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## BUREAUCRATIC OPPRESSION: ITS CAUSES AND CURES

EDWARD L. RUBIN\*

One of the most salutary developments in modern public law scholarship has been the emergence of an administrative law literature focusing on governance rather than legality. Until recently, scholarship about the operation of modern government devoted nearly all its attention to the legal limits on administrative action.<sup>1</sup> This is an important inquiry, and one that can be pursued using familiar modes of legal analysis. The Supreme Court has certainly encouraged it by reviving formalist approaches to federalism and the separation of powers.<sup>2</sup> Even so, the

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\* University Professor of Law and Political Science, Vanderbilt University. I want to thank Lisa Bressman, Daniel Cornfield, Matthew McCubbins, Roger Noll, Daniel Rodriguez, and Kevin Stack for their comments on various aspects of this Article, and my research assistants, Leah Bressack and Maria Glover. All the views expressed are, of course, my own.

1. This literature can be characterized as either formalist, that is, deriving those limits from legal authority, most notably the Constitution, or functionalist, that is, deriving those limits from pragmatic considerations of governance. For discussions of the formalist and functionalist approaches, see, for example, Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Consistency?*, 72 CORNELL L. REV. 488, 488–89 (1987) [hereinafter Strauss, *Formal and Functional Approaches*] (noting that the Supreme Court has alternatively decided separation of powers questions on the basis of formal and functional considerations); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 584–86 (1984) (explaining how organizations can have formal distinctions and yet be functionally similar). The functionalist approach, although addressing the same issue of legal limits as the formalist approach, opens the door to the governance approach discussed below. See *infra* text accompanying notes 5–6.

2. Cf., e.g., *Clinton v. New York*, 524 U.S. 417, 448–49 (1998) (striking down the Line Item Veto Act for violation of the Article I, Section 7 rules governing the enactment of legislation); *Printz v. United States*, 521 U.S. 898, 935 (1997) (prohibiting the federal government from “commandeering” state officials to administer federal law); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (striking down a federal law that banned guns in school zones in part because upholding the law would “bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States”); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (striking down

resulting scholarship, like the Court's decisions, tends to nibble around the edges of modern government without addressing its essential functions. Recent scholarship, in contrast, addresses basic questions regarding the organization and operation of the governmental apparatus: How should agencies be designed? How should they implement their statutory mandates? How should they interact with each other? Does cost benefit review improve the quality of their decisions? Does the timing of decisions affect the quality of those decisions?<sup>3</sup> These inquiries demand new modes of analysis, often unfamiliar in legal literature, that hold great promise for understanding and improving modern government.

Much of the new scholarship involves what the legality model calls "rulemaking."<sup>4</sup> From the governance perspective, rulemaking is only a

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the Gramm-Rudman-Hollings Act as an impermissible delegation of executive authority to a legislative official); *INS v. Chadha*, 462 U.S. 919, 956–59 (1983) (striking down legislative veto for violation of Presentment Clause and the bicameralism requirement of Article I, Sections 1 and 7).

3. For sources addressing these questions, see, for example, Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (analyzing agency insulation by looking at neglected elements of agency design); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006) (investigating effect of cost-benefit analysis and other forms of executive control on agency action and behavior); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003) (same); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (discussing agency reform efforts and proposing a "collaborative agency" model); Jacob E. Gerson & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157 (2009) (exploring the way that the timing of agency announcements of decisions affects oversight of agency action); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (analyzing control of administrative agencies by presidential administrations); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008) (investigating the effect of changes in political control of the executive on patterns of rulemaking); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422 (2011) (exploring the impact of institutional design on the incentive of agencies to engage in information acquisition); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005) (identifying and analyzing the phenomenon of interagency lobbying).

4. This terminology appears in the Administrative Procedure Act (APA), 5 U.S.C. § 553 (2010). The precise term for what the new scholarship often calls "rulemaking" is "informal rulemaking," because the Act establishes a more formal procedure for making rules that is essentially equivalent to adjudication. See §§ 553(c), 556, 557. Since it is virtually impossible to make rules this way, Congress rarely requires this procedure and the Supreme Court has avoided interpreting statutes to conclude that it does. See *United States v. Fla. East Coast Ry.*, 410 U.S. 224 (1973) (Congress will not be assumed to have required formal rulemaking); Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1142–50 (1972) (describing impediments to formulating a rule specifying the peanut content of peanut butter using the formal rulemaking procedure). Thus, section 553 informal rulemaking is the most formal process by which administrative rules are made. See generally JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 195–402 (4th ed. 2006) (detailing the informal rulemaking process). Even this so-called informal rulemaking is often criticized as too formal. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (arguing that Congress, the President, and the courts have imposed

subset of a larger category of administrative action that is more accurately described as policymaking and generalized implementation.<sup>5</sup> In addition to rulemaking, government carries out a great deal of individualized implementation, that is, the application of established policy to individuals. The legality model tends to describe this function as “adjudication,”<sup>6</sup> but again, a governance approach indicates that adjudication is only a subset of a larger category that includes planning, targeting, threatening, cajoling, advising, and a variety of similar functions.<sup>7</sup> This larger category also includes most of the government’s interactions with individuals who are enrolled or confined in public institutions such as schools, universities, long-term care facilities, mental hospitals, and prisons. Legal scholarship about these interactions has tended to remain within the legality model, however, rather than moving to consider broader questions of governance.<sup>8</sup>

scientific and substantive requirements on rulemaking that unduly formalize the process). Truly informal approaches to rulemaking are those that avoid or circumvent the section 553 requirements. See Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383–88 (distinguishing legislative and nonlegislative rules and describing a variety of nonlegislative rules); *id.* at 402–10 (arguing that nonlegislative rules serve valuable and proper purposes); cf. David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 303–24 (2010) (explaining the rationale for prevailing judicial scrutiny of rules adopted without following 553 procedures); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1464–66 (1992) (arguing that interpretive rules not subject to section 553 are normatively acceptable when the government is bound and the citizen is not, but that a more formal approach, i.e., informal rulemaking, should be required when citizens are bound).

5. This characterization is purposely framed in non-legal terms, that is, it describes its category without reference to our prevailing concept of law. The point of doing so is to problematize, or bracket, that concept, so that its descriptive value can be assessed in comparison to other perspectives. See EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 12–22, 191–226 (2005) (describing and applying this bracketing method).

6. This terminology is also used in the Administrative Procedure Act. 5 U.S.C. § 554 (2010). Regarding the distinction between adjudication and rulemaking, see, for example, Mark H. Grunewald, *The NLRB’s First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 277–82 (1991) (describing the legal and practical aspects of a federal agency’s choice between rulemaking and adjudication); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1398–1403 (2004) (describing differing modes of policymaking available to federal agencies); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452–54 (1986) (describing the legislative history of the distinction between rulemaking and adjudication in the APA).

7. These varied functions are sometimes described in administrative law scholarship as “informal adjudication,” a term that is not used in the APA but seems to emerge from its structure. See Note, *The Federal Administrative Procedure Act: Codification or Reform?*, 56 YALE L.J. 670, 705 (1947) (depicting APA procedural requirements as a four-box grid, with the category of informal adjudication emerging from the structure of the grid but having no applicable APA provisions). In fact, most of them are not recognizable as adjudications at all but are more accurately characterized as executive action. Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 173–81 (2003) (describing category of executive action and explaining its relationship to existing APA categories).

8. Some actions carried out by administrative agencies that fall within the category of informal

One reason for the difference may be that policymaking and large-scale implementation are more visible than the quotidian interactions between government and individuals. Another may be the greater relevance and appeal of the legality model in the individualized implementation context. The application of legal rules, particularly constitutional rules, to issues of governmental structure is controversial; many commentators<sup>9</sup> and a number of recent and current Supreme Court Justices<sup>10</sup> would dispense with much or all of it. In contrast, the legality model for individualized implementation—which centers on procedural due process—is widely accepted. Although the extent of its application is a source of controversy, hardly anyone questions its value or its applicability to a wide range of modern governmental functions. There is now a general consensus that

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adjudication are genuine adjudications that happen to be exempt from the legal requirements of 5 U.S.C. §§ 554, 556, and 556. It might be desirable to extend these requirements to such actions. See Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003 (2004) (discussing rationale for extension and providing a draft statute to achieve it). But this argument could not be made for the vast majority of actions that fall into the informal adjudication category, since they bear no resemblance to actual adjudications.

9. Cf., e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) (arguing that courts should not enforce federalism or separation of powers issues where the political process functions effectively); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing that courts should only intervene where the political process has broken down due to exclusionary attitudes); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 149–335 (1998) (arguing that federalism and separation of powers considerations are outmoded in the American cultural and legal context); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 40–67 (1993) (a) (arguing that existing resource distribution and its common law enforcement is outmoded in modern era); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (arguing that delegation is essential to modern government and should not be viewed as violating separation of powers); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 387–97 (1989) (arguing that concept of delegation does not apply in administrative context and that separation of powers considerations should not constrain legislative grants of authority to agency); Strauss, *Formal and Functional Approaches*, *supra* note 1, at 510–25 (arguing that Supreme Court's separation of powers decisions fail to recognize the functional structure of modern government where previously separated powers are combined); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 812–17 (1983) (arguing that the Court's invalidation of the legislative veto on formalist separation of powers grounds failed to recognize the political functions served by the veto).

10. The most vehement opponent of the Court's formalist decisions was Justice White. See *Bowsher v. Synar*, 478 U.S. 714, 759 (1986) (White, J. dissenting) (describing the Court's "view of [the] separation of powers" as "distressingly formalistic"); *INS v. Chadha*, 462 U.S. 919, 967–1003 (1983) (White, J., dissenting) (arguing that Congress should be permitted to enact legislative veto provisions). In recent years the Court has endorsed the functionalist position in a number of cases and explicitly rejected formalist arguments, sometimes by wide margins. See, e.g., *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001) (unanimous decision rejecting claim that the Clean Air Act involved impermissible delegation); *Mistretta v. United States*, 488 U.S. 361 (1989) (8–1 decision permitting judicial commission to enact sentencing guidelines).

due process applies to the revocation of licenses and benefits, to the termination of government employment, to expulsion from beneficial institutions such as public schools, and to the more severe restrictions within punitive institutions such as prisons.<sup>11</sup>

The value of due process as a means of controlling bureaucratic oppression will be discussed below.<sup>12</sup> For the present, the point is not whether it is good or bad, but rather that it is only one of many mechanisms that can be deployed to regulate the government's interactions with individuals. To limit consideration of these mechanisms to due process protections is to make the same mistake that recent scholarship has overcome with respect to policy formation—that is, focusing primarily on issues of legality rather than confronting the broader range of issues that are relevant to governance.

The purpose of this Article is to expand consideration of the problems involved in the interactions between government and individuals, and to explore potential solutions to those problems, in the same manner that recent legal scholarship has expanded consideration of the problems and potential solutions involved in government policymaking. Because the topic is so vast, it is best approached by considering specific types of interactions between the government and individuals. This Article will focus on interactions that are potentially oppressive.<sup>13</sup> The paradigmatic case, and the image that might most quickly spring to mind, is the treatment of individuals applying for government benefits or licenses. But the problem extends to a much broader range of interactions, including the treatment of business enterprises by regulatory agencies, the treatment of government grantees by funding agencies, the treatment of individuals by protective services like police or firefighters, and the treatment of individuals in government institutions, whether beneficial or restrictive. Of course, each of these situations has distinctive features that merit specific

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11. For cases finding a right to due process in these various contexts, see, for example, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (termination of government employment); *Hewitt v. Helms*, 459 U.S. 460 (1983) (transfer of a prisoner to administrative segregation); *Goss v. Lopez*, 419 U.S. 565 (1975) (suspension from public school); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of parole); *Bell v. Burson*, 402 U.S. 535 (1971) (revocation of a driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits). The contested issue in these cases is whether the individual has a sufficient interest in, life, liberty or property to qualify for due process protection and how much protection is due under the circumstances. *See infra* Part II.A. These cases illustrate the fairly general agreement that, given a sufficient interest, the due process clause is applicable to all of these administrative settings.

12. *See infra* Part II.A.

13. For a definition of bureaucratic oppression, see *infra* text accompanying note 26.

and detailed analysis. Thus, a general discussion of this vast topic is necessarily of a preliminary nature.

Part I of the Article discusses the sources of bureaucratic oppression and identifies four such sources: status differences, stranger relations, institutional pathologies, and divergent incentives. Part II explores four solutions to the problem of bureaucratic oppression that have been proposed and in some cases implemented. The first two—the judicial solution of due process and the legislative solution of ombudspersons—involve actors external to the administrative system. The second two—the management theory solution of client-centered administration and the microeconomic solution of market simulating mechanisms—are internal to that system. Because of the limitations of these various solutions, Part III proposes an additional solution, described as a collaborative monitor. This monitor would be an agency of the legislature that could bring the issue of oppressiveness to an administrative agency's attention and then work collaboratively with that agency to resolve or ameliorate the problem.

#### I. THE SOURCES OF BUREAUCRATIC OPPRESSION

Modern administrative, or bureaucratic, government became dominant in Europe toward the end of the eighteenth century.<sup>14</sup> It advanced rapidly because it was a more effective mode of governance than the traditional approach, which was modeled on feudal relationships and the royal household.<sup>15</sup> In addition, it provided some protection for the working

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14. See THOMAS ERTMAN, *BIRTH OF THE LEVIATHAN: BUILDING STATES AND REGIMES IN MEDIEVAL AND EARLY MODERN EUROPE* 156–263 (1997) (discussing the administrative state in England and setting its advent at the end of the seventeenth and the beginning of the eighteenth century); RUBIN, *supra* note 5, at 29–34 (same); see also IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM IV: CENTRIST LIBERALISM TRIUMPHANT, 1789–1914*, at 21–76 (2011) (discussing the creation of the “liberal state” and setting the advent of the administrative state at the beginning of the nineteenth century). In the United States, however, the full transition, at the national level at least, came a century later. See RICHARD FRANKLIN BENSEL, *YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877*, at 366–415 (1990) (discussing changes in the structure of American society after the Civil War); THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* 1–152 (1984) (describing the rise of agencies and the increase in regulations in the United States from the late 1800s up to the New Deal); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920*, at 177–211 (1982) (describing the growth of the administrative state during the Progressive era).

15. See generally MARC BLOCH, *FEUDAL SOCIETY* 375–437 (L. A. Manyon trans., 1961) (describing medieval states based on feudal structure); S. B. CHRIMES, *AN INTRODUCTION TO THE ADMINISTRATIVE HISTORY OF MEDIAEVAL ENGLAND* 21–32 (2d rev. ed. 1959) (administration in Norman England developed from royal household); RICHARD MORTIMER, *ANGEVIN ENGLAND, 1154–1258*, at 41–76 (1994) (describing how the financial and legal system of Angevin England evolved from feudal structure and the administrative system evolved from the king's household); JOSEPH R.

classes whose relocation from their traditional villages to industrial cities had subjected them to the otherwise unregulated rigors of modernity. But the increasing power and extent of the bureaucracy also created serious potential for the mistreatment of the individuals who were subject to, and dependent on, this new mode of governance.

It is not surprising that the classic account of bureaucratic oppression, Nikolai Gogol's "The Overcoat,"<sup>16</sup> comes from nineteenth-century Russia, where bureaucracy was used as a means of controlling a vast, underdeveloped realm, and no mechanisms of democratic supervision were available to moderate its rigors.<sup>17</sup> The story involves a timid, impecunious government clerk named Akaky Akakyevich. When Akaky's newly-made overcoat, on which he has lavished his meager life savings, is stolen, he is advised that he will never get it back if he goes to the police because he will be unable to prove that was his. Instead, he should apply to a higher official, a Very Important Person, who can intercede on his behalf. But Akaky happens to appear at the time when this Very Important Person has received a visit from a childhood friend, whom he wants to impress. After making Akaky wait outside his office for an inordinate length of time, he allows him to come in and state his request. "What do you mean, sir?" he thunders to Akaky,

"Don't you know the proper procedure? What have you come to me for? Don't you know how things are done? In the first place you should have sent in a petition about it to my office. Your petition, sir, would have been placed before the chief clerk, who would have transferred it to my secretary, and my secretary would have submitted it to me. . . ."<sup>18</sup>

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STRAYER, ON THE MEDIEVAL ORIGINS OF THE MODERN STATE 49–52 (1970) (describing how French monarchs expanded their rule by extending feudal model of estate management to newly acquired provinces); 1 T. F. TOUT, CHAPTERS IN THE ADMINISTRATIVE HISTORY OF MEDIAEVAL ENGLAND: THE WARDROBE, THE CHAMBER AND THE SMALL SEALS 158–69, 177–87 (1937); 6 T. F. TOUT, CHAPTERS IN THE ADMINISTRATIVE HISTORY OF MEDIAEVAL ENGLAND: THE WARDROBE, THE CHAMBER AND THE SMALL SEALS 1–54 (1933); W.L. WARREN, THE GOVERNANCE OF NORMAN AND ANGEVIN ENGLAND, 1086–1272, at 65–86, 125–33 (1987) (describing how the royal administration in medieval England was modeled on the king's household).

16. NICOLAI V. GOGOL, *The Overcoat*, in TALES OF GOOD AND EVIL 233 (David Magarshack trans., 1957).

17. See R. D. CHARQUES, A SHORT HISTORY OF RUSSIA 114–17 (1956) (describing the harsh rule of Peter the Great and the bureaucracy he established); JOHN LAWRENCE, A HISTORY OF RUSSIA 156–61 (7th rev. ed. 1993) (describing Peter the Great's difficulties in running the Russian administrative state).

18. GOGOL, *supra* note 16, at 263. When Akaky mildly protests, the Very Important Person continues: "How dare you speak like this, sir? . . . Do you realise, sir, who you are talking to? Do you

Further admonitions of this kind reduce Akaky to a state of nervous collapse; he is carried out of the office, succumbs to a fever, and dies.<sup>19</sup>

Charles Dickens's depiction of the Circumlocution Office in *Little Dorrit*<sup>20</sup> is less severe but perhaps more familiar, as is to be expected from someone writing about a more securely ordered and at least quasi-democratic regime. When Arthur Clennam, recognizably a gentleman, attempts to discover the nature of the debt that is keeping William Dorrit in Marshalsea Prison, he is referred to the Circumlocution Office. There, he is treated politely enough but sent back and forth from one office to another, all occupied by supercilious officials who spend their time making sure that nothing get done. His most helpful informant tells him to keep inquiring until he finds out which department has a record of the debt:

“Then you'll memorialise that Department (according to regular forms which you'll find out) for leave to memorialise this Department. If you get it (which you may after a time), that memorial must be entered in that Department, sent to be registered in this Department, sent back to be signed by that Department, sent back to be countersigned by this Department, and then it will begin to be regularly before that Department.”<sup>21</sup>

The official's parting words, after providing this useful information, are: ““You had better take a lot of forms away with you. Give him a lot of forms!””<sup>22</sup>

These two narratives, which depict interactions whose consequences range from the tragic to the irritating, can be combined under the heading of bureaucratic oppression; they represent opposite or near opposite ends of a continuum, but only with respect to one type of interaction—the treatment of individuals applying for government benefits or licenses. A

understand, sir, who is standing before you?” *Id.*

19. Gogol also authored two somewhat more lighthearted variations on this same theme. In his play *The Government Inspector*, a minor civil servant passing through a small town is mistaken by the town's corrupt officials for a dreaded emissary from the capital. See NIKOLAY GOGOL, *The Government Inspector: A Comedy in Five Acts*, in *THE THEATER OF NIKOLAY GOGOL: PLAYS AND SELECTED WRITINGS* 51, 74–80 (Milton Ehre ed., Milton Ehre & Fruma Gottschalk trans., 1980) (scene describing the initial exchange between the civil servant and the fearful mayor of the town). In “The Nose,” a civil servant of the eighth rank wakes up missing his nose, only to find that it has been transformed into a State Counselor of the fifth rank. NICOLAI V. GOGOL, *The Nose*, in *TALES OF GOOD AND EVIL*, *supra* note 16, at 203.

20. CHARLES DICKENS, *LITTLE DORRIT* (Alfred A. Knopf, Inc. 1992) (1857).

21. *Id.* at 116. A rather similar parody of bureaucratic practices appears in the movie *BRAZIL* (Universal Studios 1985).

22. DICKENS, *supra* note 20, at 158.



separate set of scenarios could be supplied for different sorts of interactions, such as the treatment of business executives by government regulators.<sup>23</sup> It seems safe to say that bureaucratic oppression, with all its variations, and in all its many settings, is part of virtually every individual's experience in modern society. It fuels both general condemnations of the modern state<sup>24</sup> and anecdotal accounts of its endemic inefficiencies.<sup>25</sup> Eliminating or reducing such oppression can be regarded as desirable regardless of one's political orientation. Advocates of regulation will want to minimize the unpleasantness and inefficiencies of the bureaucratic process so that it functions more effectively and engenders less opposition. Opponents will want to reduce its severity and inefficiencies in the inevitably frequent circumstances where they are unable to eliminate it entirely for either political or practical reasons.

23. THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 105–13 (2d ed. 1979). Lowi offers the following imaginary dialogue, a somewhat less literary parallel to Gogol and Dickens:

*Wages and Hours Regional*: Mr. Employer, we find that you owe your ten employees a total of \$10,000 in back wages, plus fines, for having them take telephone messages while having lunch on the premises.

*Employer*: I object. You interrogated my employees without my knowledge, and did not interrogate me at all . . . .

*Regional*: How about \$2,500 in back pay?

*Employer*: Well, hell, I . . .

*Regional*: How about an exchange of memoranda indicating future compliance?

*Employer*: Mmm . . . [aside: Lawyers' fees . . . trips to testify . . . obligations to that damned congressman of ours . . .]

*Official memo from Regional, weeks later*: You are hereby directed to cease . . .

*Id.* at 108–09 (all brackets, Italics, and ellipses in original except first ellipsis, which indicates deleted material). Lowi's point is not that the employer in his scenario is either terrorized or even particularly discomfited, but rather that he is subject to arbitrary authority. *Id.* at 109 (“Disgust, disappointment, and distrust would arise in such a case because the agency appears gutless.”). The agency is using its discretion to impose requirements in an uncontrolled or lawless manner. *Cf.* *Chamber of Commerce v. U.S. Dep’t of Labor*, 174 F.3d 206 (D.C. Cir. 1999) (holding that a directive issued by the Occupational Safety and Health Administration (OSHA) violated the APA notice and comment requirements). As in Lowi's dialogue, the program that was struck down in *Chamber of Commerce* obtained compliance by using OSHA's ability to cause inconvenience by discretionary investigation. *See id.* at 208 (employer that complied with the program “reduce[d] by 70 to 90 percent the probability that it [would] be inspected”). The complexity of the situation is that the program seems to have been quite successful in achieving its purpose of reducing workplace injuries. This suggests that responses to the problem of bureaucratic oppression need to be carefully crafted to avoid hobbling valuable regulatory initiatives.

24. For such condemnations, see, for example, F.A. HAYEK, *THE ROAD TO SERFDOM* 112–31 (1994); LUDWIG VON MISES, *BUREAUCRACY* (Bettina Bien Greaves ed., Liberty Fund 2007) (1944); GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* (1965).

25. For such anecdotal accounts, see, for example, JACK ANDERSON & JOHN KINDER, *ALICE IN BLUNDERLAND* (1983); DONALD LAMBRO, *FAT CITY: HOW WASHINGTON WASTES YOUR TAXES* (1980); GEORGE ROCHE, *AMERICA BY THE THROAT: THE STRANGLEHOLD OF FEDERAL BUREAUCRACY* (1985).

For purposes of the following discussion, bureaucratic oppression will be defined as action by administrative agents that impose unnecessary and harmful burdens on private parties.<sup>26</sup> This definition is not limited to illegality. Although it certainly includes an unjustified fine or a decision that violates an agency's own rules,<sup>27</sup> it also includes dogged insistence on following the rules when doing so imposes burdens for no purpose (e.g., forcing people to stand in multiple, ambiguously labeled lines, or imposing of formal rules in an excessively rigid manner). David Shipler describes the "Kafkaesque labyrinths of paperwork" in a local welfare office:

If you want a job, you need day care for your children, and if you can't afford it, you have to get a day-care voucher, and if you want a voucher, you have to prove that you're working. Getting a voucher involves multiple visits to multiple offices—during working hours, of course.<sup>28</sup>

James Q. Wilson's description of a state motor vehicle bureau is similar: "motorists wait in slow-moving rows before poorly-marked windows . . . . When someone gets to the head of the line, he or she is often told by the clerk that it is the wrong line: 'Get an application over there and then come

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26. It is generally preferable to avoid the term bureaucracy, an eighteenth century synecdoche based on the French word for desk, since the term has developed such negative associations that it is now more of a condemnation than a description. See FRITZ MORSTEIN MARX, *THE ADMINISTRATIVE STATE: AN INTRODUCTION TO BUREAUCRACY* 16–21 (1957) (discussing the origins and ambiguity of the term); RUBIN, *supra* note 5, at 22–25 (discussing the negative connotations of the term). Administration, or administrative governance, is a preferable alternative. But in the context of oppressive behavior by administrative agents, bureaucracy turns out to be a highly descriptive term, as it evokes the various ways in which these agents can mistreat citizens.

27. On the general principle that an administrative agency must follow its own rules, see, for example, *Vitarelli v. Seaton*, 359 U.S. 535, 539–40 (1959) (holding that, in discharging petitioner, the administrator "was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily"); *Service v. Dulles*, 354 U.S. 363 (1957) (holding that the Secretary of State was bound to follow State Department regulations when discharging an employee); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (having established a deportation procedure, the Attorney General is required to follow it in individual cases); *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 387–89 (1932) (once the Interstate Commerce Commission has established maximum shipping rates that apply generally, it may not vary them in an individual case); Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1319–31 (1972) (discussing cases which considered administrative discretion); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 594–603 (2006) (reformulating the *Accardi* decision principle that agencies must follow their own rules). *Cf.* *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (holding that the government is required to obtain a warrant to conduct an administrative search, but does not need to show probable cause; rather it could show that it was conducting inspections according to a pre-arranged plan).

28. DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* 229 (2004).

back . . . .”<sup>29</sup> Bureaucratic oppression is not limited to personal or face-to-face interactions, but it certainly flourishes in these settings.<sup>30</sup>

In order to fashion remedies for bureaucratic oppression, it is first necessary to understand its sources. Here, there is an embarrassment of riches: almost every feature of the governmental process seems to possess the potential to generate oppressive behavior. As a result, it is necessary to be careful. The idea that government is invariably oppressive and that it never does anything correctly is a political vulgarity, a simplistic grumble that many American politicians seem content to adopt in an effort to recruit support.<sup>31</sup> As Anthony Giddens points out, modern society actually demonstrates an impressive functionality.<sup>32</sup> Water is provided, garbage is disposed of, food is supplied, and electricity is delivered; a vast range of basic services essential for life in a complex, urbanized society are systematically and reliably maintained by government or with government assistance, and without oppression in most cases. In addition, the government establishes a high level of civil order, sustaining the integrity of the nation both internally and externally. Therefore, when specifying

29. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 113 (1989).

30. It is therefore common among the front-line employees who deal with the public, which is an increasingly large proportion of the employees in both the public and the private sectors. *See generally* ROBIN LEIDNER, *FAST FOOD, FAST TALK: SERVICE WORK AND THE ROUTINIZATION OF EVERYDAY LIFE* 1–23 (1993) (discussing routinization of “interactive service work”); MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 13–26 (1980) (arguing that “street-level bureaucrats” make policy through their interactions with the the public); STEPHEN J. FRENKEL ET AL., *ON THE FRONT LINE: ORGANIZATION OF WORK IN THE INFORMATION ECONOMY* 205–21 (1999) (discussing customer relations and workflows in the context of service, sales, and knowledge work).

31. One example is Ronald Reagan’s famous quip: “[t]he 10 most dangerous words in the English language are ‘Hi, I’m from the government, and I’m here to help.’” President Ronald Reagan, Remarks to Representatives of the Future Farmers of America (July 28, 1988), *available at* <http://www.reagan.utexas.edu/archives/speeches/1988/072888c.htm> (last visited Jan. 8, 2012). For more systematic presentations of this type of view, see WILLIAM C. MITCHELL & RANDY T. SIMMONS, *BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY* 66–83 (1994); GORDON TULLOCK, ARTHUR SELDON & GORDON L. BRADY, *GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE* 53–62 (2002). For opposing views, see ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 149–240 (2002) (arguing that constitutional design can produce effective administrative governance structure); DONALD A. WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL INSTITUTIONS ARE EFFICIENT* 87–121 (1995) (arguing that microeconomic analysis indicates that political markets create efficient administrative structures).

32. *See* ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE: VOLUME TWO OF A CONTEMPORARY CRITIQUE OF HISTORICAL MATERIALISM* 172–81 (1985) (describing the efficiency of transportation and communications systems); ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 79–100 (1990) (discussing how mutual reliance in modernity is based on trust, organization, and expertise). For a similar view, see PAUL SEABRIGHT, *THE COMPANY OF STRANGERS: A NATURAL HISTORY OF ECONOMIC LIFE* 17–32 (rev. ed. 2010) (describing economic coordination in the supply of consumer products).

the sources of bureaucratic oppression, it must be kept in mind that although these sources seem pervasive, they are in fact not invariably present. Many government agents, at the federal, state and local level, are competent and considerate.<sup>33</sup> The sources of oppression are widespread, but they are not universal.

The sources that will be delineated here involve both the nature of government agents and the nature of the forces acting on them. In the first category are status differences and stranger relations; in the second are institutional pathologies and divergent incentives. Each of these four sources of oppression will be considered in turn.

### A. Status Differences

Government officials have generally occupied high status positions in most societies throughout the course of history. In the Western World, the social and governmental hierarchies were virtually identical in the Early and High Middle Ages. The king was the head of government precisely because he had the highest social status, that is, he was the feudal overlord of the nobility.<sup>34</sup> The social status of the nobles, in turn, was defined by their position as feudal lords, and this position made each of them the official ruler of a territory, or honor, and all who lived within it.<sup>35</sup> As royal

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33. CHARLES T. GOODSSELL, *THE CASE FOR BUREAUCRACY: A PUBLIC ADMINISTRATION POLEMIC* 84–111 (2004) (explaining why the stereotypical views of bureaucrats are wrong); DANIEL KATZ ET AL., *BUREAUCRATIC ENCOUNTERS: A PILOT STUDY IN THE EVALUATION OF GOVERNMENT SERVICES* 63–116 (1975) (in a survey of clients of seven government service agencies, slightly over two-thirds of the clients reported that they were satisfied, and nearly half reported that they were very satisfied).

34. See HEINRICH FICHTEAU, *LIVING IN THE TENTH CENTURY: MENTALITIES AND SOCIAL ORDERS* 157 (Patrick J. Geary trans., 1991) (1984) (“Even monarchy is, in its essence, enhanced nobility; the king is the “first nobleman” of a “crowned republic.”); cf. ANTONY BLACK, *POLITICAL THOUGHT IN EUROPE 1250–1450*, at 137–39 (1992) (describing various sources of the king’s authority); JOSEPH CANNING, *A HISTORY OF MEDIEVAL POLITICAL THOUGHT 300–1450*, at 47–59 (1996) (discussing the principles of theocratic monarchy); OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 30–37 (Frederic William Maitland trans., 1938). The idea that the king ruled by divine right, thereby deriving his authority from God, was consistent with the idea that kingship was defined as the apex of the social hierarchy because this hierarchy was itself regarded as divinely ordered. Cf. ERNST H. KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* 194 (1957) (“Pope Boniface was bent upon putting political entities in what he considered their proper place, and therefore stressed, and overstressed, the hierarchical view that the political bodies had a purely functional character *within* the world community of the *corpus mysticum Christi*, which was the Church, whose head was Christ, and whose visible head was the vicar of Christ, the Roman pontiff.”).

35. See generally ROBERT BARTLETT, *THE MAKING OF EUROPE: CONQUEST, COLONIZATION AND CULTURAL CHANGE, 950–1350*, at 24–59 (1993) (describing the expansion of aristocracy in Europe); BLOCH, *supra* note 15, at 145–344 (discussing various aspects of the feudal system); FICHTEAU, *supra* note 34, at 135–56 (discussing nobility); F.L. GANSHOF, *FEUDALISM* 113–17, 129–33 (Philip Grierson trans., Univ. of Toronto Press, 3d ed. 1996) (1961) (describing different types of

government advanced in the High Middle Ages, and the Renaissance and Reformation periods, a class of officials who were separate from the landed nobility began to emerge. These officials often had noble backgrounds<sup>36</sup> and quickly acquired a high status of their own, which was often formalized by grants of land and titles.<sup>37</sup> The French practice of selling governmental offices had the natural effect of transforming appointed officials into a hereditary nobility.<sup>38</sup>

The advent of the administrative state and the rapid development of industrial wealth in the late eighteenth and early nineteenth centuries produced a definitive separation between status and official position. According to Weber's classic definition, bureaucratic government is characterized by full-time employees who are compensated by regular salaries, rather than by the fees they collect.<sup>39</sup> All but the most high-ranking employees are selected on the basis of merit, as opposed to social position.<sup>40</sup> Industrialization shifted the primary locus of wealth, and ultimately status, away from the landed nobility who exercised governmental or quasi-governmental authority over defined territories, and to a group of persons who, while perfectly content to influence the government in their favor, defined themselves as private persons.<sup>41</sup> These

fiefs and the differences between the rights of lords and vassals over fiefs). As Fichtenau points out, the term "honor" originally referred to an office but its meaning expanded to include the property of the nobles during the feudal period. FICHTENAU, *supra* note 34, at 141.

36. JONATHAN DEWALD, *THE EUROPEAN NOBILITY, 1400–1800*, at 97–98 (1996); HANS ROSENBERG, *BUREAUCRACY, ARISTOCRACY, AND AUTOCRACY: THE PRUSSIAN EXPERIENCE, 1660–1815*, at 60–65 (1966).

37. *See generally* JAMES B. COLLINS, *THE STATE IN EARLY MODERN FRANCE 132–40* (1995); Wolfram Fischer & Peter Lundgreen, *The Recruitment and Training of Administrative and Technical Personnel*, in CHARLES TILLY, *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* 456 (Charles Tilly ed., 1975); ROSENBERG, *supra* note 36, at 137–59; ELLERY SCHALK, *FROM VALOR TO PEDIGREE: IDEAS OF NOBILITY IN FRANCE IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* 145–73 (1986).

38. *See generally* RICHARD BONNEY, *THE KING'S DEBTS: FINANCE AND POLITICS IN FRANCE, 1589–1661*, at 1–28 (1981) (discussing, among other things, the French practice of buying and selling offices); ERTMAN, *supra* note 14, at 100–10 (discussing warfare and officeholding in France from 1494 to 1559).

39. *See* 2 MAX WEBER, *ECONOMY AND SOCIETY* 959, 963 (Guenther Roth & Claus Wittich eds., Ephram Fischhoff et al. trans., 1978) (describing office holding as a vocation with a salary). For a similar definition, see MARX, *supra* note 26, at 22 ("The type of organization called bureaucratic . . . has several unmistakable characteristics. They include—as principal factors—hierarchy, jurisdiction, specialization, professional training, fixed compensation, and permanence.").

40. *See* David Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* 11–74 (2008).

41. *See generally* E.J. HOBBSBAM, *THE AGE OF REVOLUTION: EUROPE, 1789–1848*, at 44–73, 202–17 (1962); E.J. HOBBSBAM, *INDUSTRY AND EMPIRE: FROM 1750 TO THE PRESENT DAY* 57–74 (rev. ed. 1999) (describing the "human results" of the Industrial Revolution); MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 103–47 (Stephen Kalberg trans., 2001).

developments, combined with the massive growth of government in the administrative era, produced a group of official functionaries with no particular position in the social hierarchy.

The precise social status of administrators and the consequences of that status are complex. On the one hand, many of the people the administrators regulate, particularly corporate executives, possess higher social status; on the other hand, the administrators' authority and their ability to impose sanctions enhance their status beyond that which their title or salary might suggest.<sup>42</sup> Officials who provide benefits or services—such as welfare workers, social security administrators, teachers, doctors, nurses, and police—are located somewhere in the middle of the social hierarchy. In upper middle class suburbs, teachers and police are socially subordinate to those they serve, although they do benefit from the authority of their position. In impoverished areas, they enjoy clear social superiority.<sup>43</sup> Officials who provide assistance to disadvantaged citizens—such as welfare workers or public housing inspectors—are unambiguously superior because they themselves have higher status and because their clients are automatically placed in a socially subordinate position by the nature of the benefits being provided to them.<sup>44</sup>

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42. A fairly dramatic example is the Federal Reserve Board. In regulating financial institutions, Federal Reserve officials deal with some of the most highly compensated and prestigious corporate leaders in the country. But the Fed's broad authority and well recognized expertise tends to counteract the inequality between its staff members and those it regulates. *See generally* STEPHEN H. AXILROD, *INSIDE THE FED: MONETARY POLICY AND ITS MANAGEMENT*, MARTIN THROUGH GREENSPAN TO BERNANKE 159–72 (2009) (describing the Fed's image); WILLIAM GREIDER, *SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY* 48–74 (1987) (discussing, among other things, the unique status of the Federal Reserve).

43. Police tend to be service-oriented in wealthy suburban communities and enforcement-oriented in impoverished inner city areas. *See generally* Michael D. Reisig & Roger B. Parks, *Experience, Quality of Life, and Neighborhood Context: A Hierarchical Analysis of Satisfaction with Police*, 17 *JUST. Q.* 607 (finding that homeowners have more positive attitudes toward police); SUDHIR VENKATESH, *GANG LEADER FOR A DAY: A ROGUE SOCIOLOGIST TAKES TO THE STREETS* 105–06 (2008) (describing how residents of a housing project have negative attitudes toward police).

44. *Cf.* David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 *YALE L.J.* 815, 825–30 (2004) (examining methods for rationing public benefits, such as discouraging potential recipients from claiming benefits to which they are entitled by using bureaucratic barriers and systematic stigmatization of the recipients); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990) (telling the story of a welfare recipient's attempts to be heard in an administrative hearing and the difficulties she encountered due to various social barriers, including gaps in understanding between her and a sympathetic welfare worker). For discussions of the way in which service workers react to similar status differences in private enterprise, see, for example, Blake E. Ashforth & Ronald H. Humphrey, *Emotional Labor in Service Roles: The Influence of Identity*, 18 *ACAD. MGMT. REV.* 88 (1993); Stephen Fineman, *Organizations as Emotional Arenas*, in *EMOTION IN ORGANIZATIONS* 9 (Stephen Fineman ed., 1993); Martin B. Tolich, *Alienating and Liberating*

The consequence is that public officials in the modern administrative state are not automatically superior to those they govern, in the manner of feudal lords or Gogol's Very Important Person, but they are often superior in particular situations, like the supercilious officials at Dickens's Circumlocution Office. Wherever such superiority prevails, it carries with it substantial opportunities for oppression. This oppression consists of scorn, peremptory treatment, failure to empathize, and, most seriously, unwillingness to perform the assigned task of benefit distribution, education, or protection. It can be obvious and open,<sup>45</sup> or it can be rather subtle;<sup>46</sup> but it is generally hurtful and often impedes the policy that the relevant legislation was designed to advance.

In his study of the Social Security Administration, Jerry Mashaw observes that people who can claim disability benefits because they are eligible for Social Security were generally treated respectfully and conscientiously.<sup>47</sup> This is consistent with the idea that status differences are partially responsible for bureaucratic oppression. While the poor, the unemployed and other recipients of government benefits are generally low status persons—that is, lower than public officials—Social Security recipients are not. Everyone grows old, including the wealthy, the well connected, and the skillfully vociferous. Moreover, Social Security is not regarded as welfare but as a return on payments made by working people, which is exactly what Franklin Roosevelt intended when he crafted the program.<sup>48</sup> These features confer status on Social Security recipients and thus serve to secure respectful behavior by the agency.

*Emotions at Work: Supermarket Clerks' Performance of Customer Service*, 22 J. CONTEMP. ETHNOGRAPHY 361 (1993).

45. See, e.g., MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979) (describing the dismissive and inefficient treatment of criminal suspects in New Haven criminal courts).

46. See, e.g., White, *supra* note 44 (illustrating, among other things, the way that welfare workers, despite their conscious and expressed efforts to be helpful, can fail to understand the life situation of their clients).

47. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 132–45 (1983). The picture Mashaw draws is a mixed one, but it certainly compares favorably with other examples of mass administrative programs.

48. WILLIAM E. LEUCHTENBURG, *FRANKLIN ROOSEVELT AND THE NEW DEAL*, 1932–1940, at 133 (1962); ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* 308–09 (1959). For other discussions of FDR's vision for the Social Security program, see, for example, NANCY J. ALTMAN, *THE BATTLE FOR SOCIAL SECURITY: FROM FDR'S VISION TO BUSH'S GAMBLE* 109–72 (2005); FRANCES PERKINS, *THE ROOSEVELT I KNEW* 282–85 (1946). When told that the employee contribution feature of his plan reflected unsound economics, Roosevelt replied that the taxes were not based on economics, but politics: “We put those payroll contributions there so as to give the contributors a legal, moral, and political right to collect their pensions and their unemployment

This process may also occur in reverse. Benefits that are regarded as a recompense for meritorious effort enjoy a generally positive reputation. Examples, in addition to Social Security benefits, include veterans' benefits<sup>49</sup> and federal home loan mortgage assistance.<sup>50</sup> These benefits may sometimes confer status on their recipients, but at the very least, the recipients are not viewed as low-status individuals. In contrast, programs that provide benefits based on general eligibility, such as food stamps,<sup>51</sup>

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benefits. With those taxes in there, no damn politician can ever scrap my social security program.'" SCHLESINGER, *supra*, at 308–09.

49. See 38 U.S.C. § 101 *et seq.* (2012). This includes a wide range of specific benefits, such as death and disability compensation, 38 U.S.C. §§ 1101–1163, 1501–1508; health care, 38 U.S.C. §§ 1701–1786; life insurance, 38 U.S.C. §§ 1901–1980A; job counseling, psychological treatment, and housing assistance for homeless veterans, 38 U.S.C. §§ 2001–2066; burial benefits, 38 U.S.C. §§ 2301–2308; and educational assistance, 38 U.S.C. §§ 3001–3493. The federal government issues a publication summarizing these benefits each year. See, e.g., DEPARTMENT OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS, DEPENDENTS AND SURVIVORS (2011). The government also maintains a website providing similar information. See Dep't of Veteran Affairs, <http://www.vba.va.gov/VBA/>. For more information on veterans' benefits, see generally William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 339 (2004).

50. The federal government has established three institutions to expand the secondary market for home mortgages. The first was Federal National Mortgage Association (FNMA or Fannie Mae), established under the authority of the National Housing Act of 1934, Pub. L. No. 84-345, 48 Stat. 1246. See Oakley Hunter, *The Federal National Mortgage Association: Its Response to Critical Financing Requirements of Housing*, 39 GEO. WASH. L. REV. 818 (1970) (offering an overview of the history and operation of the FNMA). The second was the Government National Mortgage Association (GNMA or Ginnie Mae), established by the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476, to extend Fannie Mae's mortgage support to government employees and veterans. The third, the Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac), was established by the Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450, to supplement Fannie Mae. These programs only aid those who can qualify for a private home mortgage, which generally means wage earners. These institutions are now subject to massive criticism, but largely regarding the way they have been managed, not on the ground that wage earners did not deserve mortgage assistance. See, e.g., VIRAL A. ACHARYA ET AL., GUARANTEED TO FAIL: FANNIE MAE, FREDDIE MAC, AND THE DEBACLE OF MORTGAGE FINANCE 11–60 (2011) (arguing that defective design allowed Fannie Mae and Freddie Mac to expand beyond fiscally responsible limits); JAMES R. BARTH ET AL., THE RISE AND FALL OF THE U.S. MORTGAGE AND CREDIT MARKETS: A COMPREHENSIVE ANALYSIS OF THE MARKET MELTDOWN 41–73 (2009) (arguing that excessive and unjustified extension of credit produced a home lending bubble). See generally Robert S. Seiler, Jr., *Estimating the Value and Allocation of Federal Subsidies*, in SERVING TWO MASTERS, YET OUT OF CONTROL: FANNIE MAE AND FREDDIE MAC 8–40 (Peter J. Wallison ed., 2001) (describing how, as private corporations, Fannie Mae and Freddie Mac transfer federal funding to private shareholders); PETER J. WALLISON & BERT ELY, NATIONALIZING MORTGAGE RISK: THE GROWTH OF FANNIE MAE AND FREDDIE MAC (2000) (describing how Fannie Mae and Freddie Mac use government subsidies to expand beyond fiscally responsible limits).

51. The Food Stamp Program was recently renamed the Supplemental Nutrition Assistance Program (SNAP). See Pub. L. No. 110-234, 122 Stat. 1092 (2008) (codified at 7 U.S.C. § 2011 *et seq.* (2012)). The Food Stamp Program was created by the Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703. See generally Patti S. Landers, *The Food Stamp Program: History, Nutrition Education and Impact*, 107 J. AM. DIETETIC ASS'N 1945 (2007) (offering an overview of the Food Stamp Program, from its New Deal precursor to 2006); RONALD F. KING, BUDGETING ENTITLEMENTS: THE



public housing,<sup>52</sup> and welfare,<sup>53</sup> tend to be more controversial and often become the particular focus of anti-government rhetoric.<sup>54</sup> This attitude may decrease the status of those receiving such benefits, because they are seen as undeserving. One can speculate that oppressive behavior is more common among public officials dispensing or monitoring the latter category of benefits. Sustained empirical observation, however, would be required to determine whether this is in fact the case.

### *B. Stranger Relations*

A closely related problem is that the individual with whom a government official is dealing in the modern administrative state is likely to be a stranger.<sup>55</sup> In the pre-administrative era, the inherent

POLITICS OF FOOD STAMPS (2000) (considering the political pressures caused by food stamp entitlements).

52. For a recent version of a statute dealing with public housing, see the Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, 104 Stat. 4079. Its predecessors were the Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (the first major statute of Truman's Fair Deal), and the Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (establishing the Department of Housing and Urban Development as part of President Johnson's War on Poverty).

53. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. §§ 601-17 (2012)). The Personal Responsibility and Work Opportunity Reconciliation Act replaced the Social Security Act's Aid to Families with Dependent Children, originally known as Aid to Dependent Children, which was Title IV of the Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620. Aid to Dependent Children was subject to widespread criticism during the three decades of its existence. *See generally* LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935*, at 287-305 (1994) (discussing criticisms of Aid to Dependent Children); MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 66-78 (1989) (describing the feminist movement's view of poverty). It was amended several times to induce its recipients to work, rather than relying on public support. *See, e.g.*, Social Security Amendments of 1967, Pub. L. No. 90-248, § 204, 81 Stat. 821, 884-92 (establishing work incentive programs); Family Support Act of 1988, Pub. L. No. 100-485, §§ 201-04, 102 Stat. 2343, 2356-82 (establishing job opportunities and skills training program).

54. For further discussion of this point, see Edward L. Rubin, *The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 WM. & MARY L. REV. 1639 (2012) (discussing, among other things, the opposition to the Patient and Affordable Care Act).

55. For an illuminating discussion of this general situation, see MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* (1984). *Cf.* SEABRIGHT, *supra* note 32, at 17-32 (discussing how the modern economy is based on the cooperation of strangers); RICHARD SENNETT, *THE FALL OF PUBLIC MAN* 48 (1976) ("A city is milieu in which strangers are likely to meet."). Sennett dates the beginning of the urbanization process in the Western World to the mid-eighteenth century city, a bit before the advent of the administrative state. *Id.* at 47-52. But he notes that in the eighteenth century, true urbanization in Western Europe was limited to London and Paris, the largest cities of their day but nonetheless small portions of their nations' total populations. *See id.* at 49-50. London had about 750,000 residents at the time, Paris about 500,000. *Id.* at 50. By the mid-nineteenth century, when administrative governance was fully established, England had many large cities as a result of industrialization and

oppressiveness of the status differences between rulers and their subjects was ameliorated by the localized nature of social control. Interactions between high and low status individuals typically occurred within the confines of a village or a manor, where the people who were being ruled most likely spent their entire lives. The lord—or, more often, the lord's seneschal or bailiff—was likely to know every person under his command and every person who applied to him for assistance. The same can be said of the parish priest who administered aid and provided education. While ingrown relationships of this sort can certainly lead to antipathy and resentment, there is also a human level of familiarity and at least the potential for empathetic concern. In any event, members of the local elite were likely to understand the needs of the lower-status people in their village or manor, since the two groups spent their entire lives together.<sup>56</sup> Moreover, unlike Gogol's Very Important Person, the village elite had no reason to resort to oppression to assert their social superiority. The status hierarchy in pre-modern localities was well established and well understood by all concerned.<sup>57</sup>

A regulatory official may come to know the executives and attorneys in the firm she regulates. She may even develop friendly relations with them, particularly if she intends to seek a job at that firm when she leaves the government. But benefits workers, Social Security administrators, police officers, and medical personnel are typically dealing with large numbers of individuals whom they are unlikely to have known before or to see again. Moreover, to the extent that there are racial differences between government officials and their clients, there may be an increased sense of

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London's population had grown to five million. *Id.* Thus, stranger relations were not only more widespread within cities, but urban populations where they took place were beginning to dominate their respective nations.

56. For descriptions of the lives of lower-status people in these circumstances, see, for example, BLOCH, *supra* note 15, at 241–79; FICHTENAU, *supra* note 34, at 359–78; FRANCES GIES & JOSEPH GIES, *LIFE IN A MEDIEVAL VILLAGE* 67–87 (1990). For literary accounts of traditional village life, see JANE AUSTEN, *EMMA* (Penguin Books 1966) (1816); JOHANN WOLFGANG VON GOETHE, *ELECTIVE AFFINITIES* (R.J. Hollingdale trans., Penguin Books 1971) (1809); ANTHONY TROLLOPE, *BARCHESTER TOWERS* (David Skilton ed., The Trollope Society 1995) (1857). These accounts are admittedly written as traditional village culture was coming to an end. That is not surprising, however, in part because earlier literature rarely dealt with the lives of ordinary people, and in part because it was the nostalgia resulting from the loss of village culture that motivated writers to depict that culture. See RAYMOND WILLIAMS, *THE COUNTRY AND THE CITY* 13–45 (1973). The point is not that this social system of the past was a particularly kind or effective one, but simply that it was not one that was being administered by strangers.

57. One reason why it was so well understood and accepted was that people thought it had been established by God. See GIERKE, *supra* note 34, at 8–9; ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA* 67–98 (1936) (the chain of being concept reconciled belief in the divine creation of the universe with plenitude, the multiplicity of creation).

“otherness” leading to hostile or oppressive behavior.<sup>58</sup> These factors not only render each individual anonymous to officials, but also create a sense of being overwhelmed by work that cautions officials against making any effort to reduce this anonymity.<sup>59</sup> To give people individualized attention would quickly make the job impossible to perform.<sup>60</sup>

There is also a proliferation of functions in the modern state that results from the need to manage mass society and thus has no pre-modern analogue. Modern people need to obtain driver’s licenses, passports, zoning variances, change of address forms, licenses, benefits, benefit increases, and a variety of other authorizations. Because of the increasing specialization that, as Emile Durkheim observed,<sup>61</sup> is almost certainly an intrinsic feature of modern industrial society, each of these many interactions will involve a different government bureaucracy.<sup>62</sup> This not

58. Cf. Albert E. McCormick, Jr. & Graham C. Kinloch, *Interracial Contact in the Customer-Clerk Situation*, 126 J. SOC. PSYCHOL. 551 (1986) (observing that relations between checkout clerks and customers of the same race were friendlier, as measured by increased verbal exchanges, smiles and eye contact, than relations between clerks and customers of different races). Relations between customers and service workers of the same gender, however, are not friendlier than relations between customers and service workers of the opposite sex. Cf. Elaine J. Hall, *Smiling, Deferring and Flirting: Doing Gender by Giving “Good Service”*, 20 WORK & OCCUPATIONS 452 (1993) (study of the difference between the service of waiters and waitresses). The difference is, as Hall observes, a product of gender roles. This difference can lead to the harassment of female workers by both customers and employers. See generally JAMES P. SPRADLEY & BRENDA J. MANN, *THE COCKTAIL WAITRESS: WOMAN’S WORK IN A MAN’S WORLD* (1975) (discussing, among other things, harassment by customers); cf. Jackie Krasas Rogers & Kevin D. Henson, “*Hey, Why Don’t You Wear a Shorter Skirt?*”: *Structural Vulnerability and the Organization of Sexual Harassment in Temporary Clerical Employment*, 11 GENDER & SOC’Y 215 (1997) (discussing harassment by employers). But an additional factor is that gender is not class or race related, since every class and race contains both men and women. Thus gender differences produce a sense of otherness that is different than those produced by racial or economic differences.

59. Cf. Anat Rafaeli & Robert I. Sutton, *Busy Stores and Demanding Customers: How Do They Affect the Display of Positive Emotion?*, 33 ACAD. MGMT. J. 623 (1990) (study done by authors demonstrates that service personnel in busy stores display less positive emotions); Robert I. Sutton & Anat Rafaeli, *Untangling the Relationship Between Displayed Emotions And Organizational Sales: The Case of Convenience Stores*, 31 ACAD. MGMT. J. 461 (1988) (authors’ study shows that service personnel in busy stores with long lines are less likely to display positive feelings than those in slower-paced stores).

60. Cf. Joel F. Handler & Ellen Jane Hollingsworth, *Reforming Welfare: The Constraints of the Bureaucracy and the Clients*, 118 U. PA. L. REV. 1167, 1176–77 (1970) (“The effect of large numbers of recipients on administration of a welfare program is staggering. The major elements of . . . administration—eligibility determination, budget, and social services including employment—presume individualized treatment, but such individual attention requires greater time and energy than public assistance caseworkers can expend.”).

61. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 68–174 (W. D. Halls trans., 1984).

62. On the specialized nature of modern bureaucracy, see generally CLIVE H. CHURCH, *REVOLUTION AND RED TAPE: THE FRENCH MINISTERIAL BUREAUCRACY 1750–1850* (1981); WEBER, *supra* note 39, at 973–97; MARX, *supra* note 26; Frank Fischer, *Organizational Expertise and Bureaucratic Control: Behavior Science as Managerial Ideology*, in *CRITICAL STUDIES IN*

only precludes a global assessment of the person's needs but also precludes sustained relationships between government officials and the people they serve. Barbara Gutek's study of customer relations in business firms concluded that most interactions with customers took the form of encounters—that is, superficial, instrumentally-oriented interchanges that lacked real human contact—rather than relationships.<sup>63</sup> Interactions between government employees and citizens generally display similar characteristics.

It is important, of course, not to romanticize pre-modern times by painting the sort of picture that Oliver Goldsmith does in *The Deserted Village*.<sup>64</sup> Familiarity was no guarantee against harsh treatment by one's superiors, and life in a small, insulated town could be stultifying and oppressive in its totality. Cities were generally regarded as places of freedom and opportunity during the medieval, Renaissance, and Reformation periods,<sup>65</sup> the famous proverb being that “[c]ity air makes a

ORGANIZATION & BUREAUCRACY 174 (Frank Fischer & Carmen Sirianni eds., rev. ed. 1994); Fischer & Lundgreen, *supra* note 37.

63. See BARBARA A. GUTEK, *THE DYNAMICS OF SERVICE: REFLECTIONS ON THE CHANGING NATURE OF CUSTOMER/PROVIDER INTERACTIONS* 33–61 (1995) (describing “service through encounters”). Gutek distinguishes such encounters from relationships. See *id.* at 15–32 (describing “service through relationships”); *id.* at 63–94 (describing “key distinctions” between relationships and encounters in the context of customer-provider interactions). She further observes that some firms make an effort to personalize the essentially impersonal encounters by creating “pseudorelationships.” See *id.* at 197–213 (describing two kinds of pseudorelationships).

64.

Sweet Auburn, loveliest village of the plain,  
Where health and plenty cheered the laboring  
swain,  
Where smiling spring its earliest visit paid,  
And parting summer's lingering blooms  
delayed . . . How often have I paused on every charm,  
The sheltered cot, the cultivated farm,  
The never failing brook, the busy mill,  
The decent church that topped the neighboring hill.

Oliver Goldsmith, *The Deserted Village*, in *ENGLISH PROSE AND POETRY, 1660–1800: A SELECTION* 306 (Frank Brady & Martin Price eds., 1961). The poem bemoans the destruction of such villages by the enclosure movement. For an analysis of the poem, see WILLIAMS, *supra* note 55, at 74–79.

65. See generally BARTLETT, *supra* note 35, at 167–96; FRANCES GIES & JOSEPH GIES, *LIFE IN A MEDIEVAL CITY* 199–210 (1969) (describing town governments in this period); LAURO MARTINES, *POWER AND IMAGINATION: CITY-STATES IN RENAISSANCE ITALY* 7–61 (1988) (describing the growth of communes in Italy up to the thirteenth century); JOHN H. MUNDY & PETER RIESENBERG, *THE MEDIEVAL TOWN* 41–53 (1958) (describing the unique characteristics of towns that emerged in the eleventh and twelfth centuries); HENRI PIRENNE, *ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE* 42–56 (I.E. Clegg trans., Harcourt, Brace & World, Inc. 1956) (1933) (describing towns in Europe during the medieval period); WEBER, *supra* note 39, at 1236–62 (describing the city of the medieval Occident). One reason for this view is that the cities, and even smaller population centers that can be characterized as villages, were outside the feudal system and the feudal hierarchy. See generally BARTLETT, *supra* note 35, at 117–32, 167–96; GIES & GIES, *supra*, at 199–210; MUNDY & RIESENBERG, *supra*, at 41–53. The separation of the cities from the feudal system meant that all residents of the city, no matter how modest their means, were free people. See Bartlett, *supra* note 35, at 168–71; GIES & GIES, *supra*, at 199–202.

man free.”<sup>66</sup> But we no longer need to worry about the many oppressions perpetrated during these prior periods; we need to address the oppressions that prevail at present. The value of considering past periods is simply to delineate our present situation through the process of comparison.

Modern urban society certainly offers its citizens an escape from the oppressiveness of ingrown village culture. But this escape comes at a price—the price of a different and, in certain ways, more virulent form of oppression.<sup>67</sup> Indeed, administrative government can be seen as an effort to reassert control over people in the more uncertain, otherwise unsupervised circumstances of modern life. The crucial point is that familiarity and affective bonds of pre-modern society are not available as a palliative against this new form of control. The freedom that the social circumstances of modernity have conferred on people can be undermined or extirpated by bureaucratic supervision, and the anonymity which has been a component of that freedom now leaves people alone and unprotected when this supervision turns abusive.

### C. Institutional Pathologies

A medieval lord owed certain obligations to his feudal superior, but in his treatment of the ordinary people on his property, he was essentially free to use his judgment, while his seneschal or bailiff were answerable only to him. The parish priest was part of a large, hierarchically organized institution, but he was also free to use his judgment in his quotidian interactions with his parishioners.<sup>68</sup> Modern administrative agents,

66. MARVIN PERRY ET AL., *WESTERN CIVILIZATION: IDEAS, POLITICS, AND SOCIETY* 232 (9th ed. 2009).

67. SENNETT, *supra* note 55, at 28–122. Sennett describes the need for people in modern urban setting to assert or construct their identity as follows:

In a milieu of strangers, the people who witness one’s actions, declarations, and professions usually have no knowledge of one’s history, and no experience of similar actions, declarations, and professions in one’s past; thus it becomes difficult for this audience to judge, by an external standard of experience with a particular person, whether he is to be believed or not in a given situation . . . . The arousal of belief depends on how one behaves—talks, gestures, moves, dresses, listens—within the situation itself.

*Id.* at 39. In this effort to establish status and social superiority, modern urban residents may resort to more oppressive behavior than the village elite, whose status was generally recognized and accepted. Gogol’s Very Important Person, Dickens’s supercilious officials, and Wilson’s officious, blasé clerks can all be viewed as being motivated by this modern social need.

68. There were some broad constraints imposed by Christianity that did distinguish medieval society from its pagan predecessor. See ANTONY BLACK, *POLITICAL THOUGHT IN EUROPE 1250–1450*, at 136–61 (1992); Jean Dunbabin, *Government*, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C. 350–1450*, at 477, 488–98 (J.H. Burns ed., 1988); ERNST KANTOROWICZ, *THE KING’S TWO BODIES* 42–97 (1957). While we cannot know for sure what monarchs did in private, we

however, are part of large, complex institutions. The consequences, not surprisingly, are mixed. On the one hand, the administrative hierarchy provides supervision and control that can constrain or combat oppressive behavior, particularly behavior that contravenes agency policy. On the other hand, the same hierarchy can malfunction in a way that produces such oppression.

Organization theory has amply documented a wide variety of such malfunctions.<sup>69</sup> For example, the difficulty of managing a large institution and specifying performance standards to control the actions of its hundreds, thousands, or tens of thousands of employees often induces mid-level managers to establish intermediate goals whose consequence is to harm the people they are supposed to help. Welfare and Social Security workers, as David Super observes, have a variety of incentives to minimize the benefits that they provide—thus saving their department money—rather than for making sure that every eligible recipient receives

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do not seem to have any records of medieval kings indulging in the sorts of public debaucheries and hideous tortures that characterized many of the Roman Emperors. For examples of Roman Emperors engaging in such acts, see, for example, GAIUS SUETONIUS TRANQUILLUS, *THE TWELVE CAESARS* 162 (Michael Grant ed., Robert Graves trans., rev. ed. 2003) (“It was [Caligula’s] habit to commit incest with each of his three sisters and, at large banquets, when his wife reclined above him, placed them all in turn below him.”); *id.* at 229 (“Nero . . . invented a novel game: he was released from a cage dressed in the skins of wild animals, and attacked the private parts of men and women who stood bound to stakes.”); GEORGE C. BRAUER, JR., *THE DECADENT EMPERORS: POWER AND DEPRAVITY IN THIRD-CENTURY ROME* 66 (Barnes & Noble 1995) (1967) (upon gaining power, Caracalla had perhaps as many as 20,000 people executed); *id.* at 132–33 (Elagabalus, dressed in women’s clothes or standing naked, acted the part of a prostitute in a brothel that he established in his palace).

69. Organization theory, generally regarded as a branch of sociology, consists of multiple strands. Among them are decision theory, which treats the organization as a decision-making hierarchy, *see generally* RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* (2d ed. 1992); JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* (1958); HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS* (4th ed. 1997), human relations theory, which treats the organization as an arena of personal interaction, *see generally* GEORGE C. HOMANS, *THE HUMAN GROUP* (1950); JOHN W. MEYER & W. RICHARD SCOTT, *ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY* (1983); PHILIP SELZNICK, *TVA AND THE GRASS ROOTS: A STUDY OF POLITICS AND ORGANIZATION* (1949), and general systems theory, which treats the organization as an organism, *see generally* LUDWIG VON BERTALANFFY, *GENERAL SYSTEMS THEORY: FOUNDATIONS, DEVELOPMENT, APPLICATIONS* (1968); JAY R. GALBRAITH, *ORGANIZATION DESIGN* (1977); GEORGE J. KLIR, *AN APPROACH TO GENERAL SYSTEMS THEORY* (1969). Needless to say, each school has numerous sub-schools. In addition, rational actor theory, the dominant approach in microeconomics, tends to view the organization as a collection of self-interested individuals. *See generally* ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1967); JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* (1990); OLIVER HART, *FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE* (1995). Transaction cost economics has attempted to combine this perspective with some of the insights of the sociological approach. *See generally* *ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND* (Oliver E. Williamson ed., 1995).

the intended benefit.<sup>70</sup> Police officers are rewarded for making arrests and obtaining confessions rather than for reducing crime; doctors and nurses at public hospitals may be encouraged to treat patients quickly and discharge them, or to discourage people from using the hospital at all, rather than to make a thorough assessment of their medical condition.<sup>71</sup> Institutional leaders will often abandon or compromise their basic mission in response to external pressure in order to ensure their own survival or advance a subsidiary goal.<sup>72</sup> The Federal Trade Commission, for example, was notorious for adopting a lenient approach to unfair and deceptive trade practices committed by large, politically powerful companies and pursuing remedies against small, marginal operators.<sup>73</sup>

One of the best-known and most notorious institutional pathologies of governmental agencies is excessive formalism, popularly known as “red tape.”<sup>74</sup> This is the vice depicted when Gogol’s Very Important Person

70. See KATZ ET AL., *supra* note 33, at 195 (“In the absence of adequate feedback about basic objectives, lower level administrators are likely to be motivated by . . . [a] tendency, to redefine the major goal in terms of a limited objective”); Super, *supra* note 44, at 836–44 (describing this approach as “informal rationing”); cf. Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000) (describing how decision making has shifted to ground level benefits workers); SHIPLER, *supra* note 28, at 229 (“The welfare cheats are the officials who design Kafkaesque labyrinths of paperwork that force recipients of food stamps or Medicaid or welfare to keep elaborate files of documents and run time-consuming gauntlets of government offices while taking off from work.”).

71. For discussions of how bureaucracy can limit services, see generally SIMON, *supra* note 69, at 140–207; WILSON, *supra* note 29, at 113–36.

72. See SELZNICK, *supra* note 69, at 85–104, 238–42. Selznick found that the Tennessee Valley Authority largely abandoned the populist agricultural policies which it was designed to implement in favor of the less controversial goal of rural electrification.

73. See generally EDWARD F. COX ET AL., “THE NADER REPORT” ON THE FEDERAL TRADE COMMISSION (1969) (critiquing the FTC for failing to protect consumers due to ineffectiveness, passivity, and a pro-business attitude); ALAN STONE, *ECONOMIC REGULATION AND THE PUBLIC INTEREST: THE FEDERAL TRADE COMMISSION IN THEORY AND PRACTICE* (1977) (critiquing the FTC for failing to protect consumer interests). When the FTC attempted to adopt a more aggressive approach, however, it elicited the wrath of Congress and quickly retreated. See generally MICHAEL PERTSCHUK, *REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT* 69–117 (1982); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (describing how Congress exercises substantial supervision of the FTC through oversight hearings, legislative veto, budgetary control, and other means). Since the FTC’s original mandate came from Congress, its retreat could be seen as an institutionally appropriate response to its superior, rather than as an institutional pathology.

74. For discussions of red tape, see generally Barry Bozeman & Patrick Scott, *Bureaucratic Red Tape and Formalization: Untangling Conceptual Knots*, 26 AM. REV. PUB. ADMIN. 1 (1996); Gene A. Brewer & Richard M. Walker, *The Impact of Red Tape on Governmental Performance: An Empirical Analysis*, 20 J. PUB. ADMIN. RES. & THEORY 233 (2010); GOODSELL, *supra* note 33, at 60–65; Alvin W. Gouldner, *Red Tape as a Social Problem*, in *READER IN BUREAUCRACY* 410 (Robert K. Merton et al. eds., 1952); HERBERT KAUFMAN, *RED TAPE: ITS ORIGIN, USES, AND ABUSES* 5–22 (1977); Hal G.

insists that Akaky file a petition that would be submitted to “the chief clerk, who would have transferred it to my secretary, and my secretary would have submitted it to me,”<sup>75</sup> and when Dickens’ Circumlocution Officer declares that “memorial must be entered in that Department, sent to be registered in this Department, sent back to be signed by that Department, sent back to be countersigned by this Department.”<sup>76</sup> It is the basis of James Q. Wilson’s complaint that the state motor vehicle office compels people to wait in long, slow-moving lines to complete even a simple transaction.<sup>77</sup> But the term, however vivid, is not really self-explanatory. It is obviously a metaphor, apparently derived from the English practice of using red tape to tie up batches of legal documents.<sup>78</sup> In fact, red tape is easier to condemn than to define. Herbert Kaufman’s leading discussion of the subject notes that ordinary people, when they use the term, “mean that they are subject to too many constraints, that many of the constraints seem pointless, and that agencies seem to take forever to act.”<sup>79</sup> That is a good explanation, but hardly a rigorous definition. The Gore Report discusses the problem at length but never even attempts a definition.<sup>80</sup>

To make sense of the problem, one must distinguish red tape from the bureaucracy in general. Weber’s classic account of bureaucracy includes the features that “[t]he authority to give the commands required for the discharge of [official] duties is distributed in a stable way,”<sup>81</sup> and “[t]he management of the modern office is based upon written documents (the ‘files’), which are preserved in their original or draft form, and upon a staff of subaltern officials and scribes of all sorts.”<sup>82</sup> This suggests that the insistence that people follow prescribed, written rules, and interact with prescribed, hierarchically subordinate officials, may be intrinsic to the structure of modern administrative government.<sup>83</sup> If so, what makes rules

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Rainey, Sanjay Pandey & Barry Bozeman, *Research Note: Public and Private Managers Perceptions of Red Tape*, 55 PUB. ADMIN. REV. 567 (1995).

75. GOGOL, *supra* note 16, at 263.

76. DICKENS, *supra* note 20, at 157.

77. *See supra* text accompanying note 29.

78. KAUFMAN, *supra* note 74, at 1. “The ribbon has long since disappeared, but the hated conditions and practices it represents continue, keeping the symbol alive.” *Id.* at 2.

79. KAUFMAN, *supra* note 74, at 5.

80. ALBERT GORE ET AL., NATIONAL PERFORMANCE REVIEW, RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 11–41 (1993).

81. WEBER, *supra* note 39, at 956.

82. *Id.* at 957.

83. There is extensive debate about whether red tape is more prevalent in public institutions than in private ones of equivalent size and complexity. *See, e.g.*, Barry Bozeman et al., *Red Tape and Task Delays in Public and Private Organizations*, 24 ADMIN. & SOC’Y 290 (1992) (public character of



and procedures qualify as red tape is the perception that they are unnecessary. Large numbers of rules and restrictions are unavoidable, but unnecessary rules and restrictions are truly oppressive precisely because they impose additional burdens on inherently burdensome processes for no good reason. Distinguishing the necessary from the unnecessary, however, is likely to be a difficult task. If one opens the typically thick office manual or employees' manual of a governmental agency,<sup>84</sup> one is unlikely to find a statement that any particular requirement is unnecessary. What is needed is a microanalysis of the particular agency, a careful assessment that determines which rules and requirements are essential to the orderly operation of a large institution and which ones are imposed for the agency's convenience or as remnants of some now-forgotten practice.<sup>85</sup>

#### D. Divergent Incentives

Divergent incentives are a familiar source of bureaucratic oppression due to the attention they have received from public choice analyses.<sup>86</sup> Public choice theory is grounded on the premise that people maximize their material self-interest. It asserts that the self-interest of elected

organization provides the best explanation for the prevalence of red tape); Kenneth W. Clarkson, *Some Implications of Property Rights in Hospital Management*, 15 J. L. & ECON. 363 (1972) (red tape prevalent in non-profit private hospitals); Mary K. Feeney & Hal G. Rainey, *Personnel Flexibility and Red Tape in Public and Nonprofit Organizations: Distinctions Due to Institutional and Political Accountability*, 20 J. PUB. ADMIN. RES. & THEORY 801 (2010) (red tape more prevalent in public institutions than in similar private nonprofit institutions).

84. This is one of the many ways in which governance goes beyond the reach of the legality model. If an agency adopts a general principle for carrying out its mission in the form of a regulation, it is required to comply with the notice and comment process of the Administrative Procedure Act, 5 U.S.C. § 553 (2006). Much of the legal literature about administrative law concerns compliance with these statutory requirements. See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); McGarity, *supra* note 4; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997). But the agency can achieve a similar effect by embedding that general principle in its employee manual. See *Morton v. Ruiz*, 415 U.S. 199 (1974) (challenging a decision made on the basis of a rule stated in the Bureau of Indian Affairs' internal manual that Indians not living on a reservation were ineligible for benefits). In that case, it is not subject to any legal restrictions, and the legal literature about this mode of agency action is sparse.

85. Regarding institutional microanalysis, see Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

86. See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003); Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43 (1988); Geoffrey Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989).

officials, most notably legislators, lies in obtaining reelection,<sup>87</sup> rather than in any desire to either represent their constituents' views or implement their own view about the public good.<sup>88</sup> Because it rests on a general theory of human behavior, public choice theory argues that all public officials are motivated by self-interest of this sort. Thus, the decision makers and employees of government bureaucracies, although appointed rather than elected, will also be motivated by the desire to maximize their own material self-interest, rather than fulfilling their obligation to serve the needs of their programs' beneficiaries or the general public.

The oppression that is likely to result from such divergent incentives is apparent. What is not so obvious, however, is the nature of the interest that these decision makers and employees are trying to maximize. While public choice has had considerable success in modeling legislators as reelection maximizers, it has struggled to identify the equivalent maximizing behavior for administrative agents. William Niskanen's idea that they are trying to maximize their agency's budget<sup>89</sup> has proven to be empirically untenable,<sup>90</sup> while subsequent claims that they are trying to maximize their

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87. See generally MORRIS P. FIORINA, REPRESENTATIVES, ROLL CALLS AND CONSTITUENCIES (1974); DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); MUELLER, *supra* note 86, at 230–302. This claim has been challenged on both empirical and theoretical grounds. See, e.g., CHRISTOPHER J. DEERING & STEPHEN S. SMITH, COMMITTEES IN CONGRESS 63–86 (3d ed. 1997); MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 134–36 (1985); DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 147–78 (1994).

88. These being the two normative goals that the theory of representative government establishes. See BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT (1997) (arguing that election is an alternative to direct democracy, and raising the question of how directly the representative should be answerable to the constituency); Philip Petit, *Varieties of Public Representation*, in POLITICAL REPRESENTATION 61 (Ian Shapiro et al. eds., 2010) (distinguishing between the indicative representative, who acts on behalf of the people, and the responsive representative, who reflects their views); HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967) (distinguishing among formalistic, symbolic, descriptive and substantive representation, which with symbolic and descriptive involving relationship to the constituency and substantive involving actions of governance).

89. WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971). See also James L. Weatherby, *A Note on Administrative Behavior and Public Policy*, 11 PUB. CHOICE 107 (1971) (administrative agents attempt to maximize agency staff).

90. See HERBERT KAUFMAN, THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS (1981) (bureau chiefs are motivated by a complex set of motives that include maintaining budgets rather than increasing them); WILSON, *supra* note 29, at 118, 214–15 (some agency heads see their mission as budget cutting); John F. Chant & Keith Acheson, *The Choice of Monetary Instruments and the Theory of Bureaucracy*, 12 PUB. CHOICE 13 (1972) (central bankers seek to avoid risk and increase prestige, not to increase their budgets). The FTC, under the chairmanship of consumer advocate Michael Pertschuk, might appear to be a classic example of an agency that was trying to maximize its budget. See PERTSCHUK, *supra* note 73. But how would one distinguish this from the desire of a newly appointed director to implement the agency's original mandate, which it has been severely criticized for compromising in prior periods? See Barry Weingast & Mark Moran, *The Myth of the Runaway*

“slack,” or discretion,<sup>91</sup> are only rescued from a similar level of empirical refutation by their pervasive ambiguity. A more convincing hypothesis, but one that eludes public choice analysis, is that many government agents are not trying to maximize anything, but rather trying to minimize work or hassle.<sup>92</sup> That is certainly the impression conveyed by Wilson’s account of the motor vehicle bureau.

The problem of divergent incentives, however, goes well beyond public choice analysis, or even the related hypothesis of hassle minimization, and links directly to the problem of institutional pathologies. As Wilson and Charles Schultze point out, government agents do not derive any direct benefit from providing effective or gracious service.<sup>93</sup> They work in institutions, and institutions exercise powerful effects over their members. The formal rules and informal norms of their agency, the dense web of written requirements, institutional practice, supervision and peer relations, are almost invariably the primary determinants of their behavior. One specific manifestation of such institutional effects that runs directly counter to humane, effective service is group solidarity.<sup>94</sup> People’s instinctive sociability leads government officials to establish congenial, and in some cases truly friendly relations

*Bureaucracy: The Case of the FTC*, 6 REG. 34 (1982) (contrary to the conventional view, independent federal agencies such as the FTC are subject to stringent Congressional control).

91. Jean-Luc Migué & Gérard Bélanger, *Toward a General Theory of Managerial Discretion*, 17 PUB. CHOICE 27 (1974) (administrative agents attempt to maximize their discretion, or “slack”); Paul Gary Wyckoff, *The Simple Analytics of Slack-Maximizing Bureaucracy*, 67 PUB. CHOICE 35 (1990) (same).

92. See Alberto Dávila et al., *Immigration Reform, the INS, and the Distribution of Interior and Border Resources*, 99 PUB. CHOICE 327 (1999) (administrative agents attempt to minimize political risk); John R. Gist & R. Carter Hill, *The Economics of Choice in the Allocation of Federal Grants: An Empirical Test*, 36 PUB. CHOICE 63 (1981) (administrative agents attempt to minimize political risk); see also SELZNICK, *supra* note 69 (sociological, rather than microeconomic explanation for political risk-aversion among bureaucrats).

93. Cf. CHARLES SCHULTZE, *THE PUBLIC USE OF PRIVATE INTEREST* 66–83 (1977) (describing incentives of public employees); WILSON, *supra* note 29, at 113–36 (same).

94. Gary Alan Fine, *Negotiated Orders and Organizational Cultures*, 10 ANN. REV. SOC. 239 (1984) (life in an organization is shaped by noneconomic, nonrational culture specific to that organization); ROBERT L. HELMREICH & ASHLEIGH C. MERRITT, *CULTURE AT WORK IN AVIATION AND MEDICINE: NATIONAL, ORGANIZATIONAL AND PROFESSIONAL INFLUENCES* (2d ed. 2001) (exploring the influence of professional and organizational culture on attitudes of commercial airline pilots and operating room teams); GEERT HOFSTEDE, GERT JAN HOFSTEDE & MICHAEL MINKOV, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND: INTERCULTURAL COOPERATION AND ITS IMPORTANCE FOR SURVIVAL* 119–23, 208–13, 368–70 (3d ed. 2010) (culture exercises a pervasive influence on workplace attitudes and behaviors, leading to behaviors such as treating external influences as dangers); KATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* 97–119 (1999) (group mentality in low-wage work settings); SKOLNICK, *supra* note 43, at 39–60 (police develop collective, self-contained and self-protective attitudes that alienates them from the community they serve).

with their colleagues: they interact throughout the day, have lunch together, and perhaps even socialize after work. The citizens they serve, on the other hand, are often strangers and may seem to be little more than unwelcome intruders. Thus, the prevailing incentive may be to get rid of them or minimize one's dealings with them, rather than providing the required service.

Many other divergent incentives could be catalogued. Several commentators have observed that the excessively adversarial stance that U.S. agencies adopt toward those whom they regulate or serve contributes to oppressive administrative behavior.<sup>95</sup> Others claim that oppression results from an excessive grant of discretion to administrative agents.<sup>96</sup> Further inquiry and more precise definitions are required before such claims can be confirmed. Discretion, for example, is a notoriously vague term<sup>97</sup> and one of questionable relevance: virtually all administrative agents have some set of goals—whether effective or ineffective, client-centered or institution-centered—that they are expected to achieve by their hierarchical superiors.<sup>98</sup> There can be little doubt, however, that government agents are subject to a vast and varied array of incentives and motivations, and that only some of these correspond to the behaviors that meet the expectations of the program's originators or advance the program's stated goals.

## II. POTENTIAL SOLUTIONS

Bureaucratic oppression is hardly an obscure phenomenon. It is apparent to any conscientious observer, and every person is likely to have experienced it personally at one time or another. The causes of

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95. See DEREK BOK, *THE TROUBLE WITH GOVERNMENT* 163–68 (2001); PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 57–110 (1994); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 181–206 (2001).

96. LOWI, *supra* note 23, at 92–126; see also DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

97. There are various definitions of this term. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 31–32 (1978) (identifying two forms: weak discretion, which is unreviewable authority or a required exercise of judgment, and strong discretion, which is unbounded authority); HENRY M. HART, JR. & ALBERT M. SACHS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 144 (William N. Eskridge & Philip Frickey eds., 1994) (defining discretion as “the power to choose between two or more courses of action, each of which is thought of as permissible”).

98. See M.P. Baumgartner, *The Myth of Discretion*, in *THE USES OF DISCRETION* 129 (Keith Hawkins ed., 1992); Martha Feldman, *Social Limits to Discretion: An Organizational Perspective*, in *id.* at 163; RUBIN, *supra* note 5, at 74–96; Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI-KENT L. REV. 1299, 1304–05, 1317 (1997).

bureaucratic oppression, however, are so closely related to the inherent structure of modern government and modern society that the difficulty of finding a solution has been equally apparent. While this sometimes induces a sense of fatalism, it has also elicited thoughtful programs and proposals for fundamental change in governmental operations from a variety of perspectives. A judicial perspective urges the imposition of due process standards on government agencies;<sup>99</sup> a legislative perspective suggests the mechanism of ombudspersons;<sup>100</sup> a management perspective leads to proposals for client-centered administration;<sup>101</sup> a microeconomic perspective urges reliance on market incentives.<sup>102</sup> Government officials have implemented all of these approaches, albeit to varying extents, and academic observers have urged that each of them should be adopted. This section will consider them in turn.

#### A. *Due Process: The Judicial Solution*

The rationale for using due process to combat bureaucratic oppression is a powerful one, and the concept has been applied in practice in creative and sophisticated ways. Originally, due process involved a set of rules governing the conduct of civil and criminal trials.<sup>103</sup> The historical significance of these rules is that trials were essentially the only legal means by which the pre-modern state imposed penalties or restrictions on ordinary individuals. By providing due process protection in this setting, the pre-bureaucratic state was effectively limiting the ability of its agents to oppress its citizens.

99. *See infra* Part II.A.

100. *See infra* Part II.B.

101. *See infra* Part II.C.

102. *See infra* Part II.D.

103. *See* EDWARD CORWIN, "THE HIGHER LAW" BACKGROUND OF THE AMERICAN CONSTITUTION 30–33 (1928); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 326–31 (1968); RODNEY L. MOTT, DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY THE COURTS IN THE APPLICATION OF THE CONCEPT OF THE "LAW OF THE LAND" 143–66 (1926). Its origin is Chapter 39 of the Magna Carta: "No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land." J.C. HOLT, MAGNA CARTA 461 (2d ed. 1992). The actual phrase "due process of law" appears in re-issues of the document by subsequent kings. The due process clauses in the Fifth and Fourteenth Amendments of the U.S. Constitution continue to be extensively applied in the context of trials, of course. For modern applications of the due process clause, see, for example, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (due process requires that a person held as an enemy combatant be granted a hearing before a neutral decision maker); *In re Gault*, 387 U.S. 1 (1967) (due process requires that a person must be granted a fair trial before being confined as a juvenile delinquent).

With the advent of the administrative state, however, agencies became the primary means for implementing legislation and thus the primary means by which the state interacted with individuals. The problem was that there was initially no established means of applying the Due Process Clause to these non-judicial situations. Thus, the first instinct was to declare that the clause did not apply at all, that administratively implemented benefits were privileges, not rights, and could be reduced or eliminated at will.<sup>104</sup> This position was originally a product of the substantive due process era, when the misplaced empathy for property owners that led the courts to use the Due Process Clause to police general legislation<sup>105</sup> was matched by a corresponding lack of empathy for wage earners and poor persons who depended on benefits created by the legislature and enforced by agencies.

Because the concept of due process was tied, conceptually, to judicial trials, the right-privilege distinction persisted for thirty years after the demise of substantive due process.<sup>106</sup> This suggests that the primary

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104. *E.g.*, *Fleming v. Nestor*, 363 U.S. 603 (1960) (social security payments are a privilege); *Barsky v. Bd. of Regents*, 347 U.S. 442 (1954) (license to practice medicine is a privilege); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934); (enrollment at a state university is a privilege); *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (1892) (“The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”); *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (condemning treatment of public benefits as privileges and arguing that they should have the same legal status as traditional property); Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1047–60 (1984) (tracing the development and decline of the right-privilege distinction in the administrative context); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (describing the right-privilege distinction and its gradual rejection by the courts).

105. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down laws prohibiting employment for longer than a prescribed number of hours per day as violating the freedom of contract considerations found in the concept of due process). Of course, the Supreme Court continues to use the due process clause to impose limits on state legislation. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (striking down the prohibition of abortion as a violation of the privacy considerations found in the concept of due process). This use of the Due Process Clause, generally called substantive due process, involves policy making and generalized implementation (which includes rulemaking), rather than individualized implementation (which includes adjudication). But the Court no longer reviews legislation in general on due process grounds merely because it has economic effects. *See* HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (offering a more charitable interpretation of the Court’s motivation, but confirming the decline of the Due Process Clause as a provision for judicial review of economic legislation).

106. *Fleming v. Nestor*, 363 U.S. 603 (government benefits are a privilege and thus do not merit due process protection); *Barsky v. Bd. of Regents*, 347 U.S. 442 (occupational licenses are a privilege and thus do not merit due process protection). *See* Reich, *supra* note 104; Charles A. Reich, *Individual Rights and Social Welfare: the Emerging Legal Issues*, 74 YALE L.J. 1245 (1965). The substantive due process era is generally regarded as having ended with the Court’s decisions in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and *United States v. Carolene Prods. Co.*, 92 U.S. 144 (1938). *See*

difficulty in applying due process protections to administrative action was as much conceptual as it was political.<sup>107</sup> The conceptual difficulty was finally solved by abstracting the elements of due process from their civil trial context, so that they could be applied in a broader range of settings—specifically to the now-ubiquitous interactions between administrative agencies and individuals.<sup>108</sup> The case that began this process is probably *Mullane v. Central Hanover Bank & Trust Co.*,<sup>109</sup> but the crucial step was the Supreme Court’s 1970 decision in *Goldberg v. Kelly*.<sup>110</sup> *Goldberg* is best known for its abolition of the right-privilege distinction, but this was virtually a foregone conclusion by the time the case was decided and is stated in an almost off-hand manner.<sup>111</sup> The decision’s real contribution is the effort to identify the generalized elements of due process protection so that the application of this protection in the administrative setting would be practicable.<sup>112</sup> These elements, the Court declared, are notice of the matter at stake, an oral or written hearing where each side is able to state

BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 139–226 (1998); GILLMAN, *supra* note 106, at 175–94.

107. For further discussion of the conceptual character of doctrine, see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 204–52 (1998); Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989 (1996).

108. See Henry J. Friendly, *Some Kind of a Hearing*, 123 U. PA. L. REV. 1267 (1975) (specifying the components of due process and urging that their value be separately assessed).

109. 339 U.S. 306 (1950). New York law provided that notice to beneficiaries of a common trust fund that the fund was being terminated could be provided by newspaper publication. *Id.* at 309–10. Justice Jackson argued that the due process clause required more specific notice in cases where the beneficiaries were known to the trustee. *Id.* at 313–15. He did so by detaching the concept of notice from the indictment or complaint of traditional trials, and then applying this generalized concept to the specific situation in the case. *Id.* at 318–20.

110. 397 U.S. 254 (1970).

111.

Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are “a ‘privilege,’ and not a ‘right.’” Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation.

*Id.* at 261–62 (citations omitted).

112. For discussions of *Goldberg*’s impact, see, for example, Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 197–200 (1991); Randy Lee, *Twenty-Five Years After Goldberg v. Kelly: Traveling from the Right Spot on the Wrong Road to the Wrong Place*, 23 CAP. U. L. REV. 863 (1994); Rubin, *supra* note 104, at 1060–65; Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 126–28 (1978).

its case, a neutral decision-maker, and a decision based on the evidence and arguments presented.<sup>113</sup>

Having characterized the essence of due process in this manner, the Court was able to apply it, in a series of subsequent cases, to a wide variety of administrative settings. In *Mathews v. Eldridge*,<sup>114</sup> the Court held that only written submissions were necessary prior to termination of Social Security disability benefits.<sup>115</sup> In *Vitek v. Jones*,<sup>116</sup> it fashioned a quasi-adversarial proceeding to determine whether prisoners could be transferred to a mental institution.<sup>117</sup> Most dramatically, in *Goss v. Lopez*,<sup>118</sup> it reduced the due process requirements to a minimum in order to apply them to a two-week suspension from public school.<sup>119</sup> From a rather formalized and structured procedure for judicially managed trials, the Court had fashioned a flexible instrument that could be adapted to

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113. *Goldberg*, 397 U.S. at 267–71. The only matter that was truly at issue was whether a written pre-termination hearing would be sufficient; the state had already conceded the relevance of due process and the applicability of its other elements. *Id.* at 255–61. In holding the state's procedure unconstitutional, the Court required a prior oral hearing in the specific context of welfare termination, but implied that written hearings could be acceptable in other situations. *Id.* at 262–64.

114. 424 U.S. 319 (1976).

115. *Id.* at 349. An oral hearing was available after the termination. *Id.* at 339. The case is most famous for the three-part test that the Court established (private interest, risk of error, and public interest) to determine what process is due in given situations. *See id.* at 335. *See generally* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 331, 336–37 (1993) (arguing that the decision's test represents an appropriate way of determining due process demands); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (arguing that the decision's test ignores important values). For the background of the case, see generally Cynthia R. Farina, *Due Process at Rashomon Gate: The Story of Mathews v. Eldridge*, in *ADMINISTRATIVE LAW STORIES* 228 (Peter Strauss ed., 2006).

116. 445 U.S. 480 (1980).

117. *Id.* *See also* *Hewitt v. Helms*, 459 U.S. 460, 476 (1983) (establishing a quasi-adversarial hearing requiring only "informal nonadversary review" for placement of a prisoner in administrative segregation).

118. 419 U.S. 565 (1975).

119. The Court said:

There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is . . . We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.

*Id.* at 582–83.



virtually any administrative setting that could be characterized as an adjudication of an individual's legal status.

This impressive conceptual success in generalizing due process protections for individuals has been ramified by scholarly discussion. Jerry Mashaw and Frank Michelman point out that due process serves a dignitary or fraternal function by giving individuals a voice and requiring the government to respond seriously to their challenges or allegations.<sup>120</sup> Tom Tyler finds, through empirical investigation, that government's compliance with due process requirements lends moral authority to its determinations and reconciles people to adverse decisions.<sup>121</sup> Through their scholarship, these writers, and others, advanced the important point that administrative due process—in applying an abstracted, generalized version of the trial model—must incorporate the symbolic and dramaturgical features of trials along with their fairness in determining the facts.

Despite its grounding in our basic theory of government and the sophistication with which it has been developed by both judges and scholars, generalized due process is limited as a means of controlling bureaucratic oppression. To begin with, and most importantly, it is only applicable to interactions between individuals and government that fall into the category of adjudications, that is, a final determination about whether to impose some disadvantage or to grant or deny some advantage to an individual.<sup>122</sup> But most of the interactions that give rise to

120. See Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 887–88 (1981); MASHAW, *supra* note 47; Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS: NOMOS XVIII 126, 126–28 (J. Ronald Pennock & John W. Chapman eds., 1977).

121. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (empirical study indicating that people are more willing to accept adverse legal decisions if they feel they have been given a fair hearing). Tyler concludes that the underlying reason for this effect is not only the perceived fairness of the due process-bound determination, but also the dignitary or fraternal effects that Mashaw and Michelson discerned. See *id.* at 164.

122. The Administrative Procedure Act uses the term “adjudication” extensively but only defines it indirectly, in relation to rulemaking. See 5 U.S.C. § 551(7) (2006) (“[A]djudication” means agency process for the formulation of an order[.]”); § 551(6) (“[O]rder” means the whole or a part of a final disposition . . . in a matter other than rule making.”). The definition of a rule is “an agency statement of general or particular applicability and future effect.” § 551(4). This definition is conceptually problematic, since classic adjudications, that is, judicial decisions, often have future effect. The Supreme Court provided a much better definition in two cases decided several decades earlier. See *Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 385–86 (1908) (individuals are entitled to a due process hearing when a tax is assessed against them as individuals); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (individuals are not entitled to a due process hearing when a tax is imposed on a group of people). See generally Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of “Rule”*, 56 ADMIN. L. REV. 1077 (2004). Levin argues that the APA should be amended to define the term “rule” in terms of “generality, not prospectivity.” *Id.* at 1079. The rationale

bureaucratic oppression lie well outside this category. Gogol's Very Important Person is not making a determination at all, but only demanding, however harshly, that Akaky follow established procedures; the crabby official at Wilson's motor vehicle bureau is simply informing the hapless applicants that they have chosen the wrong line. Much oppression resides in the informal, quotidian contacts between individuals and government officials. Because both due process decisions and due process scholarship emerge from the discipline of law, they follow the legality, (rather than the governance) model and suffer from that model's disproportionate emphasis on adjudicatory action.<sup>123</sup> The legality model simply fails to provide an adequate conceptual framework for addressing non-adjudicatory interactions.

Even within the ambit of adjudication where the legality model is applicable, due process requirements do not necessarily provide a solution to the problem of bureaucratic oppression. The pursuit of an adjudicatory remedy requires a certain rights-orientation—an optimistic confidence in one's own position and abilities—that is often precisely what is lacking in recipients of government assistance.<sup>124</sup> To say that people who are capable of obtaining benefits through adjudication are probably those who do not require benefits in the first place would be going too far. But clearly, many people who receive benefits or services from government—the disabled, the sick, the elderly, the young, the very young, the mentally deficient or deranged—are precisely those whose vulnerabilities impede assertion of their rights. Like consumers generally, they are more likely to “lump it” than to enter the foreign and seemingly perilous territory of legal action.<sup>125</sup>

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behind the Court's definition of adjudication, which is the one used in the text, is that groups have access to the political process but that individuals do not, and thus need due process protection.

123. According to Robert Kagan, this is a culturally specific feature of the American legal system. KAGAN, *supra* note 3.

124. See BARBARA A. CURRAN, AM. BAR ASS'N & AM. BAR FOUND., *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 126 (1977); Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 *LAW & SOC'Y REV.* 701, 707, 722–23 (1977).

125. See DAVID CAPLOVITZ, *THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES* 171 (1963) (noting that impoverished people rarely enforce their rights to redress in commercial situations); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 14 (1983) (finding that most ordinary people do not use litigation to enforce their rights); Robert Paul Hallauer, *Low Income Laborers as Legal Clients: Use Patterns and Attitudes Toward Lawyers*, 49 *DEN. L.J.* 169, 213–14 (1972) (observing that distrust of lawyers and fear of high costs may lead low income people to avoid legal enforcement of rights); Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC'Y REV.* 525, 562 (1981) (suggesting that American culture is less adversarial than generally depicted because ordinary citizens avoid legal involvement).

Lawyers or other professional representatives can supply the required sense of confidence and outrage, but they are formidably expensive and often just as foreign and frightening as the legal system, to which they unmistakably belong. Legal services lawyers are an exception on both counts, but they are in increasingly short supply, perhaps, if one wants to be cynical, for that very reason.<sup>126</sup>

Even when the aggrieved individual can obtain legal representation, or when the adjudication is so informal that most people can assert their claims on their own, as in the case of school suspension hearings, there is a further question whether due process requirements really serve to decrease bureaucratic oppression.<sup>127</sup> The image of a hearing that ensures an accurate application of the law's general categories to individuals or, better still, conveys a sense of fairness and respect, is an appealing one, and not without factual foundation. There is, however, the countervailing image conjured up by Malcolm Feeley's study of the New Haven criminal courts, tellingly entitled *The Process Is the Punishment*.<sup>128</sup> Legal procedures can be an instrument of oppression rather than an antidote to such oppression; they can immerse the average person in a foreign world where strange, barely-comprehended rituals lead to potentially disastrous results. While law-trained people see logic, dignity, and protection from government oppression in judicial and judicially-based procedures, others may discern the suffocating and ultimately incomprehensible affliction of Kafka's *Trial*,<sup>129</sup> or an *Alice in Wonderland* farrago where strange

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126. The Congressional hostility to legal enforcement of rights to welfare benefits has become particularly apparent in the welfare system since the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended primarily in scattered sections of 7 and 42 U.S.C.). For scholarship analyzing the PRWORA's privatization of welfare benefits on due process grounds, see generally David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231 (1998) (arguing that privatization incentivizes providers to abuse the poor's due process rights and that state monitoring is necessary); Melissa Kwarterski Scanlan, *The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due Process Rights*, 13 BERKELEY WOMEN'S L. REV. 153 (1998) (arguing that Wisconsin's post-PRWORA welfare reforms violate notice and hearing requirements); Super, *supra* note 44, at 869-82 (discussing the reduced role of law in post-PRWORA benefits systems); Rebecca E. Zietlow, *Two Wrongs Don't Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111 (1996) (arguing, while Congress was considering the PRWORA, that without additional action the new benefits system would erode the poor's essential due process rights).

127. As established by *Goss v. Lopez*, 419 U.S. 565, 583 (1975). This situation is quite rare, however. The Court claimed that it applied to adjudications involving veterans' benefits in *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), but the opinion is unconvincing.

128. FEELEY, *supra* note 45.

129. FRANZ KAFKA, *THE TRIAL* (Willa & Edwin Muir trans., 1953). To be sure, the primary meaning of Kafka's law courts is almost certainly religious, but they are also a satire on middle

creatures speak gibberish and the presiding official shouts, “Give your evidence . . . and don’t be nervous, or I’ll have you executed on the spot.”<sup>130</sup> Rather than providing protection from government authority, people may see due process as simply an exercise of that authority, a situation that Carroll’s illustrator, John Tenniel, depicted by having the King, who presides at Alice’s trial, wear his crown on top of his judicial wig.<sup>131</sup>

Finally, even if it avoids this sort of Very Important Person despotism, due process can lead to a rule-bound rigidity that undermines the purpose of the program it is intended to control. As Philip Howard writes regarding the administration of welfare benefits, the subject of the *Goldberg* case, “[d]ue process does not . . . put more bread on the table; government can set benefits at whatever level it wants. What due process puts on the table is a thick manual of rules designed to ensure uniformity and procedural regularity.”<sup>132</sup> Echoing the Circumlocution Officer’s instruction to give the bewildered citizen “lots of forms,” he adds: “People in need get lots of law.”<sup>133</sup> It is true that the Court has crafted more informal versions of due process for administrative settings, but these settings may be so fluid and complex that the supposedly streamlined procedures produce equivalent or greater rigidity. And the informality of bureaucratic process may make the situation seem more threatening, not less. A particularly sinister-seeming feature of Kafka’s law courts is that they are placed on the top floor of tenements, insinuating themselves into people’s lives without the liminal warning that ceremony and formality provides.<sup>134</sup>

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European bureaucracy, and it is the simultaneously metaphysical and mundane character of his imagery that makes the novel so effective.

130. LEWIS CARROLL, *THE ANNOTATED ALICE: ALICE’S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS* 147 (Martin Gardner ed., 1960).

131. *Id.* at 144. Carroll thought this a sufficiently significant image to make it the frontispiece of his book, a decision which he refers to in the text. *See id.* at 16.

132. HOWARD, *supra* note 95, at 156.

133. *Id.*; *see also id.* at 104–08, 150–68. For other discussions of the way that the emphasis on rights can undermine effective governance, see generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1993) (arguing that framing political discourse in terms of rights leads to absolutist claims and undermines personal responsibility and collective sociability); PHILIP K. HOWARD, *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA’S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* (2001) (contending that the prevalence of lawsuits undermines willingness to compromise and appropriate reliance on authority); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974) (arguing that while a rights-oriented strategy can empower social movements, it also channels and limits the kinds of demands they advance).

134. KAFKA, *supra* note 129, at 43–49.

### B. Ombudspersons: The Legislative Solution

The ombudsperson mechanism was developed in Scandinavia,<sup>135</sup> which is why it has a funny-sounding name. An ombudsperson is an individual or, given the scale of modern government, an office or agency that stands apart from the administrative hierarchy and is authorized to intervene in its procedures on behalf of private parties.<sup>136</sup> In its original and classic formulation, the ombudsperson was an officer of the legislature.<sup>137</sup> This arrangement is designed, in part, to assert legislative control over the administrative apparatus, which means that the ombudsperson can be placed in the same category as oversight hearings,<sup>138</sup> budgetary control,<sup>139</sup> and the now unconstitutional but far from defunct legislative veto.<sup>140</sup> But it

135. See generally IBRAHIM AL-WAHAB, *THE SWEDISH INSTITUTION OF OMBUDSMAN: AN INSTRUMENT OF HUMAN RIGHTS* 21–36 (1979) (reviewing the historical development of the ombudsman in Sweden); WALTER GELLHORN, *OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* 194–95 (1966) (same); FRANKLIN SCOTT, *SWEDEN: THE NATION'S HISTORY* 298 (enlarged ed. 1988) (describing the creation of the Swedish ombudsman).

136. See TREVOR BUCK, RICHARD KIRKHAM & BRIAN THOMSON, *THE OMBUDSMAN ENTERPRISE AND ADMINISTRATIVE JUSTICE* 3–23 (2011) (describing the proliferation of the ombudsman system); JAMES T. ZIEGENFUSS, JR. & PATRICIA O'ROURKE, *THE OMBUDSMAN HANDBOOK: DESIGNING AND MANAGING AN EFFECTIVE PROBLEM-SOLVING PROGRAM* 16–21 (2011). See generally GELLHORN, *supra* note 135, at 5–33 (describing the ombudsman in Denmark); *id.* at 49–80 (Finland); *id.* at 91–141 (New Zealand); *id.* at 154–91 (Norway); *id.* at 194–227 (Sweden).

137. See AL-WAHAB, *supra* note 135, at 20 (“[T]he term Ombudsman signifies the person (or persons) who is elected by the Parliament as its representative.”); *id.* at 25–27 (describing the Swedish Parliament’s efforts to establish the Ombudsman as a legislative officer); see also GELLHORN, *supra* note 135, at 8, 51, 158, 202–03 (describing legislative choice of ombudsman in Scandinavian countries).

138. See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* (1990) (describing the growth of oversight hearings as a means by which Congress can exercise control of the burgeoning administrative apparatus); CHRISTOPHER H. FOREMAN, JR., *SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION* (1988) (describing ways in which oversight hearings are used to both restrain and motivate administrative agencies); cf. Steven Shimberg, *Checks and Balance: Limitations on the Power of Congressional Oversight*, 54 *LAW & CONTEMP. PROBS.* 241 (1991) (suggesting that oversight can be an effective way to assert Congressional control of agencies such as the EPA, but it has significant limitations).

139. See Barry Bozeman, *The Effect of Economic and Partisan Change on Federal Appropriations*, 30 *POL. Q.* 112, 112 (1977) (noting Congress sets and controls public policy through alterations, particularly non-incremental alterations, in agency budgets); PERTSCHUK, *supra* note 73, at 76–97; Kate Stith, *Congress’ Power of the Purse*, 97 *YALE L.J.* 1343, 1363–77 (1988) (describing mechanisms by which Congress can use its appropriations authority to control executive action).

140. The legislative veto, a provision in a statute authorizing a committee, one house of Congress, or both houses of Congress to reverse an agency’s duly-enacted regulation, was declared unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983), as a violation of the Presentment Clause and, in the case of a one house or committee veto, the bicameralism requirement of Article I, Section 7, clause 2. *Id.* at 956–59. Congress continued to include legislative veto provisions in enacted statutes after *Chadha*, however, on the assumption that Congressional disapproval would stop agencies from proceeding with a regulation even if they were authorized to do so. See Louis Fischer, *The Legislative*

also reflects a more general desire to secure the ombudsperson's independence from the administrative hierarchy.

This device has been used fairly extensively in the English-speaking world, specifically in the United Kingdom,<sup>141</sup> Canada,<sup>142</sup> New Zealand<sup>143</sup> and India,<sup>144</sup> and has been adopted by the European Union.<sup>145</sup> In the United States, it has been implemented in some specific administrative programs at the federal and state level,<sup>146</sup> and comprehensively in several states.<sup>147</sup> It is particularly well developed in the U.K., where there are three separate groups of ombudspersons at the national level, one having general jurisdiction,<sup>148</sup> a second with jurisdiction over health-related matters,<sup>149</sup>

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*Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288 (1993). Congress then enacted the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 251, 110 Stat. 847, 868-74 (1996) (codified at 5 U.S.C. §§ 801-803 (2011)), which requires agencies to submit their regulations to Congress and wait for a designated period of time before implementing them. *See id.*

141. *See generally* ROY GREGORY & PETER HUTCHESON, ROYAL INST. OF PUB. ADMIN., THE PARLIAMENTARY OMBUDSMAN: A STUDY IN THE CONTROL OF ADMINISTRATIVE ACTION (1975); ROY GREGORY & PHILIP GIDDINGS, THE OMBUDSMAN, THE CITIZEN AND PARLIAMENT: A HISTORY OF THE OFFICE OF THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION AND HEALTH SERVICE COMMISSIONERS (2002); CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 391-455 (2d ed. 1997); MARY SENEVIRATNE, OMBUDSMEN: PUBLIC SERVICES AND ADMINISTRATIVE JUSTICE (2002); H.W.R. WADE & C.F. FORSYTH, ADMINISTRATIVE LAW 87-112, 137-38 (8th ed. 2000).

142. *See generally* Wendy Bernt & Stephen Owen, *The Ombudsman in Canada*, in RIGHTING WRONGS: THE OMBUDSMAN IN SIX CONTINENTS 127 (Roy Gregory & Philip Giddings eds., 2000); Claude-Armand Sheppard, *An Ombudsman for Canada*, 10 MCGILL L.J. 291 (1964).

143. *See generally* GELLHORN, *supra* note 135, at 91-153; LARRY B. HILL, THE MODEL OMBUDSMAN: INSTITUTIONALIZING NEW ZEALAND'S DEMOCRATIC EXPERIMENT (1976).

144. *See generally* M. P. JAIN, LOKPAL: OMBUDSMAN IN INDIA (L.M. Singvi ed., 1970); D.R. SAXENA, OMBUDSMAN (LOKPAL): REDRESS OF CITIZENS' GRIEVANCES IN INDIA (1987). India is at least arguably part of the English-speaking world.

145. *See generally* MARÍLIA CRESPO ALLEN, EUROPEAN PARLIAMENT, DIRECTORATE-GENERAL FOR RESEARCH AND DOCUMENTATION, EUROPEAN OMBUDSMAN AND NATIONAL OMBUDSMEN OR SIMILAR BODIES (Political Series No. POLI 117 EN, 2001) (comparatively describing the office of the European Ombudsman); KATJA HEEDE, EUROPEAN OMBUDSMAN: REDRESS AND CONTROL AT UNION LEVEL (Kluwer Law Int'l, European Monographs No. 24, 2000); INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION (Gerald E. Caiden ed., 1993).

146. *See, e.g.*, Older Americans Act of 1965, 42 U.S.C. § 3011(d) (2011) (ombudsman for long-term care patients); IND. CODE § 4-13-1.2 to 1.3 (2012) (ombudsman for prisoner complaints). Utah, true to form, has something called an ombudsperson to aid in the prosecution of pornography. UTAH CODE ANN. § 67-5-18 (LexisNexis 2011). For a seminal, although now-outdated study of the use of this approach in the U.S., see Kenneth Culp Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. PA. L. REV. 1057 (1961). For a more contemporary survey, see Douglas Ivor Brandon et al., *Special Project, Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 1031-36 (1984).

147. Some examples of such states are Alaska, Arizona, Hawaii, Iowa, Montana, Nebraska, Ohio, and Rhode Island. A number of cities also have ombudspersons, such as Atlanta, Cleveland, Portland and Seattle. New York City has an elected ombudsperson.

148. DONALD C. ROWAT, THE OMBUDSMAN PLAN: THE WORLDWIDE SPREAD OF AN IDEA 135-37 (rev. ed. 1985); FRANK STACEY, OMBUDSMEN COMPARED 122-75 (1978).

149. ROWAT, *supra* note 148, at 138; STACEY, *supra* note 148, at 176-94.

and a third for local government.<sup>150</sup> In addition, many U.K. government agencies have developed their own ombudspersons.<sup>151</sup>

In order to invoke the authority of the U.K.'s national ombudspersons, citizens must file their complaints with a member of the House of Commons, who then transmits them to the ombudspersons.<sup>152</sup> This arrangement, which reflects the mechanism's historical roots, may appear to resemble casework in the U.S., that is, interventions by legislators on behalf of influential constituents.<sup>153</sup> In fact, the legislators in the U.K. perform only a general screening or gate-keeping function and transmit most of the complaints to the ombudspersons, rather than providing redress on their own and reaping political benefits for doing so.<sup>154</sup> Once the ombudspersons have received a complaint, they investigate and can either intervene directly with the agency or recommend legislation.<sup>155</sup>

The content of the complaints covers a range of problems regarding the performance of administrative agencies. The typical ones are substantive—that the agency has given the individual incorrect information, applied an incorrect rule, or applied the correct rule in an incorrect manner. If the complaint is deemed plausible, the ombudspersons can investigate to determine its validity.<sup>156</sup> Their remedial repertoire is generally limited to advisory or hortatory interventions. This may be sufficient in many cases; if the agency has made an error, all that may be

150. ROWAT, *supra* note 148, at 137–38; STACEY, *supra* note 148, at 195–226.

151. *See, e.g.*, PATRICK BIRKINSHAW, *GRIEVANCES, REMEDIES AND THE STATE* (2d ed. 1994); *see id.* at 412–14 (prisons), 414–21 (police).

152. Roy Gregory & Philip Giddings, *The Ombudsman Institution: Growth and Development*, in *RIGHTING WRONGS*, *supra* note 142, at 21, 24–25; ROWAT, *supra* note 148, at 135–36; STACEY, *supra* note 148, at 142–43.

153. *See generally* FIORINA, *supra* note 87, at 41–70; JOHN R. JOHANNES, *TO SERVE THE PEOPLE: CONGRESS AND CONSTITUENCY SERVICE* 95–118 (1984) (sketching the mechanisms and process of legislative casework); MAYHEW, *supra* note 87, at 52–61 (discussing casework as a form of “credit claiming” by which a legislator acquires political capital). Casework can also be regarded as a form of legislative oversight of the administration, thus grouping it with hearings, appropriations and the legislative veto. *See generally* John R. Johannes, *Casework as a Technique of U.S. Congressional Oversight of the Executive*, 4 *LEGIS. STUD. Q.* 325 (1979) (studying where casework can be useful as a means of oversight); *see supra* notes 138–40 and accompanying text.

154. *See* Roy Gregory & Jane Pearson, *The Parliamentary Ombudsman After Twenty-five Years*, 70 *PUBLIC ADMIN.* 469, 475–79 (1992); *see also* HARLOW & RAWLINGS, *supra* note 141, at 423–55 (describing and evaluating the Parliamentary Commissioner for Administration complaints system); Richard Rawlings, *The MP's Complaints Service*, 53 *MOD. L. REV.* 22, 30–35 (1990) (describing how the screening and gate-keeping functions are performed).

155. Gregory & Giddings, *supra* note 152, at 27–30; STACEY, *supra* note 148, at 155–61.

156. The decision to pursue an investigation is within the discretion of the Parliamentary Ombudsman, the head of the U.K. ombudsperson's office (which is called the Parliamentary Commissioner for Administration). *See* Gregory & Giddings, *supra* note 152, at 25–26. The Ombudsman can compel the disclosure of information by any person, and refusal to comply is deemed contempt of court. *Id.* at 27–28.

necessary is to bring that error to the attention of a responsible official. The official's own motivation to correct the error is greatly amplified by the fact that the person pointing out the error is an agent of the legislature. If systematic errors occur that seem to stem from the design of the authorizing legislation, the ombudspersons are expected to frame recommendations to the legislature for revision of the statute.<sup>157</sup>

Three defining features of legislative ombudspersons are that they are complaint driven, they are empowered to investigate, and they are independent of the administrative hierarchy. In this sense, they are similar to the judges who enforce due process requirements.<sup>158</sup> They enable both ombudspersons and judges to redress specific wrongs or problems involving individuals, to do so on the basis of information about these wrongs and problems, and to act in a more neutral, more confrontational way toward administrative agents than those agents' superiors or colleagues in the administrative hierarchy.<sup>159</sup> The mechanisms employed by judges and ombudspersons thus depend on the existence of independent centers of political authority that are characteristic of a democracy, as opposed to the unitary structure of a monarchy or an autocracy.<sup>160</sup> The two mechanisms differ, however, in that judges are authorized to issue definitive decisions reversing administrative action, while ombudspersons rarely have such authority.<sup>161</sup> This lack of authority can be regarded as a fourth defining feature of the ombudsperson mechanism, and perhaps an inherent defect, or it can be seen as the failure to fully realize the mechanism's full potential.

While the ombudsperson mechanism began as an instrumentality of the legislature, and often continues to function in that form, it is also found in

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157. Gregory & Giddings, *supra* note 152, at 28–30; STACEY, *supra* note 148, at 142–50.

158. American judges, of course, generally do not initiate investigations, but they place the force of law behind investigations by the parties. Continental, or inquisitorial, procedure includes direct investigation by judges. See JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 62 (1977) (“The presiding judge has the primary forensic role at trial, the role that belongs to the opposing lawyers in Anglo-American procedure: he is the examiner-in-chief.”); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 828 (1985) (“The judge serves as the examiner-in-chief. At the conclusion of his interrogation of each witness, counsel for either party may pose additional questions, but counsel are not prominent as examiners.”).

159. See, e.g., GELLHORN, *supra* note 135, at 422–26; LINDA C. REIF, *THE OMBUDSMAN, GOOD GOVERNANCE AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM* 2–4, 399–4–4 (2004); ROWAT, *supra* note 148, at 4–5.

160. REIF, *supra* note 159, at 397–99; see *id.* at 397 (“Ombudsmen and hybrid institutions usually cannot fulfill their functions effectively in states that do not have some level of democratic governance.”).

161. GELLHORN, *supra* note 135, at 433–36; REIF, *supra* note 159, at 4; ROWAT, *supra* note 148 at 5. Reif describes the “extreme end of ombudsman powers (found in Ghana and Tanzania) as being empowered to appear in court “to enforce its own recommendations.” REIF, *supra* note 159, at 404.



many other settings. As noted above, administrative agencies sometimes establish internal ombudspersons offices.<sup>162</sup> Universities, health care facilities, and other non-profit institutions sometimes do so as well, to deal with either employee or client complaints.<sup>163</sup> The device has also been adopted by a number of private, for-profit corporations, again for either employee or customer complaints.<sup>164</sup> While all such offices tend to be complaint-driven and to grant the ombudsperson investigative authority, they often lack the independence of the legislative ombudsperson. The reason is that none of these institutions possess the separate power centers that are available to a democratic government. In a sense, they are autocracies, no matter how benignly they are run. On this basis, many observers assert that these mechanisms do not deserve to be placed in the same category as the legislative ombudsperson, and charge that they are using the ombudsperson name to obtain an undeserved legitimacy.<sup>165</sup> Their real purpose, it is claimed, is not to provide genuine redress but, in Erving Goffman's phrase, to "cool the mark out."<sup>166</sup>

The legislative ombudsperson avoids this defect, but suffers from the obverse problem of being inherently confrontational. An investigation carried out by someone who answers to the governmental entity that can, and regularly does, review the agency's budget, subject its leaders to adversarial oversight hearings, review its regulations, and sometimes revise its authorizing statutes, necessarily conveys a sense of threat. Judicial intervention via due process is also confrontational, of course, but it can back its inherently threatening stance with real sanctions. Legislative ombudspersons, lacking these sanctions, are left with little to combat the defensive and intransigent response that confrontation is likely to elicit. At

162. See Birkinshaw, *supra* note 151, at 412–21; Daniel Jacoby, *The Future of the Ombudsman*, in *THE OMBUDSMAN CONCEPT* 211, 212 (Linda Reif ed., 1995).

163. See ZIEGENFUSS & O'ROURKE, *supra* note 136, at 33–36.

164. Arlene Redmond & Randy Williams, *Enter the Watchmen: The Critical Role of an Ombuds Program in Corporate Governance*, 51 *RISK MGMT.* 48 (2004) (relating the use of ombudspersons in corporations to whom employees can report problems); ZIEGENFUSS & O'ROURKE, *supra* note 136, at 36–39.

165. Donald C. Rowat, *The American Distortion of the Ombudsman Concept and Its Influence on Canada*, 50 *CANADIAN PUB. ADMIN.* 42 (2007) (explaining that the concept of ombudsperson was originally someone who, by virtue of being a legislative officer, was independent of the institution being complained against, but term is used in the U.S. for someone appointed by the heads of those institutions); Caroline Stieber, 57 *Varieties: Has the Ombudsman Concept Become Diluted?*, 16 *NEGOT. J.* 49 (2000) (arguing that proliferation of positions designated as ombudsman in U.S. has undermined the meaning and function of the original idea).

166. Erving Goffman, *Cooling the Mark Out: Some Aspects of Adaptation to Failure*, 15 *PSYCHIATRY* 451 (1952) (relating the use of specialists within personal service organizations assigned to reassure persons who have been taken advantage of that they have not been taken advantage of).

the outset, the agency will tend to resist the ombudsperson's investigatory efforts, concealing rather than disclosing information and squelching genuine self-criticism by its staff with appeals to institutional loyalty and threats of subsequent, clandestine punishment. It would be possible to provide a legislative agency with subpoena power,<sup>167</sup> but this might not reveal the necessary information and would certainly exacerbate the sense of confrontation. When solutions are discussed, the agency will tend to justify its existing procedures because it will regard any changes as risky admissions of fault and because it will resent being asked to make such changes by an outside force. In short, the legislative ombudsperson often finds herself in the unenviable position of having no means of effecting change other than empty threats.

### C. *Client-Centered Administration: The Management Solution*

Management theory, developed through the disciplines of both sociology and engineering, offers a different solution to the problem of bureaucratic oppression.<sup>168</sup> Rather than engaging other branches of government—such as the judiciary or the legislature—to supervise administrative agents, the management approach attempts to change the internal structure and procedures of the agency itself, enabling it to carry out its tasks more fairly and effectively.<sup>169</sup> In the particular case of

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167. The U.K. ombudsperson possesses this power, see Gregory & Giddings, *supra* note 156, at 27–28, as does the U.S. Congress, see *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975); *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). As the Court said in *Eastland*, the power to issue subpoenas is “an indispensable ingredient of lawmaking.” 421 U.S. at 505. The sanction of contempt for refusal to obey a Congressional subpoena is provided by statute. 2 U.S.C. § 194 (2010); see Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means By Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 73–84 (1986) (describing range of Congressional investigative powers); Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 566–68, 575–82 (1991) (discussing means of enforcing Congressional subpoenas).

168. Management theory is a school of thought developed during the first half of the twentieth century that advanced the idea of the “scientific” or systematic design of functional organizations, both public and private. For its foundations, see HENRI FAYOL, *GENERAL AND INDUSTRIAL MANAGEMENT* (Constance Storrs trans., 1949); ELTON MAYO, *THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION* (1933) (discussing, inter alia, the Hawthorne experiments); FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911); MAX WEBER, *ECONOMY AND SOCIETY* 220–26, 956–1003 (Guenther Roth & Claus Wittich trans., 1978) (analysis of bureaucracy). Weber wrote *Economy and Society* from 1911 to 1913. See REINHARD BENDIX, *MAX WEBER: AN INTELLECTUAL PORTRAIT* 423 n.14 (1977) (documenting publication date of Weber's work).

169. See EUGENE BARDACH, *A PRACTICAL GUIDE FOR POLICY ANALYSIS: THE EIGHTFOLD PATH TO MORE EFFECTIVE PROBLEM SOLVING* 137–43 (3d ed. 2009) (listing issues for application of policy analysis model to agency decision making); THOMAS A. BIRKLAND, *AN INTRODUCTION TO THE POLICY PROCESS: THEORIES, CONCEPTS AND MODELS OF PUBLIC POLICY MAKING* 66–73, 108–34, 157–80 (2d ed. 2005) (discussing policy making role of agencies, their agenda setting process and the

controlling oppressive behavior, management theory seeks to modify or eliminate the procedures that produce oppression and to instill among the staff an ethos of client orientation, a prevailing attitude that the people for whom the agency provides benefits or services are to be treated as clients, or better still, as customers.<sup>170</sup>

Management theory draws upon the premise that organizational realities control behavior and thus tends to efface distinctions between public agencies and private firms. The same kinds of strategies that private firms adopt because they need to please their customers in order to obtain their income can therefore be adopted by government agencies in their effort to serve their clients. According to the Gore Report, an action plan drafted at the beginning of the first Clinton administration that summarized the work of a study group called the National Performance Review, “government agencies must do what many of America’s best businesses have done: renew their focus on customers.”<sup>171</sup> The report, moreover, documents a number of cases where agencies actually implemented this approach.<sup>172</sup>

Michael Barzelay provides a more systematic account of client-centered administration.<sup>173</sup> The first step, he suggests, is to identify the customer with care: “A customer relationship is a mutually adjustable

policy making tools that they employ); MALCOLM K. SPARROW, *THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE* 53–64, 155–70 (2000) (discussing client service approach and problem-solving infrastructure of an agency); EDITH STOKEY & RICHARD ZECKHAUSER, *A PRIMER FOR POLICY ANALYSIS* 74–88, 201–54 (1978) (describing client service and decision-making protocol of organizations); John D. Donahue & Richard J. Zeckhauser, *Public-Private Collaboration*, in *THE OXFORD HANDBOOK OF PUBLIC POLICY ANALYSIS* 496, 500–10 (Michael Moran et al. eds., 2006) (discussing direct and indirect government action and agency relationship to private parties). Regarding the application of this approach to administrative law, see Lisa S. Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 516–44 (2003) (determining that constitutional principles governing administrative agencies can be adapted to combat arbitrary action, rather than accountability).

170. See MICHAEL BARZELAY, *BREAKING THROUGH BUREAUCRACY: A NEW VISION FOR MANAGING IN GOVERNMENT* 102–14 (1992); JOHN J. DI IULIO, JR. ET AL., *IMPROVING GOVERNMENT PERFORMANCE: AN OWNERS’ MANUAL* 73–78 (1993); GORE, *supra* note 80, at 43–64; DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 166–94 (1992).

171. GORE, *supra* note 80, at 44; see generally *id.* at 43–64 (section entitled “Putting Customers First”).

172. *Id.* at 45–47 (describing programs run by the IRS, the Social Security Administration and the Postal Service).

173. BARZELAY, *supra* note 170, at 102–14. Barzelay is part of a movement within policy analysis called New Public Management that strongly influenced the Gore Report. For other examples of this approach, see *supra* note 171; PETER AUCOIN, *THE NEW PUBLIC MANAGEMENT IN CANADA IN COMPARATIVE PERSPECTIVE* (1995); Donald F. Kettl, *The Global Revolution in Public Management: Driving Themes, Missing Links*, 16 J. POL’Y ANALYSIS & MGMT. 446 (1997); MARK H. MOORE, *CREATING PUBLIC VALUE: STRATEGIC MANAGEMENT IN GOVERNMENT* (1995).

working relationship in which the provider's main purpose is to meet the user's needs."<sup>174</sup> After the customer has been identified, the agency must decide the particular kind of service that it should be providing. The best sources of information about this are the customers themselves: "as a rule," he writes, "customers' informed and reflective judgment about how well a service meets their needs are accurate."<sup>175</sup> To foster an ethos of customer service, control functions should be separated from service functions and assigned to a different unit of the agency.

One way to achieve these goals is through the technique that Arlie Hochschild describes as "emotional labor."<sup>176</sup> Her study of flight attendants indicated that their employer greatly valued friendly, welcoming behavior toward the customers, and fostered this desired behavior by encouraging the attendants to actually experience the emotions they were expected to convey. Subsequent studies reveal that employers use a variety of management strategies to induce these feelings among employees,<sup>177</sup> thereby inducing similarly positive feelings among customers.<sup>178</sup>

Another important technique, developed by drawing upon the post-Fordist movement in industrial organization,<sup>179</sup> is to actively engage the

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174. BARZELAY, *supra* note 170, at 110.

175. *Id.* This often leads to an emphasis on complaints. See, e.g., JANELLE BARLOW & CLAUS MØLLER, A COMPLAINT IS A GIFT: RECOVERING CUSTOMER LOYALTY WHEN THINGS GO WRONG (2d ed. 2008); Donald E. Conlon & Noel M. Murray, *Customer Perceptions of Corporate Responses to Product Complaints: The Role of Explanations*, 39 ACAD. MGMT. J. 1040 (1996); Linda Fuller & Vicki Smith, *Consumers' Reports: Management by Customers in a Changing Economy*, 5 EMP. & SOC'Y 1 (1991).

176. ARLIE RUSSELL HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING 137–61 (1983) (exploring efforts by employers to engage the emotions of employees to improve customer relations); Arlie R. Hochschild, *Emotional Work, Feeling Rules, and Social Structure*, 85 AM. J. SOCIOLOGY 551 (1979) (same). Hochschild is generally critical of emotional labor, which she sees as placing unfair demands on the workers in order to increase the profits for managers and owners. For a discussion of judicial behavior as emotional labor, see Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485 (2011).

177. See, e.g., RICHARD EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY (1979) (surveying various methods); LEIDNER, *supra* note 30 (establishing tightly scripted exchanges between fast food workers and customers); Martin B. Tolich, *Alienating and Liberating Emotions at Work: Supermarket Clerks' Performance of Customer Service*, 22 J. CONTEMP. ETHNOGRAPHY 361 (1993) (monitoring supermarket checkout clerks); John Van Maanen & Gideon Kunda, "Real Feelings": *Emotional Expression and Organizational Culture*, 11 RES. ORG. BEHAVIOR 43 (1989) (selection and monitoring of amusement park employees).

178. See Brian Parkinson, *Emotional Stylists: Strategies of Expressive Management among Trainee Hairdressers*, 5 COGNITION & EMOTION 419 (1991) (finding that trainee hair stylists achieve elicited positive reactions from clients by displaying emotion); S. Douglas Pugh, *Service With a Smile: Emotional Contagion in the Service Encounter*, 44 ACAD. MGMT. J. 1018 (2001) (customers "catch" the affect of the staff).

179. See, e.g., DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL

customers or clients in setting goals and developing implementation strategies. This approach has been utilized in a variety of for-profit settings.<sup>180</sup> With respect to the public sector, it comprises a major element in the school of legal scholarship generally referred to as New Public Governance.<sup>181</sup> One of New Public Governance's primary themes is that command and control regulation is ineffective and should be replaced by more flexible mechanisms featuring consultation, collaboration, and compromise.<sup>182</sup> When applied to government provision of goods and services, it suggests that clients of government agencies should be consulted about both the design and implementation of the program.<sup>183</sup>

FORECASTING 47–119 (1973); 1 MANUEL CASTELLS, *THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE: THE RISE OF NETWORK SOCIETY* 201–31 (1996); CHARLES F. SABEL, *WORK AND POLITICS: THE DIVISION OF LABOR IN INDUSTRY* 194–231 (1982); MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* 251–307 (1984). The idea is to move beyond assembly line, or “Fordist” production techniques through a variety of means including team production and flexible structure. For a somewhat different use of the term post-Fordism, see, for example, MICHEL AGLIETTA, *A THEORY OF CAPITALIST REGULATION: THE U.S. EXPERIENCE* (David Feinbach trans., 1979) (regulationist theory that historicizes capitalism and analyzes its internal weaknesses).

180. See, e.g., Martin O'Brien, *The Managed Heart Revisited: Health and Social Control*, 42 SOC. REV. 393 (1994) (discussing the use of emotional labor by nurses to promote health among patients); Nancy Wisely & Gary A. Fine, *Making Faces, Portraiture as a Negotiated Worker-Client Relationship*, 24 WORK & OCCUPATIONS 164 (1997) (finding that portrait painters must interact with and respond to their clients in order to be successful).

181. In addition to post-Fordism, New Public Governance draws on organization theory and on the implementation studies of public law scholars. See, e.g., SELZNICK, *supra* note 69 (analyzing pathologies, specifically goal displacement, of TVA); *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Walter W. Powell & Paul J. DiMaggio eds., 1991) (discussing the role of ritual, symbolism and patterning in organizations); EUGENE BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW* (1977) (studying strategies used by administrative agencies to carry out their statutory missions); MARTHA DERTHICK, *NEW TOWNS IN-TOWN: WHY A FEDERAL PROGRAM FAILED* (1972) (studying the implementation of the Model Cities Program); JAY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND* (1973) (studying the Economic Development Administration's program in Oakland, California). On Charles Sabel's role in joining post-Fordism with public governance issues, see Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WISC. L. REV. 357. On New Public Governance generally, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

182. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); EUGENE BARDACH & ROBERT KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); JOHN BRAITHWAITE, *TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY* (1985); Freeman, *supra* note 3; Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297 (1999).

183. See, e.g., Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 843–46, 874–81 (2000); Kathleen G. Noonan, Charles F. Sabel & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 L. & SOC. INQUIRY 523, 541–42 (2009); Susan Sturm, *Second*

Describing the use of drug courts to replace the standard criminal sanction, Michael Dorf and Charles Sabel write:

The central feature of this governance system is that the monitored agents choose their own precise goals and the means for achieving them in return for furnishing a central authority with the information that allows evaluation of their performance . . . . [B]y collaborating in this way, central authority and decentralized actors can together explore and evaluate solutions to complex problems that neither alone would have been likely to identify, much less investigate or address, without the exchanges with the others. The same exchanges of information, moreover, enable the institutions continually to adjust their means and ends in the light of experience.<sup>184</sup>

Despite the broad support that it engenders, and the intellectual sophistication of its proponents, client-centered management suffers from significant limitations as a response to the problem of bureaucratic oppression. A branch of policy analysis, its implicit audience is a rational policy maker,<sup>185</sup> or, to add a dose of political realism, the rational element in the policy making process.<sup>186</sup> When attention focuses on real-world actors, the recommended policy takes on the character of advocacy or exhortation. Neither is without its value, to be sure. It is useful to know the optimal strategy to achieve a given result—that is, the strategy that a rational decision maker, unencumbered by political constraints, would find persuasive. Similarly, exhortations from scholars often prove to be more

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*Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 479–89 (2001).

184. Dorf & Sabel, *supra* note 183, at 833–34. For a related view, see DEREK BOK, *THE TROUBLE WITH GOVERNMENT* 235 (2001) (discussing adaptation of government action to needs of its clients).

185. BIRKLAND, *supra* note 169, at 214; SPARROW, *supra* note 169, at 11–14; STOKEY & ZECKHAUSER, *supra* note 169, at 3–4.

186. This model is derived from Herbert Simon's concept of bounded rationality—that decision makers try to decide on a rational basis, but are limited by their own cognitive abilities and the complexity of the situation. SIMON, *supra* note 69, at 87–97, 118–22. See OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 36–37, 42–44 (1996). There are, of course, other, more comprehensive critiques of rational decision making in the public policy realm. Two of the standard ones are GRAHAM T. ALLISON & PHILIP ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (2d ed. 1999), and Charles E. Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79 (1959). See also Charles E. Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADMIN. REV. 517 (1979); DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 376–83 (rev. ed. 2002).

influential than might be expected, particularly over long periods of time.<sup>187</sup>

The problem of bureaucratic oppression, however, is one that tends to be resistant to either rational strategies or moral exhortations. No one is in favor of bureaucratic oppression, and while some administrators may adopt it as a conscious approach to deter citizen users and save money, few could be said to do so justifiably.<sup>188</sup> As described above, the real causes of bureaucratic oppression are deeply embedded structural factors: status differences, stranger relations, institutional pathologies, and divergent incentives.<sup>189</sup> Thus, the task is to counteract these factors to reduce or eliminate the impediments that prevent conscientious policy makers from providing the kind of service that they know is preferable. Telling them that a client-centered strategy is the optimal approach, and exhorting them to adopt that strategy, often fails to address the real problem; as Philip Howard notes, “[It] preaches the credo of flexibility without emphasizing the cold truth that flexibility only comes from abandoning the procedural orthodoxy on which modern government is now built.”<sup>190</sup>

Despite its sophistication and thoughtfulness, management theory suffers from some notable lacunae. To explain the mechanism by which his client-centered approach would be implemented, for example, Barzelay writes: “In a typical customer relationship, users believe that providers should be accountable to them (and perhaps to other parties) for [meeting the users’ needs], and providers recognize that they ought to be so

187. See JOHN FRIEDMAN, *PLANNING IN THE PUBLIC DOMAIN: FROM KNOWLEDGE TO ACTION* 51–85 (1987); RICHARD E. NEUSTADT & ERNEST R. MAY, *THINKING IN TIME: THE USES OF HISTORY FOR DECISION-MAKERS* 1–33, 232–70 (1988); SPEAKING TRUTH TO POWER: PUBLIC INTELLECTUALS RETHINK NEW ZEALAND (Laurence Simmons ed., 2007) (account of the way that theorists and other thinkers have influenced public policy in New Zealand); Carol Weiss, *Research for Policy's Sake: The Enlightenment Function of Social Research*, 3 POL’Y ANALYSIS 531 (1977) (arguing that effect of research should be measured in cognitive rather than instrumental terms). The extent to which scholars or other commentators influence decision makers is of course a matter of controversy. The issue has been explored at length in legal literature regarding the influence of legal scholarship on judges. See, e.g., Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); MELVIN AARON EISENBERG, *THE NATURE OF THE COMMON LAW* 96–99 (1991). For my own views on this issue, see Edward Rubin, *Seduction, Integration and Conceptual Frameworks: The Influence of Legal Scholarship on Judges*, 29 U. QUEENSLAND L.J. 101 (2010); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988).

188. See *supra* note 70.

189. See *supra* Part I.

190. HOWARD, *supra* note 95, at 105.

accountable.”<sup>191</sup> His recommendation makes a good deal of sense, but the term “accountable” is undefined and, in fact, it conceals a crucial ambiguity.<sup>192</sup> It implies that one person is answerable to another and must conform his or her behavior to the other’s desires.<sup>193</sup> But the primary means by which this is achieved, in a modern context, is through administrative supervision. Other uses of the term may be more metaphorical than real. We often speak of voting as a means of making elected public officials accountable to their constituents,<sup>194</sup> for example, but being elected by a group of people and being subject to ongoing, detailed supervision by those people are two very different matters.<sup>195</sup>

The clients, or “customers,” of a government agency are often not in a position to supervise that agency’s officials in any sense, not even the attenuated sense in which voters supervise elected officials, and clearly not in the robust sense in which an administrative superior supervises a subordinate. That is precisely where the problem of bureaucratic oppression resides. In theory, and on the basis of moral exhortation, these officials should of course be accountable to the people whom the legislature has instructed them to serve. But because of status differences, stranger relations, institutional pathologies, and divergent incentives, they are simply not accountable in any real sense.<sup>196</sup>

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191. BARZELAY, *supra* note 170, at 110. The sentence appears in a section with the hortatory title “Be Accountable to Customers.” *Id.* at 109.

192. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076–91 (2005).

193. *See id.* at 2119.

194. *See, e.g.*, Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1068–71 (1995); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2200–01 (1998); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 269–73 (2000); D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 640–46 (1985).

195. Rubin, *supra* note 193, at 2076–98.

196. In contrast, large business enterprises and mobilized social movements may well be able to hold regulators accountable. *See, e.g.*, BRUCE A. ACKERMAN & T. WILLIAM HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT (1981) (documenting the influence of highly organized Eastern coal producers on the implementation of the Clean Air Act); ROBERT KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED 15–151 (1986) (documenting the effect of highly mobilized movement of disabled persons on legislative and administrative decision making for transportation); PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 96–174 (1981) (discussing budget-related and career-based incentives that influence agency officials to implement policy favorable to those they regulate); WILSON, *supra* note 29, at 79–83 (describing how the political origin of an agency dictates how it is affected by external interests). Unlike individual clients, however, these institutions and groups may be overly effective, thus raising the problem of regulatory capture.



Studies of customer relations in business firms suggest a further difficulty with client-centered governance. Management efforts to induce employees to be pleasant, helpful, and generally customer-oriented are sometimes effective, but at other times produce routinized, stereotyped behaviors that generate resentment among employees and provide customers with little more than empty gestures.<sup>197</sup> If this is true in private enterprise, where the employees are providing services to customers and the crucial choices generally lie within the customer's control, it is probably much more true in government, where the employees are often exercising coercive authority, and the citizen has few, if any options.<sup>198</sup> Thus, the only effect of an agency's efforts to make its employees more customer-oriented may be that the now-resentful employees say "Great to see you; Have a nice day," after having provided the same peremptory treatment.

The New Public Governance idea that government agents at the operational level should engage in a collaborative relationship with the beneficiaries of their program also presents difficulties.<sup>199</sup> It may be perceived as an empty exhortation, particularly if, as will often be the case, these agents lack any normative commitment to an effort of that nature.<sup>200</sup>

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197. See GUTEK, *supra* note 63, at 33–61 (describing encounter-based business systems and their inherent negatives); HOCHSCHILD, *supra* note 176, at 132–36, 185–98 (discussing how service sector employees adapt to company policies and the likelihood that they will suffer from burnout, self-doubt, or estrangement); cf. Kathryn J. Lively, *Client Contact and Emotional Labor: Upsetting the Balance and Evening the Field*, 29 WORK & OCCUPATIONS 198 (2002) (using paralegal context to demonstrate that requiring higher level of emotional labor with clients may release employees from emotional labor in their relationships with their supervisors).

198. Barzelay recognizes this problem in noting that one danger to be avoided is expanding the idea of a customer beyond the boundaries of business settings: "The potential consequences of identifying as customers the people obligated to comply with norms include misstating the principal purposes of compliance organizations and dissipating the conceptual force of the term *customer*." BARZELAY, *supra* note 170, at 107. The danger arises, according to Barzelay, when the similarity between private firms and public agencies is pushed beyond its proper limits. *Id.* at 107–08. People who are legally required to comply with agency regulations are not properly regarded as customers of the agency, he argues. *Id.* at 107. Confusion on this point undermines the concept of treating agency beneficiaries as customers.

199. See *supra* notes 181–82.

200. See David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 549, 553–55 (2008). Super argues that the new public governance approach has failed in the case of antipoverty law for a number of reasons, most notably because of the nation's lack of commitment to basic goals that could guide this rather complex strategy. See *id.* at 546–48. In particular, he argues that "[i]nstead of establishing local processes to search for non-ideological answers that work, [this approach] has sustained the most extreme positions on both the Left and the Right even after it became clear that neither side could prevail in national policy debates." *Id.* at 546. In addition, "deliberative models require relatively continuous engagement. That continuousness squanders the intense but intermittent activity that can drive progress on behalf of marginalized groups such as low-income people." *Id.* at 547.

The difficulty is that all the inherent structural features that generate bureaucratic oppression will continue to operate.<sup>201</sup> The clients will continue to be seen as low status individuals; the obligation to consult with them will strike most officials as a burden and an intrusion; the inclination to follow procedures and use those procedures as a means of avoiding difficult or trying situations will continue; and the officials will still have the same divergent incentives as before. New Public Governance theory represents a real advance, but it depends on a rather sunny view of public officials, an expectation that they will be more conscientious, more flexible, and more willing to collaborate with clients than may actually be the case.

#### *D. Market Mechanisms: The Microeconomic Solution*

A fourth means of combating bureaucratic oppression involves the use of market mechanisms. Based on microeconomic analysis, this approach is directly addressed to the divergent incentives of administrative agents; it offers an overall solution through the assertion, characteristic of this field, that rational, self-interest maximizing is the decisive factor in determining human and institutional behavior.<sup>202</sup> The basic idea is to change the structure of public administration so that this self-interest motivation opposes, rather than encourages, oppressive behaviors. In his study of bureaucracy, for example, James Q. Wilson contrasts the ubiquitous oppression of the long lines and bored officials at the state motor vehicle bureau with the cheerful politeness and efficiency of the nearby McDonald's,<sup>203</sup> a cheerfulness that has become virtually emblematic of the new service society.<sup>204</sup> His explanation for the difference is that

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201. See Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons From Chicago's Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL'Y 117, 131–32 (2009) (noting how new governance approach may not adequately protect the interests of marginalized groups); Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 333 (2007) (discussing how the methods of social reform which bypass courts and legislatures can involve high status parties going unchecked); Helen Hershkoff & Benedict Kingsbury, *Crisis, Community, and Courts in Network Governance: A Response to Liebman and Sabel's Approach to Reform of Public Education*, 28 N.Y.U. REV. L. & SOC. CHANGE 319, 322–23 (2003) (identifying inherent access and participation problems in the network theory model).

202. Edward Rubin, *The Possibilities and Limits of Privatization*, 123 HARV. L. REV. 915–25 (2010); WILSON, *supra* note 29, at 115–22; Sidney G. Winder, *Comments on Arrow and on Lucas*, 59 J. BUS. S427 (1986).

203. WILSON, *supra* note 29, at 113.

204. See NEWMAN, *supra* note 94, at 89–97 (discussing Burger Barn policies of customer deference and service with a smile); GEORGE RITZER, *THE MCDONALDIZATION OF SOCIETY* 141 (rev. n. century ed. 2004); Amy S. Wharton, *Service With a Smile: Understanding the Consequences of*

McDonald's is operating in the market, where self-interest and good service are aligned.<sup>205</sup> Market mechanisms are thus designed to avoid the defects in the previously described solutions; they are not externally imposed rules, and they do not depend on the good will or conscientiousness of the administrators.

The idea of market mechanisms actually consists of two different approaches to the problem of bureaucratic oppression. The first approach involves the literal use of these mechanisms, that is, relying on market mechanisms by diminishing the scope of regulation, benefits, and services that the government provides. The second is an effort to incorporate market mechanisms into the operation of administrative government by changing the way that administrative agencies are structured. These are independent solutions and can therefore be implemented separately; but they can also be readily combined, and often are, since they are based on the same theory of human action.

The demand that the scope of administrative regulation, benefits, and services should be reduced is obviously a major political issue that goes well beyond the topic of this inquiry.<sup>206</sup> While bureaucratic oppression undoubtedly adds some force to this demand, it seems secondary to broader and better-publicized concerns about the economic efficiency of regulation and the fairness of redistributive benefits. The one point specifically relevant to this discussion is that replacing public administration with the market does not necessarily reduce the amount of oppression that individuals experience. It may be effective for the oppression that business owners and executives experience, but not for the treatment that ordinary individuals receive from inevitably large

*Emotional Labor*, in WORKING IN THE SERVICE SOCIETY 91, 91–92 (Cameron Lynne Macdonald & Carmen Sirianni eds., 1996) (noting that employees in the service sector often must conceal their true emotions in order to portray a positive public image).

205. WILSON, *supra* note 29, at 135. Wilson notes that government agencies, unlike a private firm, “(1) cannot lawfully retain and devote to the private benefit of their members the earnings of the organization, (2) cannot allocate the factors of production in accordance with the preferences of the organization’s administrators, and (3) must serve goals not of the organization’s choosing.” *Id.* at 115.

206. At least two separate manifestations of this general demand can be distinguished. The first is to deregulate specific functions or sectors. *See, e.g.*, CHARLES W. CALOMIRIS, U.S. BANK DEREGULATION IN HISTORICAL PERSPECTIVE (2000); PAUL L. JOSCOV & RICHARD SCHMALENSEE, MARKETS FOR POWER: AN ANALYSIS OF ELECTRIC UTILITY DEREGULATION (1983); MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985); MCCRAW, *supra* note 14, at 222–99. The second strand is to privatize the functions that public agencies continue to perform, that is, to have private contractors replace public employees. For different perspectives on privatization, see JOHN D. DONAHUE, THE PRIVATIZATION DECISION (1989); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY (2007); GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009).

institutions. As observers from various disciplines note, the large firms that dominate the market in many areas are themselves bureaucracies.<sup>207</sup> Wilson and others respond that they are different kinds of bureaucracies because private firms are subject to market discipline.<sup>208</sup> The difficulty, however, is that the bureaucratic nature of the modern firm, a product of its size and the well-known separation of control from ownership,<sup>209</sup> may insulate the individuals within the firm from the market's feedback mechanisms.<sup>210</sup> Like government officials, their behavior toward their customers may be governed by status differences, stranger relations, institutional pathologies, and divergent incentives.

A second, and distinctly different, use of market mechanisms is to alter the incentive structure of administrative agencies, rather than replacing these agencies with market actors. One means of doing so is to set up a situation in which government institutions or programs compete with each other, like private firms, to obtain a source of income. In school voucher programs, for example, parents can choose among a variety of public schools, and the school then receives a fixed amount of public money for each student who enrolls.<sup>211</sup> The Gore Report recommends the creation of

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207. See JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 82–96 (1967) (noting trends in large corporations, such as decrease in passive owner influence, increase in security of executive tenure, and concentration of power in portions of the ownership); ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 49–51, 164–205 (2d ed. 1993) (describing bureaucratic behavior of people in corporations, and the “powerlessness” that results).

208. WILSON, *supra* note 29, at 134–36; see also Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 292–97 (1980) (explaining that managers' opportunity wages are determined by firm performance); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1424–30 (2003) (describing how private companies are better suited to pursuing profits than public enterprises, but noting that profit-based incentives reduce with and increase in the number of shareholders).

209. See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 47–118 (1932) (explaining how the widespread ownership of common stock leads to decreased owner control and increased manager control in corporations); JAMES P. HAWLEY & ANDREW T. WILLIAMS, *THE RISE OF FIDUCIARY CAPITALISM* 42–68 (2000).

210. See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES* 117–31 (1975) (describing how large, vertically intergrated firms solve certain market problems but are subject to hierarchy-based inefficiencies); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (explaining why negligence and excessive expenditure result from the agency issues created by separation of ownership and control); Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. LAW & ECON. 297, 321–22, 325 (1978) (examining how managers whose position is established by contract, rather than by ownership, may engage in post-contractual opportunistic behavior).

211. See generally JOHN E. COONS & STEPHEN D. SUGARMAN, *FAMILY CHOICE IN EDUCATION: A MODEL STATE SYSTEM FOR VOUCHERS* 10–15 (1971) (outlining proposal for voucher system designed to give all families the same range of choices as wealthy families possess by their ability to send children to private schools); JAMES G. DWYER, *VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM* 18–22 (2002) (describing existing voucher programs); JEROME J.

one-stop worker training centers that would compete with one another for funding based on the number of people who used each center and the results that they achieved.<sup>212</sup> Another approach, where such competition is impractical, is to place a single agency on a receipt and expenditure basis so that its budget depends on the service it provides.<sup>213</sup> This is only possible for certain agencies, namely those that can be supported by user fees, such as highways, mass transit services or recreational facilities; it is generally not possible for agencies that distribute benefits such as welfare or housing. An alternative is to simulate a receipt and expenditure situation by counting certain agency achievements as an economic input, or by counting the costs that the agency imposes as an expense. Robert Litan and William Nordhaus discuss the concept of a regulatory budget, where an agency would be allocated a fixed amount of costs that it could impose on private industry.<sup>214</sup>

But creating either real or simulated market mechanisms for public agencies has serious limitations as a means of reducing bureaucratic oppression. To begin with, introducing market discipline into an administrative agency may require massive restructuring of the agency and basic alteration of the service it provides. Bureaucratic oppression, however serious, may not rise to a level that justifies such a profound reorganization of essential public services. Market discipline in public services is generally championed on other grounds. People support school voucher programs on the ground that they will improve the intrinsic quality of education,<sup>215</sup> not because the teachers will treat the students

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HANUS & PETER W. COOKSON, JR., CHOOSING SCHOOLS: VOUCHERS AND AMERICAN EDUCATION (1996) (providing arguments in favor of and against school voucher programs); DAVID W. KIRKPATRICK, CHOICE IN SCHOOLING: A CASE FOR TUITION VOUCHERS (1990) (providing a historical overview of the concept of school vouchers); TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 26–30, 193–255, 344–69 (2001) (describing public reaction to school vouchers and explaining support and opposition); JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM (2000) (examining the Milwaukee school voucher program). The seminal implementation of a school vouchers program was by the Alum Rock, California school district. See KIRKPATRICK, *supra*, at 91–132; DANIEL WEILER, A PUBLIC SCHOOL VOUCHER DEMONSTRATION: THE FIRST YEAR AT ALUM ROCK (1974).

212. GORE, *supra* note 80, at 49–50.

213. See generally TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR (Burton A. Weisbrod ed., 1998) (discussing market mechanisms and commercialization in non-profit institutions); SCHULTZE, *supra* note 93, at 84–90 (use of market-like mechanisms for regulation).

214. ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 133–58 (1983).

215. MOE, *supra* note 211, at 17–19.

more respectfully, and they favor user fees for national parks on the ground that they eliminate unfair cross-subsidies,<sup>216</sup> not because they will make the park rangers more polite.

Even if the problem of bureaucratic oppression is seen to justify profound changes in public financing, the solution is not necessarily directed at the problem. Many other factors, including ability to pay, contribute to people's willingness to incur user fees. Imposing such fees on basic public services may decrease the usage rates, no matter how gracious the people who provide the service may become.<sup>217</sup> In general, as Richard and Peggy Musgrave note, user fees and other special taxes are less efficient than raising funds through general income taxes because they have a distorting effect on behavior, an inefficiency that may counterbalance any improvement in the attitude of those providing the service.<sup>218</sup>

Simulated market mechanisms suffer from the same difficulty in targeting the specific problem of bureaucratic oppression. In addition, their use of artificially determined valuations, or funny money, makes these programs complicated to administer and potentially inaccurate.<sup>219</sup> Real markets provide an enormous amount of information, largely for free; collecting an equivalent amount of information so that the simulated mechanism is sufficiently accurate to serve its purpose may lie beyond the capacities of government. Ultimately, simulated market mechanisms may not be much of an improvement on the Office of Management and

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216. See J.M. Bowker et al., *User Fees for Recreation Services on Public Lands: A National Assessment*, 17 J. PARK & RECREATIONAL ADMIN. 2 (1999).

217. Bowker, *supra* note 216, at 1 (discussing survey of public opinion regarding user fees for public recreation and noting race and income correlated responses to same); Joel Lexchin & Paul Grootendorst, *Effects of Prescription Drug User Fees on Drug and Health Services Use and on Health Status in Vulnerable Populations: A Systematic Review of the Evidence*, 34 INT'L J. HEALTH SERVICES 101, 104–07, 118 (2004) (discussing how implementation of user fees decreases the use of prescription drugs, leads patients to forego essential medications, and results in a general decline in health care status).

218. RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 230–35 (4th ed. 1984). For a qualified endorsement of user fees, see Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795 (1987).

219. See Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis and Environmental Protection*, 150 U. PA. L. REV. 1553, 1554–81 (2002); SCOTT H. CLEARWATER, *MARKET-BASED CONTROL: A PARADIGM FOR DISTRIBUTED RESOURCE ALLOCATION* 275–90 (1996); Robert N. Stavins, *Experience with Market-Based Environmental Policy Instruments*, in KARL-GÖRAN MÄLER & JEFFREY R. VINCENT, *HANDBOOK OF ENVIRONMENTAL ECONOMICS*, VOL. 1: ENVIRONMENTAL DEGRADATION AND INSTITUTIONAL RESPONSES 355–435 (2003).

Budget's cost-benefit analysis,<sup>220</sup> which is a good deal simpler but has nonetheless been subject to extensive criticism.<sup>221</sup>

### III. A FURTHER PROPOSAL: A COLLABORATIVE MONITOR

There is, of course, no perfect governmental mechanism; every approach has its advantages and disadvantages. Each of the means for combating oppression discussed above provides a partial solution to the problem, and each is accompanied by various side effects and unintended consequences, ranging from increased expense and additional rigidity to decreased control and goal displacement. One question that emerges from this survey is whether our current consideration of and experience with these various mechanisms can inform the design of another alternative. Can we develop a new approach that at least promises to capture the advantages of the existing mechanisms while avoiding as many of their disadvantages as possible?

220. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (expanding centralized presidential regulatory review and affirming cost-benefit analysis as the basic criterion in assessing regulatory decisions), amended by Exec. Order No. 13,497, 74 Fed. Reg. 6,113 (Jan. 30, 2009) and Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011); James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 863–70, 879–84, 897–99 (2001) (examining the history of centralized presidential review in the Office of Management and Budget (OMB) and the Office of Information and Regulatory Affairs (OIRA), detailing arguments over appropriateness of applying cost-benefit analysis to certain types of regulatory decisions and concluding that such review is both justified and constructive); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 550–59 (1989) (discussing cost-benefit analysis requirements in Executive Orders 12,291 and 12,498—predecessors to Executive Order 12,866—and describing the role of the OMB and the OIRA in regulatory review); John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 966–80 (2006) (describing accomplishments of OIRA during presidency of George W. Bush and discussing projected costs and benefits of rulemaking from 1981 to 2004); Kagan, *supra* note 3, at 2277–81, 2285–90 (providing a review and analysis of cost-benefit-based oversight under Reagan and Clinton).

221. See, e.g., RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETHINKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 145–94 (2008) (arguing that cost-benefit analysis need not be inconsistent with proregulatory view); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1561–81 (2002) (outlining flaws in cost-benefit analysis); Bressman & Vanderbergh, *supra* note 3, at 65–91 (providing analysis of agency experiences with presidential control as a basis for suggesting a reworking of same); E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 L. & CONTEMP. PROBS. 167, 171–74 (1994) (highlighting the conflict between the EPA's commitment to its mandate and the OMB's mission to find the lowest-cost solution); Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986) (criticizing OMB intervention in the regulatory system); Richard Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 4–6 (1995) (describing complaints regarding review under President Reagan's Executive Order 12,291, including the belief that cost-benefit analysis is too partisan to incorporate all considerations faced by agencies).

Proposals for government improvement tend to sound abstract and unrealistic when they are first advanced. Quite often they are; it is only through the hard work of practical implementation that the limits of the possible become apparent. The point of advancing theoretical proposals, then, is not to serve as a precise blueprint for actual government design, but rather to fulfill two more modest functions. First, such proposals begin a conversation. They are a way of raising an issue in relatively concrete form and directing the attention of those in authority to the task of developing a new approach. Second, they provide a further clarification of the underlying issues. Advancing a proposal to solve a particular problem is one way to describe that problem with greater clarity and specificity, again with the goal of encouraging and enabling those in authority to act.<sup>222</sup> With this in mind, the following section proposes a new mechanism, a collaborative monitor, to ameliorate the problem of bureaucratic oppression. It then attempts to determine whether such a mechanism would be constitutional and whether it would address the underlying causes of the problem.

#### *A. A Collaborative Monitor*

Of the approaches described above, a notable advantage of the first two is their deployment of external, independent monitoring. Due process constraints on the administrative process are imposed by the judiciary, while ombudspersons, at least in their original and classic form, answer to the legislature. These two approaches thus combat the tendency of the administrative apparatus to become a self-serving hierarchy, a system that protects its own while ignoring the interests of its clients. In effect, judicial and legislative supervision empower these clients, giving them access to government officials who can impose real sanctions on miscreant administrative agents.

The disadvantage of both approaches is that they tend to be confrontational or adversarial. In part, this is because both are complaint-driven and depend for their effectiveness on the possibility of imposing sanctions. In part, it is because of the institutional features of the two monitoring bodies. Judicial supervision is inherently confrontational, since it is exercised by bringing the agency into court as one party to an

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222. For a further explication of this argument, see Edward L. Rubin, *What Does Prescriptive Scholarship Say and Who Is Listening to It: A Response to Professor Dan-Cohen*, 63 U. COLO. L. REV. 731 (1992).



adversarial trial. Legislative supervision is less obviously so, but, as discussed, conveys an inevitable sense of threat.<sup>223</sup>

The other two approaches avoid this confrontational stance. They are internal, rather than external, seeking to change the operations of the agency and the attitudes of its employees. The client-centered or management approach attempts to achieve these goals directly, while the market approach relies on self-interest to generate equivalent alterations. It is possible to regard the market as an external monitor, taking the place of the judiciary or the legislature, but the theory is that administrators will not perceive market forces as external, personalized compulsion, but rather as a factual circumstance to which they will be required to respond.

While both mechanisms avoid confrontation, they suffer from a consequent flaccidity. Attitudes are often intractable; the status differences, stranger relations, institutional pathologies and divergent incentives discussed above are powerful forces that act over time to produce deeply entrenched behaviors. Simply urging people to adopt different attitudes, no matter how insistently and thoughtfully, may not have much effect. Market discipline may seem more effective, but it is subject to the limitations described above: it can be used only in specialized circumstances; it will often be simulated, rather than real, even in those circumstances; and its implementation often leads to undesirable collateral effects.<sup>224</sup>

A possible way to combine the effectiveness of external monitoring with the constructiveness of attitude change would be to develop a non-confrontational mode of monitoring, one that moved away from the adversarial stance of American law without losing its institutional advantages. Its goal would not be to find fault or impose sanctions, but rather to change operations and attitudes, to encourage more client-centered methods and behaviors. This might be seen as a system of external monitoring that is based on the suggestion box rather than the complaint form. To be sure, complaints are a valuable source of information for an organization,<sup>225</sup> but it would be important to treat them exclusively as information, and not as demands for redress. This makes sense because most forms of bureaucratic oppression involve actions that

223. See *supra* Part II.C and text accompanying note 167.

224. See *supra* Part II.D.

225. See BARLOW & MØLLER, *supra* note 175, at 19–54 (explaining complaints provide crucial information about customer satisfaction and potential areas for service improvement); Conlon & Murray, *supra* note 175 (examining the efficacy of various corporate responses to customer complaints); Fuller & Smith, *supra* note 175 (describing how general customer feedback, including complaints, reveals the performance level of organization personnel).

are not amenable to specific redress, such as wasting the clients' time or hurting their feelings. As for clients' dignitary interests, many people who felt oppressed by government agencies might regard a change in procedures as equivalent to an apology, one whose sincerity is indicated by the scope of the change.<sup>226</sup>

The institution that performs this function would be best structured as a separate agency, located outside the administrative apparatus. Conceivably, it could be structured to report directly to the president, or it could be administered by the judiciary through its constitutionally granted authority to appoint "inferior [o]fficers."<sup>227</sup> Neither of these designs seems optimal, however. Since the President is also the hierarchical director of the administrative apparatus, an agency that reported to him, no matter how separate from other agencies and how favored with his personal attention, might not be perceived as sufficiently independent. The judiciary would provide independence, but it generally lacks the institutional capacity to administer ongoing agencies with operational responsibilities.<sup>228</sup>

For these reasons, the best approach would be to place the monitor in the legislative branch. Congress already administers several non-partisan agencies that have significant numbers of employees and carry out ongoing tasks that include various forms of investigation, in particular the Congressional Budget Office (CBO) and the Government Accountability Office (GAO).<sup>229</sup> In addition, the location of ombudspersons' offices in the

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226. See Erin O'hara O'Connor, *Organizational Apologies: BP as a Case Study*, 64 VAND. L. REV. 1959, 1982 (2011) (noting the public relations failure of Exxon's apology and related public doubts regarding whether Exxon would change its practices); Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1310 (2006) (suggesting that some apologies must be accompanied by restitution to have meaning).

227. U.S. CONST. art. II, § 2, cl. 2 ("Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in . . . the Courts of Law . . .").

228. In the prison reform and school desegregation cases, perhaps the federal judiciary's most extensive administrative ventures, judges tended to rely on appointed special masters to monitor compliance with their orders. FEELEY & RUBIN, *supra* note 9, at 75–78, 85–90, 308–11; see also M. KAY HARRIS & DUDLEY P. SPILLER, JR., *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS* 192–95, 304–08 (1977) (discussing use of special masters to monitor implementation of prison reforms); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1369–76 (1991) (recounting the use of special masters in cases of school desegregation and allocation of water rights between Native Americans and sport fishermen).

229. See BRUCE BIMBER, *THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT* 83–92 (1996) (describing operations of GAO and CBO and the efforts of both to be perceived as politically neutral); PHILIP G. JOYCE, *THE CONGRESSIONAL BUDGET OFFICE: HONEST NUMBERS, POWER, AND POLICYMAKING* 126–28 (2011) (describing how the CBO's analysis of the Carter energy policy helped the CBO gain credibility as a nonpartisan entity). Two other Congressional agencies are the Library of Congress and the U.S. Botanic Garden.

legislative branch of many European nations, most notably the U.K.,<sup>230</sup> provides a useful precedent and a valuable source of experience.

As in the case of courts and ombudspersons, the monitoring agency would have the authority to investigate, that is, to determine the facts regarding specific behaviors by administrative agencies. Such investigations could be triggered by complaints from clients, but because they would be non-punitive, they could also be triggered by suggestions or ideas from clients, from the agency itself, or from a different agency. In addition, they could be initiated by the monitoring institution itself. There should be no need to compel disclosure; the non-punitive nature of the intervention would encourage cooperation, and reluctance could generally be overcome if such cooperation were established as an institutional norm. Compelling disclosure would tend to produce an adversarial stance that would defeat the essence of the intervention.

The intervention itself would be designed as an effort to improve the way that the agency treats its clients. Here, the attitudinal change that client-centered governance and market mechanism seek to produce would become the focus. Staff members of the monitoring agency would meet with agency employees in an effort to alter any behavior that its investigation has deemed to be oppressive. Working with both public employees and clients, the monitoring staff would try to design new approaches or alter existing ones. They could also run, or, more likely, sponsor, training or re-training programs for the employees. Ideally, these programs would be designed, and perceived, as providing these employees with new skills rather than correcting prior errors. Here again, the goal is to be collaborative rather than confrontational, thus decreasing the resistance to structural and attitudinal change.

One way to increase the independent monitor's effectiveness would be to place funds at its disposal. As a proposal, this is easy, since it is only words on paper; as a reality, it is difficult, since it involves taxpayer dollars. But the funding would need only be at a catalytic, rather than an operational level. Small bonuses for new ideas, for example, would be relatively inexpensive, and the level of expenditure would be easy to adjust. Because no one would realistically expect the bonus, the monitor could give out as few or many as its funding allowed. Another way that small amounts of funds could be used effectively is for training sessions. These could consist of extensive programs to impart new skills and develop new attitudes through either short-term immersion or long-term

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230. *See supra* Part II.B.

repetition.<sup>231</sup> But they could also be much more delimited and less expensive efforts, such as staff retreats. Giving staff a few days off their regular schedule at a local hotel conveys a sense of specialness and allows for the transmission of significant amounts of information. Even more mundane, but far from insignificant, is free food. For “street-level bureaucrats”<sup>232</sup> who spend their day in dilapidated offices doing repetitive tasks for disappointed people, a few lunch meetings in a pleasant setting might well produce palpable improvements in morale and motivation.

Although the proposal recommends that the monitor be collaborative and non-punitive in character, it obviously must not achieve this character by being ineffective or irrelevant. As noted above, critics of corporate ombudsperson programs argue that the term is being applied to functionaries who meet all the criteria for non-adversarialism suggested here, but have no impact on employee attitudes because they lack authority or prestige.<sup>233</sup> Being able to provide funding, even in small amounts, is certainly one way to make an external monitor more influential, not only because of the funding’s practical effect, but because it signals that the monitor is deemed worthy of financial support. Other sources of authority would be symbolic or atmospheric, but may well be more significant. The fact that the monitor is directly established by, and answerable to, Congress, would certainly carry weight. Despite the low approval rating of its current members,<sup>234</sup> Congress possesses the prestige of a constitutional component of our government, like the president or the Supreme Court. Ultimately, however, the monitor’s moral force would be determined by the quality of its personnel (which would depend, in part, on their salaries) and the attention that Congress, the president, and the heads of executive departments pay to its efforts.

An example of the way that a collaborative monitor might function involves the ubiquitous problem of waiting time for government services, and more specifically the mundane but notorious experience of waiting in

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231. See Rubin, *supra* note 98, at 1330–33 (describing two to three year intensive training programs for German bank examiners).

232. The term comes from the title of Michael Lipsky’s book, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*. See LIPSKY, *supra* note 30.

233. See Stieber, *supra* note 165, at 54 (noting that the corporate ombudsman model avoids investigation, favoring instead “strict neutrality suggestive of uninvolvement”).

234. According to a tally of fifty-three polls conducted by ABC/Washington Post, Associated Press/GfK Roper, CBS, CBS/New York Times, CNN/ORC, Fox, Gallup, and NBC/Wall Street Journal, during calendar year 2011, Congress’s approval rating averaged about 17.7%, rising to 30% or higher in only two of the polls and dropping below 10% in an equal number. See *Congress—Job Rating*, POLLINGREPORT.COM, <http://www.pollingreport.com/CongJob.htm> (last visited Jan. 10, 2012). Results for the previous year were only slightly higher. See *id.*

line. Long waiting periods represent a deadweight loss<sup>235</sup> and there is extensive evidence that they increase people's dissatisfaction with the service itself.<sup>236</sup> At their worst, they can be so discouraging that people make no use of the service at all, and fail to obtain the benefits to which they are entitled.<sup>237</sup> The obvious solution, which requires no particular expertise to implement, is to assign more staff members to provide the service and, if relevant, buy more machines. This is generally expensive, however, and often prohibitively so.<sup>238</sup> Management theory offers various strategies to reduce actual waiting time without using additional resources, such as forming a single line for multiple servicing stations or providing an express line for simple or stereotyped transactions.<sup>239</sup>

Once strategies such as these are developed, it might appear that government agencies could simply be informed about them through written documents, but the situation is often more complex. Long waiting periods may not result from the sheer number of clients, but from their uneven distribution. Consequently, designing an optimal management

235. STOKEY & ZECKHAUSER, *supra* note 169, at 83–87. The authors write:

Why then do we tolerate long lines for public services? . . . It is contended that . . . long lines serve a redistributive purpose because the poor value their time less highly than [sic] the rich . . . . Waiting lines are an exceedingly inefficient means for redistributing income. The poor, after all, do not receive the value of the waiting time of the rich.

*Id.* at 86–87.

236. *See, e.g.*, Jean-Charles Chebat & Pierre Filiatrault, *The Impact of Waiting in Line on Consumers*, 11 INT'L J. BANK MARKETING 35 (1993); Elizabeth C. Clemmer & Benjamin Schneider, *Toward Understanding and Controlling Customer Dissatisfaction with Waiting During Peak Demand Times*, in DESIGNING A WINNING SERVICE STRATEGY 87, 90 (Mary Jo Bitner & Lawrence A. Crosby eds., 1989); Laurette Dubé-Rioux et al., *Consumers' Reactions to Waiting: When Delays Affect the Perception of Service Quality*, 16 ADVANCES IN CONSUMER RES. 59 (1989); Shirley Taylor, *Waiting for Service: The Relationship Between Delays and Evaluations of Service*, 58 J. MARKETING 56 (1994).

237. *See* KATZ ET AL., *supra* note 33, at 19–61 (documenting high levels of benefits underutilization in certain area, such as job training); Super, *supra* note 44, at 828 (outlining methods a state might use to distinguish and exclude claimants from benefits, such as increasing their wait time).

238. Some functions, such as processing applications for driver's licenses, require only staff and involve so little training that the staff can be reassigned from other functions when needed. (Of course, the staff members will need a computer, but since this is such a ubiquitous requirement, it will simply be counted as part of the cost of the staff members themselves, like their office furniture.) Other functions, such as performing dialysis, require specially trained staff and expensive machinery.

239. *See, e.g.*, RICHARD W. CONWAY ET AL., THEORY OF SCHEDULING 84–90 (Dover Publications 2003) (1967) (use of market-like mechanisms for regulation); Samuel Eilon & I. G. Chowdhury, *Minimising Waiting Time Variance in the Single Machine Problem*, 23 MGMT. SCI. 567, 567–73 (1977) (mathematical model for organizing tasks that must be performed at a single site, concluding that tasks must be arranged in descending order of processing times when placed before the shortest job, but in ascending order if placed after it); C. Sheu & S. Babbar, *A Managerial Assessment of the Waiting-Time Performance for Alternative Service Process Designs*, 24 OMEGA INT'L J. MGMT. SCI. 689 (1996); Chwen Sheu et al., *Service Process Design Flexibility and Customer Waiting Time*, 23 INT'L J. OPERATIONS & PRODUCTION MGMT. 901 (2003).

strategy to reduce waiting times may require fairly extensive and sophisticated data gathering.<sup>240</sup> Agencies will not necessarily possess the expertise to carry out such research. A cooperative monitor could play a useful and often-welcome function in this situation by presenting the possible strategies, gathering the data, and then assisting agency staff in implementing whichever recommendations the agency chooses to implement.

In fact, recent research suggests that the waiting time problem is still more complex. Empirical studies of customer and client attitudes, beginning with the work of David Maister, indicate that subjective factors play a considerably larger role than actual waiting time in determining the level of dissatisfaction.<sup>241</sup> These factors include conditions in the physical environment, such as lighting, temperature, décor and background music,<sup>242</sup> intentional distractions or “filled time,”<sup>243</sup> and social circumstances such as the visibility of employees who are not servicing the customers, the expected waiting time versus the actual waiting time, and the sense that customers are being treated in a just or equitable manner.<sup>244</sup> Not only are these factors complex in their multiplicity, but

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240. See STOKEY & ZECKHAUSER, *supra* note 169, at 75–83. The authors give two examples of management strategies, one for a bridge toll plaza that is predictably busy during rush hour, and the other, a hypertension clinic that has unexplained variations in patient arrival rates. *See id.* at 75–80.

241. David H. Maister, *The Psychology of Waiting Lines*, in THE SERVICE ENCOUNTER 113 (John A. Czepiel et al. eds., 1985). For further discussion on subjective factors and their effects on perceived wait time, see Malin Åkerström, *Waiting—A Source of Hostile Interaction in an Emergency Clinic*, 7 QUALITATIVE HEALTH RES. 504 (1997); Julie Baker & Michaelle Cameron, *The Effects of the Service Environment on Affect and Consumer Perception of Waiting Time: An Integrative Review and Research Propositions*, 24 J. ACAD. MARKETING SCI. 338 (1996); Mark M. Davis & Thomas E. Vollmann, *A Framework for Relating Waiting Time and Customer Satisfaction in a Service Operation*, 4 J. SERVICES MARKETING 61 (1990); Ad Pruyn & Ale Smidts, *Effects of Waiting on the Satisfaction with the Service: Beyond Objective Time Measures*, 15 INT’L J. RES. MARKETING 321, 330–31 (1998); Gail Tom & Scott Lucey, *A Field Study Investigating the Effect of Waiting Time on Customer Satisfaction*, 131 J. PSYCHOL. 655, 659 (1997).

242. Baker & Cameron, *supra* note 241, at 340–42; *see also* Jean-Charles Chebat, Claire Gelinat-Chebat & Pierre Filiatrault, *Interactive Effects of Musical and Visual Cues on Time Perception: An Application to Waiting Lines in Banks*, 77 PERCEPTUAL & MOTOR SKILLS 995, 1007 (1993) (finding that music and visual stimulation, used together, significantly affect time perception); *cf.* Michael K. Hui et al., *The Impact of Music on Consumers’ Reactions to Waiting for Services*, 73 J. RETAILING 87, 100–02 (1997) (finding that music does not decrease perceived waiting time but creates a positive service environment).

243. Baker & Cameron, *supra* note 241, at 344–45; *see also* Karen L. Katz et al., Blaire M. Larson & Richard C. Larson, *Prescription for the Waiting-in-Line Blues: Entertain, Enlighten, and Engage*, 32 SLOAN MGMT. REV. 44, 49–50 (1991) (reporting increased levels of customer satisfaction where bank displayed a silent news board for customers to watch while they waited); Maister, *supra* note 241, at 115–16; Taylor, *supra* note 236, at 64–65 (finding customers who were occupied during wait time to be less likely to experience feelings of uncertainty or anger); van Maanen & Kunda, *supra* note 177.

244. *E.g.*, Mark M. Davis & Janele Heineke, *How Disconfirmation, Perception and Actual*

they do not always operate in a manner that corresponds to ordinary intuition. Several studies have indicated that decorating an interior space with warm colors (red, orange, and yellow), particularly when bright and saturated, creates a sense of anxiety or agitation, while cool, weak colors (certain blues and greens) have a calming effect.<sup>245</sup> Other studies suggest that some violations of the first-come-first-served rule, such as an express line, will be regarded as socially unjust and will increase people's sense of dissatisfaction, even if they decrease total waiting time.<sup>246</sup>

These complexities place the waiting time problem beyond the reach of simple prescriptions. Substantial expertise is needed to identify and recognize them, to determine whether and to what extent they operate in a given situation, and to suggest operational changes that would be likely to ameliorate the problem. An outside expert with knowledge and experience could greatly improve clients' satisfaction with the service and decrease their sense of oppression by conducting research, proposing solutions, and providing training for the agency employees.<sup>247</sup> Perhaps it could also reiterate its new public governance approach to the agency itself by consulting with the agency's clients and inviting them to participate in the formulation of the recommended strategy for reducing their

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*Waiting Times Impact Customer Satisfaction*, 9 INT'L J. SERV. INDUS. MGMT. 64 (1998); Richard C. Larson, *Perspectives on Queues: Social Justice and the Psychology of Queueing*, 35 OPERATIONS RES. 895, 895–97, 900–01 (1987); Maister, *supra* note 241, at 118–21; Winter Nie, *Waiting: Integrating Social and Psychological Perspectives in Operations Management*, 28 OMEGA 611 (2000); David A. Thompson et al., *Effects of Actual Waiting Time, Perceived Waiting Time, Information Delivery, and Expressive Quality on Patient Satisfaction in the Emergency Department*, 28 ANNALS EMERGENCY MED. 657, 663–64 (1996).

245. See, e.g., RUDOLPH ARNHEIM, *ART AND VISUAL PERCEPTION* 277–78 (1954); Carl-Axel Acking & Richard Küller, *Interior Space and Colour*, in *COLOUR FOR ARCHITECTURE* 120, 121 (Tom Porter & Byron Mikellides, eds., 1976); Joseph A. Bellizzi et al., *The Effects of Color in Store Design*, 59 J. RETAILING 21, 43 (1983); National Aeronautics and Space Administration, *The Study and Application of Colour in Extraterrestrial Habitats*, in *COLOUR FOR ARCHITECTURE*, *supra*, at 102, 105.

246. See, e.g., Wenhong Luo et al., *Impact of Process Change on Customer Perception of Waiting Time: A Field Study*, 32 OMEGA INT'L J. MGMT. SCI. 77, 82 (2004); Larson, *supra* note 244, at 895–97 (explaining that a violation of first in, first out rule is often seen as a social injustice, regardless of actual effect on waiting time).

247. See Davis & Vollmann, *supra* note 241, at 68.

The first step, for the manager . . . is to identify the potential factors that might influence the relationship between customer satisfaction and the parameter of interest. This list of factors can be developed through interviews with workers, customers, and managers within the industry. Next, a customer survey is designed that includes measures of customer satisfaction at various factor levels. After the survey is fine-tuned, it is administered to customers under a variety of operational conditions, and these conditions are specifically noted. Finally . . . measures of satisfaction with a particular operational characteristic are obtained . . .

*Id.*

dissatisfaction. All of this might be achieved with relatively little expenditure of funds and no use of coercive authority.

None of this is to suggest that intervening to change either operations or attitudes is easy. The point is that an independent, collaborative monitor, devoted specifically to that goal, might be more effective than exhortations from the staff members' regular supervisors, which would tend to merge into the general flow of quotidian instructions. It might also be more effective than simulated or even real market forces, which are unlikely to reach staff members at the operations level. And it might obtain the additional motivating force for change that an external monitor can provide, while avoiding the resistance and formality that results when the external monitor adopts an adversarial stance.

#### *B. Legal Considerations Regarding the Collaborative Monitor*

Two basic questions about the proposal outlined in the preceding section are whether it would be constitutional and whether it would be effective. The first question arises because existing separation of powers doctrine places definitive limits on the powers of Congress, and specifically on the kinds of operational agencies that can be answerable to Congress, rather than the president. One does not need to be a thoroughgoing legal realist to acknowledge that the Supreme Court has taken different approaches to separation of powers issues.<sup>248</sup> What can be said, at present, is that the Court takes these issues fairly seriously.<sup>249</sup> At a minimum, a proposal of this sort must at least avoid the constitutional barriers that the Court has constructed, and it would be even more appealing if such a proposal were able to use the rationale on which those barriers are based as a rationale for its design.

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248. See generally Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988); Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371 (1976); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225.

249. See, e.g., *Clinton v. City of N.Y.*, 524 U.S. 417, 444–47 (1998) (striking down the line item veto because it allows the president to amend budget enactments, a legislative function); *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 274–77 (1991) (invalidating review board for airport authority because it exercised executive power and was staffed by members of Congress); *Morrison v. Olson*, 487 U.S. 654, 691–97 (1988) (finding that the Ethics in Government Act did not violate the separation of powers doctrine); *Bowsher v. Synar*, 478 U.S. 714, 731–36 (1986) (invalidating removal provision of the Gramm-Rudman-Hollings Act because it granted executive authority to the congressionally controlled Comptroller General); *INS v. Chadha*, 462 U.S. 919, 952–59 (1983) (striking down legislative veto because it permitted Congress to reverse administrative action by administrative means).



To begin with, the mere existence of an agency answerable to Congress does not create constitutional difficulties. As noted above, Congress has established a number of Article I agencies, and their constitutional legitimacy is well accepted.<sup>250</sup> The investigatory function that features so prominently in both the judicial process and the traditional ombudsperson's responsibilities would also pass constitutional scrutiny quite easily. Investigation is not only a permitted feature of the legislative process, but an essential feature.<sup>251</sup> Part of the legislature's basic role is to conduct inquiries in order to obtain the information necessary to draft effective statutes, but it is also well accepted that legislators have authority to obtain and revealing information about government operations as part of their responsibility as the people's representatives.<sup>252</sup> The investigations of a collaborative monitor would readily fit under both these traditional justifications for legislative action.

The real question clearly lies in the area of the monitor's effort to change operational procedures and employee attitudes. In *Bowsher v. Synar*, the Court struck down a core provision in the Gramm-Rudman-Hollings Act, a major statute designed to control the federal budgetary

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250. See *supra* note 229 and accompanying text.

251. See LANCE COLE & STANLEY M. BRAND, CONGRESSIONAL INVESTIGATIONS AND OVERSIGHT (2011) (providing historical analysis of congressional investigations, from the Teapot Dome scandal to the Nixon and Clinton impeachment proceedings to the 9/11 Commission); MARTIN O. JAMES, CONGRESSIONAL OVERSIGHT 31–32 (2002) (“Although there is no express provision of the Constitution that specifically authorizes Congress to conduct investigations . . . numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress.” (citing *McGrain v. Daugherty*, 273 U.S. 135 (1927))). For further discussion on congressional investigation and other mechanisms of oversight, see JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 130–61 (1990); CHRISTOPHER H. FOREMAN, JR., SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION (1988).

252. This latter function is the subject of the classic article by Matthew McCubbins and Thomas Schwartz. Oversight hearings are analogized to police patrols, that is, means by which Congress can monitor agency actions. Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984). Fire alarms are means by which constituents can alert Congress to situations that might demand either oversight or legislative action. *Id.* These include not only lobbying efforts and political mobilization, but also various legally established procedures. See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1767–71, 1804–14 (2007) (describing how Congress employs legal procedures to control administrative agencies and noting that the Supreme Court validates this in its administrative law decisions); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 441–43 (1989) (explaining how Congress employs procedural constraints to prevent agencies from departing from its intended outcomes in ways that it cannot counteract); Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (providing further discussion of the use of procedural constraints to control agency decision making).

deficit.<sup>253</sup> The Act provided that in certain cases, the Comptroller General, the head of the Article I Government Accountability Office (GAO),<sup>254</sup> was required to review annual estimates of the deficit prepared by the White House Office of Management and Budget and the Congressional Budget Office<sup>255</sup> and then indicate budgetary reductions based on these estimates and report them to the president.<sup>256</sup> The President was then required to issue a sequestration order implementing the Comptroller General's indicated reductions.<sup>257</sup> In an opinion written by Chief Justice Burger, the Court struck down the reporting provision of the Act because the Comptroller, who was answerable to Congress through a congressionally initiated removal provision, was performing an essentially executive function in violation of the separation of powers.<sup>258</sup>

Unfortunately, the majority opinion is less than illuminating about the criteria by which a particular function should be deemed to be "executive," and thus forbidden to a legislative officer.<sup>259</sup> Justice Stevens's concurrence argues that the Court's decision "rests on the unstated and unsound premise that there is a definite line that distinguishes executive power from legislative power."<sup>260</sup> If the majority wanted to refute this charge, it would have needed to define the term "executive" in a coherent, operational way. Instead, Justice Burger declares that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."<sup>261</sup>

Clearly, the act of interpretation, standing alone, cannot confer an "executive" character on a particular action, even in a governmental context, since a legislature must regularly interpret prior law in order to conduct oversight hearings and frame new legislation. The force of the Court's test must be carried by the idea that the interpretation is designed "to implement the legislative mandate."<sup>262</sup> This is insufficiently specific, however, since a legislative mandate could be directed to legislative as well as executive bodies. Under the provision at issue, the GAO would

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253. *Bowsher*, 478 U.S. at 735–36.

254. The Government Accountability Office is, or is the successor to, the quondam General Accounting Office, known so widely as the GAO. Congress felt free to update its name as long as it preserved its initials.

255. 478 U.S. at 718.

256. *Id.*

257. *Id.*

258. *Id.* at 726–27.

259. *Id.* at 716–36.

260. *Id.* at 748 (Stevens, J., concurring).

261. *Id.* at 733.

262. 478 U.S. at 760.

need to interpret the statute in question and implement a Congressional mandate.<sup>263</sup> The following paragraph of the opinion provides a somewhat clearer sense of what “executive” might mean, if only by giving an example. The Comptroller General, it states, is given “the ultimate authority to determine the budget cuts to be made . . . [and] commands the President himself to carry out” his directives.<sup>264</sup> Thus, it seems that the power to order other executive agents to follow specific instructions will place that action in the executive category.<sup>265</sup>

The operational efforts of the proposed collaborative monitor to change agency attitudes avoid this prohibited activity. The monitor would, by its collaborative nature, be giving advice and guidance rather than specific instructions. Holding a meeting with agency employees or between employees and clients, providing information about new approaches, designing training sessions, and even conducting those sessions would not fall within the scope of executive action defined by *Bowsher*. More generally, to go beyond the opinion’s somewhat meager reasoning, executive action (assuming it makes any sense to treat it as a separate, definable category of governmental action) can be regarded as the implementation (not interpretation) of statutes or self-generated policies through legally obligatory instructions to either government employees or

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263. *Id.* at 733. In his concurrence, Justice Stevens noted that Congressional appointees also carry out a variety of functions that are regarded as typically executive: “the Capitol Police can arrest and press charges against lawbreakers, the Sergeant at Arms manages the congressional payroll, the Capitol Architect maintains the buildings and grounds, and its Librarian has custody of a vast number of books and records.” *Id.* at 753 (Stevens, J., concurring). The problem with these examples is that, with the partial exception of the Librarian, they all fall within the separate category of institutional self-maintenance. Even in a system with strictly separated governmental powers, it would be possible for each non-executive branch to have authority to carry out executive functions that involved control of its own operations. In fact, this may be necessary for true separation of functions; an executive responsible for maintaining the facilities and disbursing the payroll of the other branches could use these powers to undermine the independence of those other branches.

264. *Id.* at 733.

265. *See Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991). This case involved a separation of powers challenge to a statute that transferred power over Washington, D.C.’s two airports from the federal government to a regional authority whose decisions would be subject to review by a board consisting of nine members of Congress that could veto the authority’s decisions. The Court, in an opinion by Justice Stevens, held the statute in question unconstitutional. *Id.* at 276–77. Once again, we are told that Congress may not exercise “executive” authority without being told the indicia of that term. *Id.* at 254. Rather, the Court said that if the authority was executive, it violated separation of powers, and if it was legislative, it violated the bicameralism and presentment requirements. *Id.* One can discern, however, that the possibility that the board’s action was executive in nature depended on the fact that it could give definitive orders to the regional authority by virtue of its veto power. *See id.* at 65 n.13 (“The threat of the veto hangs over the Board of Directors like the sword over Damocles, creating a ‘here-and-now subservience’ to the Board of Review sufficient to raise constitutional questions.” (citing *Bowsher*, 478 U.S. at 727 n.5)).

private citizens.<sup>266</sup> When imposed on the administrative apparatus from an external source, such instructions would necessarily be adversarial rather than hierarchical, and this is precisely what the notion of a collaborative monitor is designed to avoid.

Another way that constitutional problems might be avoided would be to insulate the collaborative monitor from the legislature's direct control. The reason that the characterization of the Comptroller General's actions as executive caused a constitutional problem is that he was deemed, in another part of the opinion that generated controversy, to be answerable to and removable by the legislature. If he had been the head of an independent agency, removable only for cause, his actions, no matter how "executive," would have been constitutionally acceptable.<sup>267</sup> The problem with using this approach for a collaborative monitor is that the heads of independent agencies, as "Officers of the United States,"<sup>268</sup> must nonetheless be appointed by the President and would thus be part of the administrative hierarchy. There might be clever ways to circumvent this requirement, but they would tend to eliminate or obscure the monitor's identity as a legislative agency, which is desirable for reasons stated above.

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266. This is, of course, a preliminary definition for purposes of the discussion. Justice Stevens was almost certainly correct in suggesting that "executive" action is not a definitive concept. *Bowsher*, 478 U.S. at 748–49 ("The Court concludes that the Gramm-Rudman-Hollings Act impermissibly assigns the Comptroller General 'executive powers.' . . . This conclusion is not only far from obvious, but also rests on the unstated and unsound premise that there is a definite line that distinguishes executive power from legislative power. . . . One reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of Government is that governmental power cannot always be readily characterized with only one of those three labels.").

A more coherent approach to the question would be to regard executive action as a general understanding of the way our government functions, i.e., a "form of life." See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, § 241, at 75 (G.E.M. Anscombe, trans., 3d ed. 2001). Wittgenstein argues that language is meaningful only through the social context in which it is used. See *generally id.* §§ 185–243, at 63–75. In other words, the word itself provides no assistance in determining our governmental practices. Rather, our sense of proper and improper governmental practice, a detailed and deeply embedded, albeit contested, set of beliefs, determines how we use the word.

267. See *Bowsher*, 478 U.S. at 726–32. The boundary between these two categories, executive and legislative, continues to generate controversy. See *Edmond v. United States*, 520 U.S. 651, 666 (1997) (recognizing Coast Guard Court of Criminal Appeals judges as validly appointed by the Secretary of Transportation under the Appointments Clause of the Constitution, which gives Congress the authority to vest in heads of departments the appointment of inferior officers). However, it seems likely that the function described in this section would qualify as being managed by "inferior officers." See *generally* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 309–10 (1989) (arguing that criminal law enforcement cannot be considered a core function of the executive branch and can therefore be exercised by inferior officers not appointed by the President).

268. U.S. CONST., art. II, § 2, cl. 2.

More importantly, the constitutional limits on legislative agencies, which functionalists might regard as an antiquarian annoyance in other contexts, serve a valuable function here. They establish a definitive limitation on the monitor's authority and thus provide an antidote to the natural temptation to give orders rather than advice. Anyone who tries to change attitudes within a bureaucratic hierarchy, particularly attitudes as entrenched as the ones that produce oppressive behavior, is likely to be met with intransigence. In some cases, such intransigence may seem understandable, but in other cases it may seem merely irrational or, to use a technical term, pig-headed. If the monitor possesses the prestige and funding needed to render it effective, it may also possess the ability to cut through such intransigence by abandoning its collaborative stance and giving orders. The possibility that such orders could be challenged in court on constitutional grounds could serve as a useful reminder for the monitor to maintain its non-confrontational approach and seek to change attitudes by more subtle but ultimately more effective means.

### *C. Pragmatic Considerations Regarding a Collaborative Monitor*

The Supreme Court's separation of powers doctrine has required the previous section's reversion to the legality model, an excursion into doctrine that would not be needed for a legislative agency in a nation such as the U.K. where there are no constitutional limits on institutional design. Having dealt with that issue, we can now return to the more basic governance model question: whether the proposed collaborative monitor would effectively address the problem of bureaucratic oppression. This is necessarily a speculative inquiry, and depends on many specific features of the actual institution that would be pointless to elaborate at this juncture. The purpose of this remaining, and concluding, inquiry is to clarify the issues and encourage discussion of potential solutions.

One way to think about the value of a collaborative monitor is that it would reverse, or mix around at least, some of the natural associations between the underlying causes of bureaucratic oppression described in Part I and the existing solutions to the problem described in Part II. Intervention by the judiciary—the due process solution—and intervention by the legislature—the ombudsperson solution—seem most directly addressed to the problems of status differences and stranger relations. They can be seen as restoring the balance, giving disparaged, unknown or simply powerless clients an opportunity to enlist a powerful governmental agent on their side and obtain at least partial redress for some of the wrongs that they have suffered. Client-centered management and market

incentives, in contrast, seem addressed to the institutional pathologies of administrative agencies and the divergent incentives of their employees. They attempt to restructure the agency and re-direct both the agency directors and their employees so that they are motivated to treat clients in a more responsive and respectful manner.

A collaborative monitor, in contrast, could be seen as addressing the problems of status differences and stranger relations by changing operational procedures and employee attitudes, rather than by empowering the clients. The basic reason why the monitor is structured as non-punitive and non-confrontational (the feature that allows it to be answerable to the legislature) is so that it can engender cooperation rather than resistance from the administrative agency. In this way, the monitor would have a chance of inducing administrative agents themselves to think about their clients in a new way. Of course, both the status differences and the impersonality of mass processing would remain. Collaborative interventions would address these issues indirectly by encouraging agency staff members to be more attentive to the people they serve, and to see client satisfaction as an essential component of successful role performance.

This approach fits within the general category of new public governance, as described above in connection with client-centered management.<sup>269</sup> A difficulty with the new public governance model, as noted in that section, is that it seems to depend heavily on the good will of government agents whose good will is suspect and relies on exhortations that can seem hollow-sounding to staff who are exhorted all too often.<sup>270</sup> The alternative suggested here might be more effective in altering operations and attitudes because the monitor would possess the sort of expertise described in the waiting time example. It could be described as an authority, but its authority would be based on knowledge, not the power to command.<sup>271</sup>

It is with respect to the problems of institutional pathologies and divergent incentives that the collaborative monitor's external status might play a primary role. The practices established in administrative hierarchies become notoriously entrenched. While this is often attributed to a variety

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269. See *supra* Part II.C.

270. See *supra* Part II.C.

271. See J. Raz, *Authority and Justification*, in *AUTHORITY* 115, 122–29 (Joseph Raz ed., 1990) (advancing the dependence thesis, which holds that a legitimate authority is one whose requirements serve as a reason for action that takes the place of other reasons based on considerations such as knowledge).

of evil or venal motivations, such as the desire to maximize slack, minimize effort, avoid hassle, and maintain job security,<sup>272</sup> it probably results more often from the powerfully felt need to get through the day, and to manage complex responsibilities with limited staff and material resources. An external monitor might be able to alter the pattern of existing practices. Merely taking time, in a series of training sessions or lunch meetings, to re-think those practices might produce salutary effects. Probing the way a particular agency or function operates might lead the agency staff to recognize that those practices are contingent folkways of the agency,<sup>273</sup> and could be changed without operational catastrophe.

In this context, the collaborative character of the external actor might provide supplementary advantages. Outside experts who appear in the midst of an ongoing organization, no matter how prestigious and well trained, can generate resistance and resentment. The very fact that they are not “in the trenches,” that they are not subject to the grinding routines that the agency staff faces day after day, undermines their legitimacy and renders their suggestions suspect. A collaborative approach offers a potential antidote. The monitor would begin by gathering information from the agency directors and employees about the difficulties that they face, and would then engage them in discussions that would encourage them to think of their own solutions. By thus making use of the suggestion box, rather than the complaint form model of intervention, the monitor might be able to induce the agency to alter the entrenched behavior that produced the problem. Its collaborative approach might generate genuinely new solutions; even if it did not, however, it would create an atmosphere in which the members of the agency would be more receptive to the monitor’s ideas.

The monitor’s connection to Congress might provide an additional advantage. In some cases, at least part of the reason for the agency’s oppressive behavior may stem directly from the provisions of the statute it is enforcing. Perhaps the statute imposes unnecessary requirements or it makes demands that are pragmatically unrealistic. In addition, the statute may produce oppressive behavior indirectly by creating institutional pathologies or divergent motivations. The optimal solution, therefore,

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272. See *supra* notes 86–87.

273. See generally John Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 41, 47–53 (Walter Powell & Paul DiMaggio eds., 1991) (rationalized institutional myths include involving changing formal structure, adopting external assessment criteria and following agreed-upon procedures in ways that are isomorphic with the institutional environment); *id.* at 59–60 (inspection and evaluation become ceremonialized to avoid the discovery of inefficiencies).

might be to change the authorizing statute rather than the agency's practices. But amending a federal statute, or even getting the attention of someone in Congress about the possibility of doing so, is generally impossible for most agency staff members. A monitor who is answerable to Congress can at least fulfill the latter function, and might initiate revision of the legislation, particularly concerning its technical provisions. In most political situations, the monitor would need to be perceived as non-partisan in order to have any chance of doing so. This might seem difficult or impossible, but, in fact, the GAO and CBO have generally maintained this stance with considerable success.

#### CONCLUSION

Ultimately, the collaborative monitor suggested here, or any other mechanism for combating bureaucratic oppression, can only be effective if it possesses widespread support from governmental leaders. Funding must be provided for its operations, decent salaries paid to its staff, attention be paid to its ideas, and compliance urged for its suggestions. This will only occur, of course, if the problem of bureaucratic oppression is taken seriously. There seems little question that it should be; neither Gogol's Very Important Person nor Dickens' Circumlocution office have any place in a government whose declared purpose is to serve its people.<sup>274</sup> The problems caused by status differences, stranger relations, institutional pathologies and divergent incentives need to be addressed. Existing efforts implemented by due process protections, ombudspersons, management theory and market incentives are all laudable, but are far from providing a solution. Jejune fantasies about scaling back the administrative state and empty jeremiads about its inevitable continuation are of no value in this context. What is needed is serious, sustained effort to improve the government we have, and that we will continue to have as long as our society, in any recognizable form, continues to exist.

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274. See U.S. CONST. pmb1.