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Retrofitting the Administrative State to the Constitution: Congress and the Judiciary's Twentieth-Century Progress

One of the twentieth century's "big questions" for United States government has been how best to retrofit, or integrate, the full-fledged federal administrative state into the constitutional scheme. The public administration orthodoxy initially advocated placing the executive branch almost entirely under presidential control; Congress and the federal judiciary responded otherwise. Congress decided to treat the agencies as its extensions for legislative functions and to supervise them more closely. The courts developed an elaborate framework for imposing constitutional rights, values, and reasoning on public administration practice. As the challenge of retrofitting continues into the twenty-first century, public administrators might profitably play a larger role in the constitutional discourse regarding the administrative state's place in constitutional government.

> [U]nder our system of divided powers, the executive branch of the national government is not exclusively controlled by the President, by the Congress, or by the courts. All three have a hand in controlling it, each from a different angle and each in a different way (Meriam 1939, 131).

One of the "big questions" of American public administration has been how to retrofit, or integrate, the federal administrative state into the nation's constitutional scheme. The parameters of the problem are well understood. The Constitution's framers could not have anticipated the size, scope, or power of the modern administrative state. American public administration was not organized according to democratic theory and values (Waldo 1948, 1984). The separation of powers collapses into administration as agencies combine legislative, executive, and judicial functions. Administrative agencies threaten the separation of powers because, in the words of former Supreme Court Justice Robert Jackson, they are "a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking" (*Federal Trade Commission v. Ruberoid*, 343 U.S. 470 [1952]).

The overall problem of integrating federal administration into democratic-constitutional government may not be fully solvable (Waldo 1984, xviii), but its scope should not be allowed to obscure the progress that has been made. One of the great administrative developments of the twentieth century has been the extent to which Congress and the federal judiciary have responded to the rise of the administrative state by infusing it with constitutional values and folding it into the separation of powers. Psychologically, the turn of the century is a time for taking stock. That is the genre and purpose of this article.

The Orthodox Response: Enhance Presidential Control

American public administrative thought was founded from the 1870s through the 1920s on a variety of propositions that are now regarded as untenable, perhaps even hazardous. In fairness to the nineteenth-century civil service reformers and the progressives who followed them, it should be noted that their public administrative doctrine was developed primarily to serve fundamental political objectives (Rosenbloom 1971, chap. 3; Rosenbloom and O'Leary 1997, 2–6). Nevertheless, the orthodoxy's poli-

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tics–administration dichotomy has been "confounding" (Golembiewski 1984). Its belief that administrative systems and techniques are freely transferable among political systems has promoted frequent, and sometimes catastrophic, failure (Caiden 1991; Farazmand 1998).

Less well-appreciated, the orthodoxy denied that the development of the large-scale federal administrative state in the 1930s posed significant problems for the constitutional separation of powers. In its view, administration was almost exclusively an executive function that could be managed by the president and an institutionalized presidency. However, "executive-centered" public administrative theory has also proven to be inadequate. Congress and the courts cannot be relegated to minor roles in determining the course of federal administration.

The Constitution clearly provides Congress with considerable authority over federal administration. Funding, staffing, and empowering agencies require legislation. As W.F. Willoughby put it in 1927, Congress is the source of federal administration (115). The role of the courts is less specifically charted by the Constitution. However, in the framers' day judicial power was extensive and could reasonably be assumed to bear broadly on administration (Woll 1963, 91–92). Nevertheless, in the mid-1930s, the orthodoxy argued that the best way to integrate federal administration into the separation of powers was to place it almost entirely under the president's control.

The orthodoxy's most significant call for presidential domination of administration came from the U.S. President's Committee on Administrative Management (PCAM) in 1937. Its membership included three pillars of the public administrative establishment: Louis Brownlow (chair), Charles Merriam, and Luther Gulick (see Karl 1963). Proceeding on the basis that "The President is indeed the one and only national officer representative of the entire Nation," the Committee claimed that only good could come of enhancing his ability to be "the Chief Executive and administrator within the Federal system and service" (PCAM 1937, 1, 2). The "canons of efficiency require[d] the establishment of a responsible and effective chief executive as the center of energy, direction, and administrative management" (PCAM 1937, 3).

Not surprisingly, the committee specified no role in federal administration for the judiciary. The courts were out of favor with New Dealers for their interpretations of the Commerce Clause and the "non-delegation" doctrine. Shortly after the committee issued its report, President Roosevelt introduced what became known as the court-packing plan and called for other changes in the federal judicial system (Gunther 1975, 167–68). At the time, calling for greater judicial involvement in federal administration was unthinkable (see Pritchett 1948).

The committee was not much more generous toward Congress. It viewed the legislative role as essentially appropriating funds, with no strings attached, and then turning the entire administrative enterprise over to the president: "We hold that once the Congress has made an appropriation, an appropriation which it is free to withhold, the responsibility for the administration of the expenditures under that appropriation is and should be solely upon the Executive" (PCAM 1937, 49–50).

This constitutional theory is worse than dubious: It is patently wrong. In John Rohr's words, "At the heart of the [Committee's] doctrine is a fundamental error that transforms the president from chief executive officer into sole executive officer" (1986, 139).

It was also a major political error. Congress rejected most of the committee's specific recommendations. The committee's report may have been the orthodoxy's high noon (Seidman 1970, 9), but its chief legislative proposal was denounced in Congress as "the dictator bill" (Karl 1963, 24). As Senator Joel Bennett Clark put it, "no member of that committee had any real belief in Congress or any real use for the legislative department of government" (Polenberg 1966, 127). The answer to retrofitting the federal administrative state into the constitutional scheme does not lie in equating administration with the president's constitutional duty to faithfully execute the laws (see Willoughby 1927, 10–11; 1934, 114; *Morrison v. Olson*, 487 U.S. 654 [1988]). The president has substantial authority over administration, of course, but so do Congress and the federal courts.

Congress's Strategy for Retrofitting the Administrative State

In the 1930s, several senators and representatives publicly wondered how Congress should respond to the full-fledged administrative state (Rosenbloom, forthcoming 2000). There was considerable concern that either Congress was allowing itself to be supplanted by the agencies, or that the agencies were usurping its powers. Throughout the New Deal, Congress had delegated legislative authority to the president and administrative agencies on scale without precedent. Sometimes these delegations contained no real standards (*Schechter Poultry Corporation v. United States*, 295 U.S. 495 [1935]). The legislative committee structure was archaic, and Congress was institutionally incapable of exercising anything more than haphazard oversight of the agencies' activities (La Follette 1946). After World War II, some members even asked if Congress was necessary and gave "serious thought to the possibility that Congress might *not* survive the next twenty years" (Kefauver and Levin 1947, 5).

After intermittently considering how to deal with federal administration for about a decade, in 1946 Congress

collectively adopted a lasting institutional strategy for repositioning both itself and the agencies in the constitutional structure (see Rosenbloom, forthcoming 2000). Congress would write the procedures to be used by administrative agencies and exercise "continuous watchfulness" of their operations. In the process, it would begin to retrofit the agencies into the constitutional scheme by mandating that administrative procedures incorporate constitutional values and by subjecting administration to more systematic congressional control. These approaches crystallized during the extensive legislative debates on the Administrative Procedure Act of 1946, the 1946 Legislative Reorganization Act (which included the Tort Claims Act as Title IV), and the Employment Act (1946). Debate often focused on the nature of the separation of powers and the scope of individual rights.

Congressional retrofitting involved two main prongs. Each has served as a platform for the continuing infusion of democratic–constitutional values into federal administration and for the subordination of administration to congressional influence. Together, they do much to integrate federal administration into the constitutional scheme.

Constitutional Values

First, Congress reluctantly agreed that it would perforce continue to delegate its legislative authority to the agencies. However, unlike past practice, it would treat the agencies as *extensions of Congress* for carrying out legislative functions. This would be accomplished primarily by structuring their procedures, especially those regarding rule making and openness. The same general values that informed congressional lawmaking would be imposed on the agencies. As Rep. Frances Walter explained, "Day by day Congress takes account of the interests and desires of the people in framing legislation; and there is no reason why administrative agencies should not do so when they exercise legislative functions which the Congress has delegated to them" (U.S. Congress 1946, 5756).

The Administrative Procedure Act (APA) was a major step toward applying legislative values to federal administration. It was hailed by supporters as a statute of constitutional proportions (*American Bar Association Journal* 1946, 377), though, in retrospect, many of its original provisions may appear rudimentary and riddled with loopholes. President Truman readily signed the act despite some doubt in the executive branch as to the wisdom of having Congress specify administrative procedures (Brazier 1993, 318–30).

The APA seeks openness and the opportunity for public participation in rule making (see Kerwin 1999, chap. 2, 5; Warren 1996, chap. 4, 6). Informal rule making involves publishing proposed rules in the *Federal Register* and providing an opportunity for public comment. Formal rule making procedures create an elaborate hybrid between legislative and judicial hearings. The act also calls on agencies to publish and provide information about their operations. Other key features speak to the scope of judicial review and due process in agency adjudication. In some respects, the act was viewed as "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government" (Senator Pat McCarran, U.S. Congress 1946, 2149).

Participation and Representation in Rule Making

The APA's rationale for promoting public participation in rule making has served as a platform for three additional statutes which further infuse federal administration with constitutional values: the Federal Advisory Committee Act of 1972 (FACA), the Negotiated Rulemaking Act of 1990 (NRMA), and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

FACA was a congressional effort to make the federal advisory committee system more effective and representative. Such committees, which are established and funded by the government, are sometimes considered a "fifth branch" of the federal government (U.S. Senate 1978, 217, 293, 299–300). FACA requires their membership to represent the interests they purport to speak for and their meetings to be open to public scrutiny (see Steck 1984).

In some respects, NRMA is an idealization of the legislative process. It provides for regulatory negotiation in which a committee representing affected interests, including regulated entities, the public, unions, and the agency, openly negotiates the content of a rule. Regulatory negotiation looks toward reducing the adversarial quality of conventional rule making, finding better solutions to real world problems, and reducing the likelihood of litigation after a rule is enacted (see Coglianese 1997). From an orthodox standpoint, the notion that politically neutral administrative experts should *negotiate* rules with outsiders is, no doubt, startling.

The APA, FACA, and NRMA open agency rule making to public participation. SBREFA takes their logic one step further: It requires agencies to reach out to small entities which might not otherwise be able to comment effectively on proposed rules or have the opportunity to serve on advisory and negotiating committees. Its substantive purpose is to assist agencies in assessing the impact of proposed rules on small businesses and governments.

The SBREFA also provides Congress with greater control over the content of agency rules. It requires that rules be submitted to Congress and the General Accounting Office (GAO) before they can take effect. Major rules are subject to a sixty-day review period in Congress, during

which they can be disapproved by a joint resolution. There are a number of exceptions, and such a joint resolution can be vetoed by the president (though potentially reinstated by congressional override). However, if a rule is successfully disapproved by Congress, it cannot be reissued in the absence of specific legislative authorization. This aspect of the SBREFA closes an important link in Congress's delegate-but-regulate strategy for making the agencies' exercise of legislative functions comport more faithfully with constitutional values. It enables Congress, the preeminent representative governmental unit, to reject the agencies' exercise of delegated legislative authority on the grounds that a rule does not comport with legislative intent.

Transparency

The APA's limited provisions for transparency also served as a platform for additional congressional regulation of administrative procedures. The chief statutes here are the Freedom of Information Act of 1966 (FOIA, substantially amended in 1974) and the Government in the Sunshine Act of 1976. Both were congressional initiatives that engendered considerable executive opposition.

FOIA is a disclosure statute that builds on the APA's limited provisions for public information. Its key feature is that an individual does not need to show any particular standing or special need for the information he or she is seeking (see Vaughn 1994 for an evaluation).

The Sunshine Act applies to about 50 federal multiheaded boards and commissions. As a general rule, it requires them to exercise their legislative authority in the open rather than behind closed doors. However, there are a number of exceptions and meetings, or portions of them, that can be closed for a variety of reasons (see May 1997). In an earlier form, the Sunshine bill fully incorporated the view that agencies are extensions of Congress for legislative functions by applying the same requirements for openness to congressional committees. (The provision was dropped in favor of dealing with congressional openness separately.)

FOIA and the Sunshine Act are frequently criticized for encumbering the administrative process and frustrating agency decision making. But such critics miss a key point that was made during the congressional debates over legislating administrative procedures. As Senator McCarran explained in 1946, the Senate Judiciary Committee had "taken the position that the [APA] bill must reasonably protect private parties even at the risk of some incidental or possible inconvenience to, or change in, present administrative operations" (U.S. Congress 1946, 2150). Transparency is a matter of constitutional concern that, for Congress, trumps orthodox administrative values. The Senate's report on FOIA rests much of its case on James Madison's claim that "Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both" (U.S. Senate 1974, 37–38). As administrative law scholar Robert Vaughn (1994, 481) notes, federal information policy is not an "isolated body of law" because "[c]onflicts regarding information policy inescapably participate in major debates about theories of administrative legitimacy and decision-making."

Supervising Administration

The second major component of Congress's strategy for better integrating federal administration into the constitutional scheme was to subject the agencies to more comprehensive legislative supervision. Leading public administrative thinkers from the orthodoxy to contemporary "reinventers" have been wary—if not outright hostile—to such supervision (for example, Brownlow 1949, 116; Gore 1993, 13, 17, 20, 34). Nevertheless, the constitutional logic for congressional oversight is compelling. Agencies are empowered and funded by Congress and, therefore, they should be subject to its scrutiny. As Rep. A.S. Mike Monroney explained in 1946, "[O]nly half the job of a standing committee is finished when it passes the legislation .... [T]he other half should be in seeing how that legislation is carried out and seeing if the agencies are living up to the mandates of the Congress and living within the restrictions which we provide" (U.S. Congress 1946, 10040).

The Legislative Reorganization Act of 1946 was an initial step toward upgrading congressional oversight of administration. It reorganized the congressional committee structure so that the committees in each chamber would more or less parallel one another *and*, to an extent, the organization of the federal bureaucracy. Section 136 called on each standing committee "to exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee." Additionally, the act increased and further institutionalized committee staff, in part to assist with oversight.

As in the case of the APA, the 1946 Legislative Reorganization Act provided a platform for extending Congress's role in federal administration. Today, congressional (sub)committees are deeply involved in agency decision making and operations. In some cases congressional action is excessive—even abusive (Gore 1993, 13). Nevertheless, this may be part of the price the United States pays for the separation of powers. As Francis Rourke (1993) has reminded us, constitutionally, federal administration is under the "joint custody" of the president and Congress (and, one should add, the courts as well). Following the PCAM's advice might not have led to "an American form

of dictatorship," as Rep. Hamilton Fish contended (Polenberg 1966, 50). However, if the checks and balances system is to be balanced, each constitutional branch needs leverage and authority over federal administration, which, by all accounts, is a major center of governmental power.

For the most part, Congress's extension of its supervisory capacity since 1946 is well-known to the public administration community. Its formal oversight mission was strengthened by the Legislative Reorganization Act of 1970, which calls on the committees to "review and study, on a continuing basis, the application, administration, and execution of those laws" under their jurisdictions. The number and quality of committee staff has grown substantially (Rosenbloom 2000). The Congressional Budget and Impoundment Control Act of 1974 strengthened Congress's information and role in the budget process (Joyce 1993, 10). The Inspector General Act of 1978 created congressional "moles" in the agencies (Moore and Gates 1986, 10; Light 1993). The GAO was transformed from an auditing agency into one with great competence in program evaluation (Mosher 1984; Walker 1986). Similarly, the Legislative Reference Service, which was established by the 1946 Reorganization Act, was significantly upgraded in 1970 by its transformation into the modern Congressional Research Service. The Chief Financial Officers Act of 1990 was aimed at improving federal financial management and the quality of information available to Congress about agencies' finances.

The potential for congressional supervision of the agencies took a quantum leap with the enactment of the Government Performance and Results Act of 1993 (GPRA). The act was a congressional initiative that enjoyed the Clinton-Gore administration's support for its promotion of results-oriented administration. It requires agencies to formulate strategic plans with concrete goals and indicators, preferably quantitative, for assessing progress toward them. It specifically requires the agencies to "consult with the Congress" when formulating their strategic plans. Although not actually required by the act, Congress has also claimed "a vital role regarding performance measurement development" (U.S. General Accounting Office 1997, 13).

In practice, the GPRA goes a long way toward enabling congressional committees and work teams to define legislative intent for the agencies and to make sure that it is written into their strategic plans. By most definitions, this gives congressional units a direct role in managerial decision making. The act also looks toward performance budgeting as a means of making sure that Congress obtains the programmatic results it seeks, or at least does not pay for agency activities that do not deliver what it wants (see Radin 1998 for an analysis). It has the potential to strengthen the congressional portion of joint custody immensely.

1946 As a Baseline for Retrofitting

If 1946 is used as a baseline for Congress's effort to retrofit federal administration into the constitutional scheme, it is evident that by the 1990s, considerable progress had been made. Administrative procedures now more closely reflect democratic-constitutional norms for legislating and governing in general. In fact, the entire debate over administrative procedures has shifted. In 1934, the American Bar Association's Special Committee on Administrative Law (1934, 228) voiced a common complaint that agency procedures were haphazard and obscure: "Practically every agency. . .has published its enactments, sometimes in the form of official printed pamphlets, bound or loose-leaf, sometimes in mimeographed form, sometimes in privately owned publications, and sometimes in press releases. Sometimes they exist only in a sort of unwritten law." Today, complaints are much more likely to be about how administrative law aimed at facilitating public participation, representation, and transparency encumbers administrative performance (Sargentich 1997, 136–137; Lubbers 1997, 121).

Similarly, it is clear that Congress has gone a long way toward integrating the agencies into the separation of powers by strengthening its capacity to supervise them. In 1946, Rep. Monroney contended that Congress was "trying to do [its] work sitting on an old-fashioned high bookkeeper's stool with a slant-top desk, a Civil War ledger, and a quill pen" and therefore could not do the ". . . fundamental task of supervision that the framers of the Constitution had in mind" (U.S. Congress 1946, 10039). By contrast, today Vice President Al Gore's National Performance Review seeks to "liberat[e] agencies from congressional micromanagement" (Gore 1993, 34).

Evaluations of congressional retrofitting are bound to differ. Perhaps Congress has gone too far or not yet far enough. For the most part, however, its actions have been in keeping with contemporary constitutional theory. Congress lost the legislative veto in *Immigration and Naturalization Service v. Chadha* (462 U.S. 919 [1983]). However, the Supreme Court's language in other cases, notably *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council* (435 U.S. 519 [1978]) and *Morrison v. Olson* (487 U.S. 654 [1988]), endorses very broad congressional involvement in federal administration. In this respect, one of the Court's decisions in 1838 remains good law as we enter the twenty-first century: "[I]t would be an alarming doctrine, that [C]ongress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President" (*Kendall v. United States*, 37 U.S. 524 [1838]).

Judicial Retrofitting

Retrofitting by the federal judiciary has been extensively analyzed elsewhere and consequently requires only brief review here (see Rosenbloom and O'Leary 1997; Rosenbloom, Carroll, and Carroll 2000). Its thrust is to force constitutional rights, reasoning, and values into public administrative practice at all levels of government. It is best understood as the product of four interrelated steps.

First, beginning in the 1950s and continuing to the present, the federal courts established a vast array of previously undeclared rights for individuals in their encounters with public administrators. For instance, clients or customers gained substantive rights, procedural due-process protections, and far greater equal protection of the laws. Their privacy received protection (albeit modest) under the Fourth Amendment. Public employees were afforded similar rights and protections. Street-level interactions became infused with Fourth Amendment considerations. Prisoners' Eighth Amendment, due process, equal protection, and other constitutional rights were strengthened substantially. Individuals confined to public mental health facilities obtained a constitutional right to treatment or habilitation. Property owners' Fifth Amendment protections against uncompensated takings have been enhanced (see Rosenbloom and O'Leary 1997).

Second, the courts made it easier for individuals to gain standing to sue administrative agencies for violations of their rights. At one point, the threshold for bringing suit in federal court was reduced "to the simple proposition that one who is hurt by governmental action has standing to challenge it" (Davis 1975, 72). Although standing requirements are tighter today than they were in the 1970s, it is probably still easier to challenge agencies in federal court than it was prior to the 1960s (Rosenbloom and O'Leary 1997, 289–91).

Third, the federal courts developed a new type of lawsuit that facilitates their direct intervention in administrative operations as a means of protecting individuals' rights. Such "remedial law" suits enable a single federal judge to control an entire prison, mental health facility, school, personnel, or other public administrative system. Although such suits typically involve state or local governments, federal agencies are subject to them as well (see Rosenbloom and O'Leary 1997, 283–89).

Fourth, the courts vastly increased the liability that most public employees face for violating individuals' constitutional rights. Today, a public employee typically faces personal liability for violations of clearly established constitutional rights of which a reasonable person should have known. Punitive as well as compensatory money damages can be assessed against individual public administrators. Indemnification varies among federal agencies and other governmental units (see Rosenbloom and O'Leary 1997, 265–81).

Liability for constitutional torts (that is, violations of individuals' constitutional rights) gives public employees a strong incentive to know the constitutional law that governs their work. In effect, as the Supreme Court has flatly stated, competence in constitutional law has become a standard aspect of job competence for public administrators at all levels of government (*Harlow v. Fitzgerald*, 457 U.S. 800 [1982]; Rosenbloom, Carroll, and Carroll 2000).

The judicial framework for retrofitting public administration into the constitutional scheme was essentially in place by the mid-1970s. How the courts use it varies among constitutional rights and according to judicial philosophies. For instance, standing requirements have been tightened since the 1970s. The Supreme Court has also tried to rein in the federal district courts' practice of remedial law, though without clear success (Rosenbloom and O'Leary 1997, 287–89). At the same time, the Court has extended First Amendment rights to contractors (*Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668 [1996]; *O'Hare Truck v. City of Northlake*, 518 U.S. 712 [1996]; see Rosenbloom 1999, 160–64). It has applied equal protection more rigorously to governmental contracting than in the past, though whether this expands or reduces constitutional rights depends on one's view of affirmative action (see especially Justice Clarence Thomas's concurring opinion in *Adarand Constructors v. Pena*, 515 U.S. 200 [1995]). In a set of decisions that may have far-reaching implications for governmental outsourcing, the Court strongly reiterated the principle that private parties engaged in "state action" (for example, public functions such as incarceration) are subject to constitutional constraints (*West v. Atkins*, 487 U.S. 42 [1988]; Rosenbloom 1999, 150–55; Gilmour and Jensen 1998). Currently, the potential liability of "private state actors" for constitutional torts is *greater* than that of public employees (*Richardson v. McKnight*, 117 S.Ct. 2100 [1997]; Rosenbloom 1999, 155–60).

As in the case of congressional retrofitting, judicial imposition of constitutional concerns into public administrative practice is best measured against the baseline of the 1940s. At that time, equal protection analysis still allowed racial segregation in public schools, prisons, and government agencies. It failed to prevent rampant governmental discrimination. Clients' benefits could be denied or terminated without regard to procedural due process or substantive rights, as could public employees' jobs (Rosenbloom and O'Leary 1997, chap. 4–7). Federal employees were investigated and sometimes dismissed for disloyalty on the basis of behavior which is now clearly protected by the First Amendment (Rosenbloom and O'Leary 1997, chap. 6; Rosenbloom 1971, chap. 6). The Eighth Amendment

did not apply to conditions in prison. Even within this framework of limited rights, public administrators generally enjoyed absolute immunity from suit for their constitutional torts. Today, by contrast, public administration is extensively governed by constitutional law.

Conclusion: A Machine That Would Go of Itself?

The Constitution has been likened to "a machine that would go of itself" (see Kamen 1987). However, congressional and judicial retrofitting of the administrative state into the constitutional scheme has been neither automatic nor easy. There has been opposition—much of it concerted—from elected executives, political appointees, and public administrators at many steps along the way (Rosenbloom 2000). Criticism of congressional "micromanagement" and judicial "interference" remains common. Often, the critics and retrofitters talk past one another.

Whether retrofitting has been good or bad for administrative cost effectiveness is not the whole issue. As Chief Justice Warren Burger once noted, constitutional government can seem "clumsy, inefficient, even unworkable," but its purpose is to "preserve freedom" not to maximize convenience or efficiency (*Immigration and Naturalization Service v. Chadha 462 U.S. 919, 959 [1983]*). The larger question is how best to adjust twentieth-century retrofitting to the twenty-first-century challenges that are sure to come. Constitutional government has strong logics. It may even "go of itself" in some sense. But as Constance Horner, former director of the U.S. Office of Personnel Management, suggested some time ago, constitutional government is likely to go much better if the public administrators who inhabit it play a larger role in constitutional discourse (Horner 1988, 14).

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