again, the content of directive activity may take many different forms that are appropriately judged using political criteria. None would properly substitute for judicial intervention, however, and the question of the role of the courts remains.

305. JONATHAN BENDOR, PARALLEL SYSTEMS: REDUNDANCY IN GOVERNMENT (1985).
307. KNOTT & MILLER, supra note 162, at 274.
CONCLUSION

Despite a century of efforts to overcome the confusion of roles inherent in the modern administrative state, tensions persist. The question of administrative discretion, of judges deferring to managerial expertise and professionalism, is still unsettled. However much courts and legislatures might wish otherwise, public managers need judicial deference to fulfill legislative mandates.

Institutional reform remedies are presently based on the premise that the inflexible application of rules and standards to every act an administration performs will produce a more equitable result—one that comports with constitutional rights—than deference within an institutional framework. We argue that this premise is incorrect. Confronting this inconvenience requires that legislators and judges recognize that responsibility requires the authority to act, that authority requires discretion in order that reliability and consistency be assured, and that discretion requires a precept of managerial responsibility.

Our objective is to strengthen the judicial check on public management in human services agencies by clarifying and relocating it in a way that encourages responsible administration. We do not pretend to deal with absolute solutions. We recognize that the attitude of courts toward the freedom of the public administration varies from time to time, jurisdiction to jurisdiction, and with the subject matter concerned. Moreover, public officials remain subject to sanction with respect to all the actions they take in conformity to the precept of managerial competence. An official may strike a balance that is offensive to the public or to the legislature. Though rational, i.e., disinterested and based on analysis, the administrator’s reasons might be regarded by the public or legislators as unconvincing and, thus, invite reprisals. As we have stressed, there is no one right answer to the complex questions of governance, and reasonable legislators, stakeholders, and judges may well differ on the manager’s exercise of responsibility.

Our position is that administering reprisals in the case of an errantly struck balance or unconvincing argument is the dominion of the legislature, not the courts. It is the responsibility of the courts to determine whether managers have acted responsibly, i.e., have been demonstrably accountable, balanced, and rational in their decisions and actions. Our argument amounts to providing principled

309. WHITE, supra note 103, at 446 (citing W. H. Pillsbury, Administrative Tribunals, 36 HARV. L. REV. 405, 405-25, 583-92 (1922-23)).
latitude for the public manager to frame actions in a manner that deserves the approbation of the courts.

We concede that this argument is not politically neutral. In arguing the need for another kind of balance, that between formal procedures and discretion, Don K. Price noted:

[t]hose who wish to protect private interests against interference will naturally, at least in the short run, want to tip the balance in favor of more formalized procedures. Those who mainly wish to accomplish broad social objectives and to integrate national policy will generally want to tip it in favor of more administrative discretion.\(^{310}\)

Our argument here is not that the balance should be struck one way rather than another, but instead that, in the case of complex social legislation, such as that which seeks to protect children from harm, the balance has already been struck by the legislature: accomplishing broad social objectives is the goal. Once the goal is chosen, discretion in its pursuit is essential. The separate elements of the precept of managerial responsibility are highly interdependent. Administration must at all times be accountable. Accountability requires good judgment, and good judgment depends in turn on recognizing the need for balance among competing values, a process that, to be accountable, must be rational.

*Marisol Revisited*

Though we believe our argument to be applicable more generally, we conclude by applying the precept of managerial responsibility to the *Marisol* case.\(^ {311}\) In our view, ACS fulfilled the precept of managerial responsibility, exhibiting accountability, judgment, balance, and rationality sufficient to sustain the conclusion that the agency was well managed.

- **ACS exhibited accountability.** City officials, in direct response to evidence of mismanagement under the old organization of child welfare services, created a new agency under qualified leadership. The new leaders immediately established an ongoing working relationship with the Mayor and his staff and with other city agencies, placed priority on implementing statewide management systems, established ongoing advisory relationships with both national and local leaders and experts in child welfare, created an Accountability Review Panel to monitor

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case management, and instituted a system for monitoring agency compliance with legislative and judicial mandates. New management information systems were utilized to ensure accountability to agency policy objectives among caseworkers and their supervisors.

- **ACS 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. Decisiveness came to characterize agency management, e.g., a new management team was assembled, backlogs were eliminated, new personnel qualifications and training were initiated, additional case workers were hired, and relationships with field offices and with agency contractors were revamped.

- **ACS exhibited balance.** The agency Reform Plan established priorities and timetables to guide agency resource allocation among its myriad functions and activities. Senior management continually monitored implementation of the Plan and reported on problems and accomplishments. Budgetary resources and management effort were reallocated toward the highest priority problems, e.g., personnel hiring and training, a new detention center, and management information systems development.

- **ACS exhibited rationality.** Adherence to the Reform Plan replaced ad hoc, crisis-oriented, and pressure-driven management. The new management information systems were used to create performance indicators, and the publication of comparative data on field offices was used as a management tool, enabling senior managers at headquarters and in borough offices to identify trends, ask questions, and engage in focused trouble-shooting. Information from case reviews was used to establish best practice guidelines that were beginning to be incorporated into training and supervision.

Though the Reform Plan could not, because no plan could, produce mistake-free administration, we believe that it would have, and indeed already had, improved the child welfare environment in New York City. Because the federal court refused to abstain, we cannot know precisely what this policy innovation might have achieved. We do know that from the date that the lawsuit was filed until Judge Ward approved the settlement agreement, there were two years of steady improvements in child welfare administration. In the future, responsible reform programs originating in the administration should be allowed to prove themselves before being displaced by a consent decree, settlement agreement, or structural injunction.