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# Liberal Constitutionalism & Bureaucratic Discretion*

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*The "rule of law" is a cardinal tenet of liberal constitutionalism. This article, however, claims that the rule-of-law principle was not central to the republicanism of the American Founders, that it guided neither their design of our constitutional system nor the two centuries of adaptation and accommodation that have modified the letter but not the spirit of this system. The author insists that it is the rule of politics, not the rule of law, that the Framers sought for their Republic and that our politics past and present are consistent with this older understanding of constitutional government.*

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Constitutionalism, in both liberal and nonliberal forms, is concerned with curbing oppressive government and preserving individual freedom while retaining a realm for the exercise of legitimate governmental power. But the experiences of the past two centuries have transformed the quest for limited but effective government into a preoccupation with the meaning and application of the principle of the rule of law, of a "political society *organized through and by law,* for the purpose of restraining arbitrary power,"[1] as if the rule of law were synonymous with legality and the only conceivable standard by which to assess legitimate government. From this perspective, the separation of powers, checks and

* I thank Murray Dry and Sidney Milkis for their helpful comments on an earlier draft of this essay, and Harvard Law School for a year in residence as a Liberal Arts Fellow during which time the final form of this essay took shape.

1. Giovanni Sartori, "Constitutionalism," *American Political Science Review* 56 (December 1962): 860; emphasis in the original.

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balances organization of the American national government is *unconstitutional:* it results in consequences which violate the rule-of-law principle of liberal constitutionalism.

Where liberal constitutionalism places its faith in the checking power of rules as rules and its confidence in the policing powers of the judiciary, the American Constitution relies on more explicitly political incentives and motives to coordinate and control the conduct of political actors. Where the liberal principle of the rule of law strives to forestall the abuse of governmental power, the Founders designed the new republic's scheme of separated institutions and its system of checks and balances to be fair and effective, capable of accomplishing the essential tasks of governing—civil order, commercial prosperity, and national defense—that the Articles of Confederation had proven so woefully inadequate to meet. Where the constitutionalism that came to fruition with the liberalism of the nineteenth century looks to the security of a rule-of-law regime, one "which exist[s] only to serve specified ends and properly function[s] only according to specified rules,"[2] and which emphasizes judicial structures over political interactions, the constitutionalism of the Founding reaffirmed an older understanding of legality which focused not only on what government is *limited to* but also *by what* it is limited.

The Founders relied on incentives for cooperation to form a government capable of achieving the proper ends of government, not on checks that would lock the system in an unhelpful stalemate. They rested their hopes for the new regime in the special elevating influence of debate and deliberation, in the uplifting of personal ambition and group interest. At least for Publius in the *Federalist Papers,* formal structures and the rule of law were not to be the essential limiting agents of the new political system, only helpful accessories to the working out of policies by harnessing principled and self-interested ambitions to the quest for limited but effective government. In short, the rule of law is a secondary, not a primary, principle in the theory of the republic founded in 1787.

The seeming paradox of an "unconstitutional" Constitution is not of merely antiquarian interest, for the absence of an explicit treatment of the meaning of liberal constitutionalism has impoverished public discussions of the appropriate roles and authorities of the bureaucracies which have grown to prominence in the twentieth century. The conflict between the liberal constitutional rule-of-law principle and the Founders' design for the new American republic has made it difficult to reconcile the role

2. Gordon J. Schochet, "Constitutionalism, Liberalism, and the Study of Politics," in *Constitutionalism,* ed. J. Roland Pennock and John W. Chapman, Nomos XX (New York: New York University Press, 1979), p. 1.

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and authority of modern bureaucracy to the expectations of a political culture founded on beliefs in limited but effective government. We have accepted too uncritically the premises of liberal constitutionalism and its challenge to the legitimacy of modern bureaucracies and their exercise of political power and discretion. The Founders' constitutional politics is more open to the possibilities of bureaucratic governance within a representative and effective system.

I will argue that the charges that bureaucratic government threatens constitutional government misstate the problem of contemporary politics. The important distinction is not between bureaucratic and constitutional governments, but between bureaucracies in authoritarian and constitutional regimes. To ensure that American bureaucracies assume the desired *constitutional* temper requires less tinkering with the structural design of American political process and more attention to the norms of behavior guiding the actors within that process.

## Why the Constitution Is *Unconstitutional*

In one of the most quoted studies of the past two decades, *The End of Liberalism,* Theodore Lowi offers what has become the conventional wisdom on the plight of "bureaupathology," excessive red tape, bureaucratic domain-building, the misuse of bureaucratic discretion, and interest group capture of the day-to-day operations of the government. He charges that the political ideals of the Constitution have been debased by the rise of "interest group liberalism"—a philosophy of government which regards all interest group demands as legitimate and which views the purposes of government in terms of the dispersal of benefits rather than the exercise of power. Less willing than some to identify the problem as simply one of interest group greed or bureaucratic and legislative incompetence and corruption, Lowi insists that the problem of arbitrary government results not from an usurpation of power by private groups but from an abdication of responsibility by the President and especially the Congress. Since the mid-thirties, Congress has delegated the substance of its law-making powers to lower and lower echelons in the bureaucracy. At the same time, it has placed oversight powers in the hands of smaller and smaller groups of legislators, typically members of Congress who find it electorally more profitable to advance the tangible interests of their constituents than to speak for the larger interests of the nation. They are rewarded for their success in preserving or enhancing constituent interests in on-going programs and punished for challenging the self-interested premises of such programs. In brief, Lowi argues that not only have the boundaries between the executive and the legislature

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been breached, but new boundaries have risen, ones favoring specific interests over the general interest.

Scholars such as Roger Davidson[3] have refined Lowi's critique to argue that this unprincipled and unchecked selfishness suppresses rather than elevates more inclusive notions of the national or common good. Interest groups no longer consult; they now dominate policy making in the legislative-bureaucratic forums governing their areas of interest. The costs of these iron triangles are two-fold. First, the capture of government by special interests decentralizes an already radically decentralized system, fragmenting government into smaller and smaller areas of policy making, each less visible and therefore less accessible to the general public or to poorly organized interests. There is a corresponding diminution of government accountability to public needs and a growing problem of coordination among the proliferating subsystems of the government. The second set of costs relates to the incentives motivating members of government. There is a powerful urge to distribute the benefits of government broadly or to conceal the costs of policies while delaying decisions which concentrate costs on powerful groups. Disenchanted observers of American politics characterize the outcomes of such a process as "Christmas tree politics" and fear that the costs of government are unnecessarily and unwisely inflated.

Both Lowi and Davidson agree that too much discretion has been placed in the hands of too small a group of public and private actors. Despite occasional and important exceptions, government is now better suited to serve the interests of small constituencies than those of the nation. If government were working effectively, it would represent interests broader than those subsumed under the label "special interests." Thus, these critics see the problem of government as not that of being ineffective but rather that of being effective for too narrow a set of concerns. They wonder what this does to the Founders' scheme of government by coalitions, where sinister interests—purposes contrary to the rights of other citizens or to the collective interests of the community—are disciplined by a process of compromise, negotiation, and the prudent recognition of the possible and desirable. They fear that American politics has become a Tower of Babel where the confusion of many interests has replaced the biblical confusion of tongues.

Such fears are not altogether misplaced. Too much of a good thing, too many internal actors and too much political ambition, may be as

3. Roger Davidson, "Subcommittee Government: New Channels for Policymaking," in *The New Congress,* ed. Thomas E. Mann and Norman Ornstein (Washington, D.C.: American Enterprise Institute, 1981), p. 99.

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hazardous as too little. But one suspects that these fears also reflect a misunderstanding of what the Founders intended, the mechanisms they relied on to keep government accessible and responsible, and the standards by which they assessed the performance of the regime.

The power of interest groups and bureaucracies in modern politics is not, as Lowi argues, a deviation from the fundamental principles of American government laid down by the Founders. Extraconstitutional adjustments, such as iron triangles, are better perceived as attempts to reconcile eighteenth century ideals with twentieth century realities. Like the extraconstitutional mechanism of the political parties in the nineteenth and early twentieth centuries, iron triangles function to centralize and organize political forces which the American constitutional scheme disperses. They do so, moreover, in a manner faithful to the Founders' premises. They are a necessary consequence of the dispersion of power and responsibility produced by the original political theory of the Constitution. Thus, the logical, necessary, and expected consequence of the American system is to prevent the kind of specificity in law and the accountability of public officials which is necessary to ensure the rule of law as the liberal tradition envisions it.

This description of the symptoms of a government of politics rather than law is not altogether novel. It repeats, and the critical reader might say parodies, arguments offered by Theodore Lowi and others, but the diagnosis of the causes of the problem is different. Where Lowi identifies the problem as a modern one, dating back to the thirties and the withdrawal of the courts from reviewing economic policies passed by Congress or the bureaucracy, I suggest that it is a problem, if it is a problem, rooted in the structure of the regime itself. A return to "juridical democracy," where the courts hold Congress accountable for the powers it delegates to bureaucrats and legislative committees, would not solve the problem but only force new and perhaps less formalized extraconstitutional accommodations. Delegation of power is not necessarily the cause of lawless government; it is an attempt to overcome some of the institutional obstacles of governing. Moreover, prescriptions calling for judicial remedies to the dilemma of coordinating a decentralized system underestimate the system's capacity to coopt even the most obstinate political actor, to make judges partners in the administrative state, not overseers.[4] Finally, by positing the necessary moral superiority of

4. Both bureaucrats and judges rely on legal-rational forms of justifications for their actions. Both are professions emphasizing a specialized knowledge of rules and procedures while abiding by internalized standards of conduct which constrain and mold their discretion. There is no reason to believe that judges will be less receptive to the logic of extra-

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juridical democracy over pluralistic democracy, Lowi equates the rule of law with the "essence of positive government,"[5] an association that reveals his misperception of the problem, as well as the appropriate purpose, of American politics.

Efforts to reestablish legal controls over the activities of bureaucrats and legislators are founded on a serious misreading of the constitutional design of the American republic, confusing what is secondary and ancillary, the rule of law, with what is primary and controlling, a reliance on political checks and incentives. While Publius does call the Constitution the "fundamental law,"[6] he meant something quite different from the liberal usage of a constitution as the basic law from which all others derive their authenticity. For some of the Founders, fundamental law meant natural law, for others, a wholly human-made artifact from which a code of laws was deducible, and for still others simply a literary device speaking to the special character of a constitution as a set of fundamental maxims establishing the regime which made it distinct from, and superior to, legislatively enacted and judicially enforceable law.

The first possibility, that the Constitution was a written form of natural law, is the least likely. Many Founders thought the concept unintelligible, and those who did were "seldom, if ever, guilty of confusing law with natural right."[7] The second possibility, that fundamental

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constitutional devices for coordination than are bureaucrats. Accounts of how judges have assumed the responsibility for making decisions and supervising the implementation of those decisions in areas traditionally the concerns of legislatures and executives indicate how judges accommodate conflicting interests by dispersing the power to make and the responsibility for policies among many private groups. According to one observer, the last decades have witnessed the rise of a new form of bureaucratic-judicial symbiosis, "a collusive relationship in which mutually reinforcing actions would allow both parties greater influence over social policy." Instead of being independent overseers of discretionary power, courts are increasingly assuming the role of "senior partners in the administrative state." (Jeremy Rabkin, "The Judiciary in the Administrative State," *The Public Interest,* 71 (Spring 1983): 73, 75.) Thus, efforts such as Lowi's to establish juridical control over the administrative state demonstrate an unwarranted confidence in the judges' immunity to the pressures for accommodation.

5. Theodore Lowi, *The End of Liberalism* (New York: W.W. Norton and Co., 1979), pp. 67, 295–7, 300.

6. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library Mentor, 1961), 53, p. 331; and especially 78, pp. 467–8.

7. Robert Cover, *Justice Accused* (New Haven, CT: Yale University Press, 1975), p. 27. Michael Oakeshott offers another reason why proponents of the Constitution as rule of law cannot appeal to the notion of a higher or natural law. To do so is to confuse the non-instrumental character of law *(lex)* with matters of "rightness" or "justice" *(jus).* What the rule of law needs for its authenticity is "a form of moral discourse, not concerned with

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law in fact means law, is the basis for the judicial claims to the control over the interpretation of constitutional text. Lowi's argument for a juridical democracy builds on this idea, and his argument is, in turn, a logical extension of Chief Justice John Marshall's effort to impose a rule of law premise onto the original constitutional fabric in *Marbury* v. *Madison.* Having paid due homage to the special irreducible nature of the Constitution as a political document, the supreme expression of that "original and supreme will" which organized the government, Marshall cleverly transforms it into a legal document, couched in language accessible through a legal construction. "It is emphatically the province and duty of the judicial department to say what the law is,"[8] as though the Constitution were not the constitutive foundation but only a code of laws, albeit of the most generalized and permanent form. Such an interpretation of fundamental law confounds the minor with the major, stressing the "law" rather than the "fundamental" attributes of the Constitution.

To see how major a change Marshall sought in the constitutional design, compare his argument with the superficially similar one of *Federalist* 78. At first glance, *Marbury* seems only a paraphrase of the twelfth paragraph in *Federalist* 78 explaining the role of the judiciary in a constitutional polity. But when the whole of *Federalist* 78 is read, the putative agreement between Marshall and Publius becomes less certain. Despite the fact that *Federalist* 78 was written by Alexander Hamilton, one of the most fervent supporters of judicial review, its author recognizes that the exertion of the rule of law is, by itself, the weakest form of power in a republican system and that the judiciary's ultimate efficacy depends less on the iron veto of fundamental rules than it does on its moderating influence upon legislative motives.[9] Thus, while the Publius of *Federalist* 78 seems to agree with Marshall on the character of the judiciary's special responsibility, the object of that responsibility for Publius was to nourish, not supplant, the actions of ambitious and high-spirited political actors.

A more plausible explanation of what the Founders meant by fundamental law is the third possibility of fundamental law as maxims. *Maxims* are distinguishable from *laws,* at least as the liberal principle of

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right and wrong in human conduct, but focused narrowly upon the kind of conditional obligation a law may impose." Michael Oakeshott, "The Rule of Law," in *On History and Other Essays* (Totowa, NJ: Barnes and Nobles Books, 1983), pp. 142–4.

8. *Marbury* v. *Madison,* 2 L. Ed., 140, 176–7 (1803).

9. *Federalist* 78, pp. 465 and 470.

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the rule of law understands the two terms, by the presence or absence of enforceability as rules. Sylvia Snowiss has shown that the use of the term "fundamental law" at the inception of the republic is most accurately understood in the context of an earlier tradition which saw fundamental law as a set of first principles setting limits to permissible governmental action while preserving individual liberties. Such law was not judicially enforceable but relied instead on the forces of political checks and internal restraints.[10] It cannot be equated with law in the sense that the rule of law usage emphasizes "limit[ing] power through the judicial application of fundamental law external and superior to governmental institutions."[11]

## The Rule of Law and the American Constitution

Constitutionalism and the rule of law would seem to have sprung from a common and ancient pedigree. Indeed, Aristotle's *Politics* appears to endorse the rule of law as second only to the rule of the best as the most praiseworthy of political ruling principles. To rule above the law or without law is to rule in one's interest only, unmindful of broader community needs. To rule lawlessly is to use the broad powers and prerogatives of government to secure one's own narrow advantage. The civic invocation that "we are a government of laws, not men" is, then, the admonition that we should not be a government of mere men and women, that personal wants, whims, or advantages are insufficient in themselves as bases for making decisions which affect the whole community and rely on the community's authority to order its own internal arrangements. Despite this apparent commonalty, Aristotle is appealing

10. Sylvia Snowiss, "From Fundamental Law to the Supreme Law of the Land," (Paper presented at the 1981 Annual Meeting of the American Political Science Association, New York City, September 3-6), pp. 2-3. Snowiss relies on Thomas Grey for the proposition that while such law was not judicially enforceable, it was still seen as legally binding and infringements of it were illegal and void. My reading of the sources relied on by Grey suggests that they were "illegal" only in the sense of violating the dictates of right reason or the settled consensus of a community, not in the more modern sense of violating prohibitions possessing a rule-like character. (See William Blackstone, *Commentaries on the Laws of England,* 3 vols. (Chicago: University of Chicago Press, 1979), 1: 41-49, 52-53, 134-41, 154-62.) The language of legality accorded fundamental law in this tradition might also be ascribed to the political genesis of the term: the contest between James I and the English Parliament over political supremacy in the sixteenth century produced a rhetoric strong in its assertiveness but misleading in its content.

11. Herman Belz, "Constitutionalism and Bureaucracy in the 1980s," *News for Teachers of Political Science,* (Spring 1984): 16.

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to a very different concept of rule of law than does liberal constitutionalism. For Aristotle and his contemporaries, the rule of law meant the rule of wisdom, of "reason free from all passion,"[12] and the rule of wisdom implied the presence of the wise founder, the almost godlike Solon or Lycurgus, who possessed the gift of eliciting popular consent to the prudent dictates embodied in the laws he laid down.[13]

The liberal concept of the rule of law takes a different tack. Constitutionalism and the rule of law underwent a dramatic metamorphosis that began in the seventeenth century and came to fruition in the nineteenth. No longer did the authority of a mythic law-giver suffice to establish the primacy of law; the primacy of the wise rule-maker was replaced by the rules themselves, the primacy of wisdom had fallen before the primacy of consent to rules. Rule of law has come to be understood as proceeding by previously agreed-upon rules with sufficient specificity to alert us to the desired means to desired ends. By the late nineteenth century, A.V. Dicey could define the rule of law as the power of judges to determine, in their ordinary role as legal adjudicators, the validity of governmental acts by referring to a constitution or other body of laws.[14] Where Aristotle had stressed the ruling-*by*-rules nature of his government of laws, emphasizing the authority of wise rules, Dicey now stressed the rule-*of*-rules nature of liberal constitutionalism, emphasizing the authority of consensual rules. By the middle of the twentieth century, the principle of the rule of law had been refined to mean either the kind of free society in which the "government in all its actions is bound by rules fixed and announced beforehand"[15] or "the mode of proceeding by general rules of declared law backed by enforcement."[16] No longer simply part of the description of a good regime, the rule of law, along with its corollary principle of limited government, is the definition of the good or constitutional regime.[17]

The rule of law stresses the special role of rules and fundamental prin-

12. *The Politics of Aristotle,* trans. Ernest Barker (London: Oxford University Press, 1958), pp. 134–5, 145–8, 152.

13. Ernest Barker, *The Political Thought of Plato and Aristotle* (New York: Dover Press, 1959), p. 323.

14. A.V. Dicey, *Introduction to the Law of the Constitution* (London: Macmillan, 1956), pp. 202–3.

15. Frederick A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), p. 72.

16. Ernest Barker, *Principles of Social and Political Thought* (London: Oxford University Press, 1951), p. 256.

17. For example, Harvey Wheeler, "Constitutionalism" in *Government Institutions and Processes,* ed. Fred Greenstein and Nelson Polsby (Reading, MA: Addison-Wesley, 1975), p. 78.

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ciples restricting the lawmaker as well as the law applier and the law obeyer. Limited government now means government limited by rules and principles institutionalized in a system of legality. A rule-of-law regime need not recognize judicial review, for even in a political society without this power, such as Great Britain, government officials are brought before a court for wrongs committed under the cloak of official authority. But it does require some overarching set of principles, enforceable in their own right, which set boundaries to permissible government behavior and goals. These principles may be found in a written charter, such as a constitution, or through an equally fundamental but unwritten body of rules, such as the English common law. In short, the rule of law rests on a respect for the restraining power of laws as laws.

By such a standard of liberal constitutionalism, the American Constitution is not a rule-of-law regime. The Founders agreed with liberal constitutionalism as to the need for limited government but they differed in their view of what government was limited by: not by laws or even fundamental principles ascertainable through the deductive reasoning of ordinary courts, but by a process melding self-interest to public spiritedness. In a manner not adequately appreciated, the American Constitution shares as much with its nonliberal precursors as it does with the almost 160 surviving constitutions written during the heyday of liberal constitutional regime building—the nineteenth and early twentieth centuries.

The Founders were mindful of the need for some rules to help set limits to the rulers. In a trivial sense, the American constitutional system is rule-bounded if only because of the careful stipulations of who can be a member of the House or Senate, where revenue bills should originate, or how presidential electors should select the President. These rules, however, set only minor limits, and the success of the Founders' experiment in constructing a limited but effective republic could not depend on so flimsy a construction if that republic were to survive. Our willingness to change so settled a rule as the voting age in so short a time (Twenty-Sixth Amendment) is a good example of the Founders' perspicacity about what were the essential guardians of good government. Even the detailed specifications of congressional power in Article I were secondary to the broader scheme.

Nor did the Founders overlook the usefulness of the rule of law as a secondary principle of governance. They fully expected that the governed should obey the laws set down by the governors, and they hoped that the governors would grant due respect to the authorized prerogatives of other governors. But while the rule of law assists the governors to rule the governed, it was not seen as a sufficiently dependable constraint on

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the governors themselves. Something more powerful and fundamental was needed.

In the most powerful sense, the Founders rejected the rule of law as the limiting principle of their new regime. They had learned through hard-won experience that only in "a nation of philosophers" would "the voice of an enlightened reason" be sufficient by itself to inculcate a "reverence for the laws." Something firmer than the "timid and cautious" reason of man was necessary to maintain "the constitutional equilibrium of the government."[18] Rather than explicating the nature of their new republic in terms of rules and juridical authority, of legal or rule-bounded checks, they sought to nurture political controls and checks, molding personal ambitions and group interest through the special elevating influence of debate and deliberation.

## A Republic of Politics, Not Laws

At the time the American Constitution was written and debated, the theory of liberal constitutionalism was still in flux. In such a period, one would not expect the Founders to be unanimous in their acceptance or rejection of the emerging liberal idea of the rule of law, and they were not. Many voices were raised both within and outside of the convention in support of a rule-of-law regime, and there were several attempts later, the most notably successful being Chief Justice Marshall's in *Marbury,* to reform the constitutional system in a more liberal direction. Moreover, experience with revolutionary era state constitutions persuaded leading political figures such as John Adams of the desirability of an "empire of laws, and not of men."[19] This explains perhaps why the convention was undecided whether to impose judicial review on the national government and why the Constitution contains no language like that in Article XXX of the 1780 Massachusetts Constitution holding itself to the explicit standard of "a government of laws and not of men."[20] Nevertheless, the Founders' long and careful study of the key works in political theory and history, coupled with their experience with the workings and consequences of self-governance in the post-revolutionary years, equipped them with a set of ideas and practical knowhow which gave the new constitutional system a special thrust and form.

18. *Federalist* 49, p. 315.

19. *The Political Writings of John Adams* (Indianapolis, IN: Bobbs-Merrill and Co., 1954), pp. 86 and 108.

20. Quoted in M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), p. 149.

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The political theory of the American regime has traditionally been identified with the intentions of the writers of the *Federalist Papers* and it is through these eighty-five essays, penned during the heat of a bitter ratification campaign, that there emerges the clearest statement of how the new political system would operate and for what ends.[21] According to Publius, democracy gives rise to the forces of its own destruction, the antinomies of liberty and equality. Liberty encourages citizens to be different, but differences may be perceived as unmerited claims of superiority, a quality reprehensible to the egalitarian sensibilities of democrats. Recognizing that the new republic was obliged to deal with human nature as it is, not as pure theories of democracy may wish it to be, Publius sought institutional and personal incentives which would encourage governing majorities to rule humanely and effectively. Nor were aristocratic or other antidemocratic principles of rule tenable in the circumstances of the day; the new American regime was to be democratic regardless of the personal preferences or apprehensions of the authors of the Constitution.

The solution to the ills of warring factions given birth by envy and suspicion relies on the social and economic diversity of an extended republic and on decentralized power and institutional incentives. An extended republic offered an advantage denied all prior democracies: a society large enough that the expected division between the haves and have-nots would be lost among the profusion of different lifestyles, occupational interests, and regional affinities. It promised a social setting in which no one faction could dominate the political arena. But an extended republic could not be ruled by the direct actions of its citizens. Instead, it called for the representative principle. The national government would foster those majorities capable of governing in the interests of the nation only by presenting again in a more manageable form the diversities of the nation.[22]

To insure that such majorities would arise, Publius relied on decentralized powers and institutional incentives. While federalism was an important part of this structural dispersion of government power and responsibility, federalism itself was less the expression of the political theory of the new republic than it was a pragmatic response to the demands of large and small states. It was the American adaptation of a separation of powers modified by checks and balances that was expected to be the best guarantee against the "abuses of government."[23]

21. But see Albert Furtwangler, *The Authority of Publius* (Ithaca, NY: Cornell University Press, 1985).

22. *Federalist* 10, pp. 82–4; and 51, p. 325.

23. *Federalist* 51, p. 322.

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"The accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective," Publius argues, "may justly be pronounced the very definition of tyranny." If governing majorities were to be animated by the sense of restraint which distinguishes them from tyrannical majorities, they had to work through a constitutional process in which the principles of "justice and the general good" could be championed over interests adverse to "the rights of [all] citizens" or the collective "interests of the community."[24] The antidote to ardent republicanism lay in investing the responsibility for specific forms of governing in three separate institutions while distributing the obligation for governing responsibly among all three by giving each the prerogative to overrule or modify the decisions of the others. In brief, Publius sought to defuse power by the diffusion and sharing of it.

It is easy to overlook the novelty of this arrangement, for the ideas of separation of powers and checks and balances were not new. But the Founders were not unreflective inheritors; they wrought major changes in the form and use of these constitutional devices. Where Montesquieu had based his concept of separated powers on the older notion of three classes of citizens—the one, few, and the many[25]—and where John Locke had argued against the coequal status of the separate branches, preferring an executive totally dependent on the legislative,[26] the Founders sought a deliberate commingling of powers among coequal institutions. This might explain why, despite the language in several state constitutions of the period explicitly endorsing the doctrine of separation of powers, the American Constitution does so only indirectly. The stipulation in Article I, section 6, forbidding simultaneous service in the executive and legislative branches, reflected the convention's decision to separate institutions if not powers, "a separation of departments of power,"[27] and to rely on the political checks exercised by independent institutions with independent constituencies.

For the Founders, the separation of powers and checks and balances were not only theories of government but hardheaded proposals about

24. *Federalist* 47, p. 301; 51, p. 325; 10, p. 78; see also George W. Carey, "Separation of Powers and the Madisonian Model," *American Political Science Review* 72 (March 1978): 159-60.

25. Montesquieu, *The Spirit of the Laws* (New York: Hafner Publishing Co., 1949), pp. 151-60.

26. John Locke, *Second Treatise of Government* (Indianapolis, IN: Hackett Publishing Co., 1980), p. 79.

27. *Federalist* 81, p. 483.

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how to create an actual government. The separation of powers ensured that each institution would have primary responsibility for one element of governing, while checks and balances insured that each could participate in the actions of the others if threatened by "encroachments of the others." Thus, while Publius seldom speaks of one device without explaining the relevance of one to the other, he appreciated the different nature of separated institutions with shared powers and he relied on both separation of powers and checks and balances to erect the unseen boundaries of the new regime.[28]

Such institutional mechanisms were presumed to depend on political, not simply structural, means to enforce constitutional maxims. This, in turn, required sufficient civic virtue in most citizens most of the time to warrant the claim that they had the capacity to govern themselves without willfully abusing their prerogatives. Institutional devices would be so many "parchment barriers," wrote Publius, if the incentives to use them were lacking. Since one could not safely assume that "enlightened statesmen will always be at the helm," some means must be found to turn the private passions and selfish interests of citizens into something mindful of the public good.[29]

To insure that majorities would form and govern in the interests of all, and that the essential functions of the government would be performed, a system of separated institutions disciplined by checks and balances was designed to force and award accommodations among spirited political actors. Such accommodations were to be produced by harnessing private ends to public purposes. Thus while it is true that separation of powers and checks and balances sought to encourage personal ambition to "counteract ambition,"[30] they also sought to broaden the perspective of members of the government. Leaders would be drawn to government to achieve personal objectives; their personal ambitions would induce them to find the means to overcome the vetoes built into the system. They

28. *Federalist* 48, p. 308; 78, p. 465; 10, p. 322; 9, p. 72; 48, pp. 308-9; 51, pp. 321-4.

29. *Federalist* 73, p. 442; 48, pp. 308 and 313; 10, p. 80. While not denying that men possessed the capacity for civic virtue, Publius was less sanguine about its regularity in the everyday operations of government. "As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities . . . which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form." *Federalist* 55, p. 346.

30. Publius was echoing Gouveneur Morris's statement in the Constitutional Convention that, "Vices as they exist, must be turned against each other." Max Farrand, *Records of the Federal Convention of 1787,* 3 vols. (New Haven, CT: Yale University Press, 1911), I: 512.

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would discover the need to forge the negotiated settlements most advantageous to the interests they represented and to their reputations as men of power and wisdom. Since government action required the concerted efforts of both the executive and legislative branches, each branch would find it advantageous to cooperate. Governing majorities would rely on the willingness of their leaders to consolidate local prejudices and mistaken rivalries into one harmonious interest, nurturing a "cool and deliberate sense of the community" through an educative process of debate and compromise. A "communion of interests and sympathy of sentiments" would arise through the process of discussion and pragmatic adjustment both within and between governing institutions.[31] According to James Madison, in a letter written before the Constitutional Convention, it is this restraint and diversity which legitimate the moral claim of majorities to rule, not the force exerted by mere numbers.[32] Publius anticipated that such majorities could meld the raw materials of diverse individual interests into a coherent whole through this dialectic of debate and compromise. Thus, only certain kinds of majorities were intended to rule in the extended republic.

These majorities would not violate the spirit of the system but would coexist with the restraining principles within the system. Political checks driven by political ambitions would restrain the misuse of power while rewarding opportunities for cooperation among the members of the government. A republic of politics, not laws, was therefore the primary objective and the best guarantee of a free and effective regime.

By opting for a politically-based rather than a rule-founded regime, what did the Founders create? Unlike the prescription laid down by Chief Justice Marshall in *Marbury* and championed by Theodore Lowi, with its stress on the architectonic nature of the Constitution and its dependence on a regime of rules as the ultimate guarantee of decent government, the Founders relied on the complex interactions fostered by self-interested pursuits, competition among leaders, and the reality of civic virtue.

Marshall and Lowi reflect the conventional teaching of modern liberalism, a teaching gleaned from the experience of the new liberal regimes of the nineteenth and twentieth centuries which feared the return of autocratic power and sought to thwart such a return by creating mechanisms to hold all forms of discretionary rule subordinate to the

31. *Federalist* 51, p. 32; 57, pp. 352–3; 63, p. 384; 57, p. 352.

32. James Madison, *The Forging of American Federalism: Selected Writings* (New York: Harper and Row Torchbooks, 1953), p. 45.

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rule of rules. The rule-of-law principle of liberal constitutionalism offered a bulwark against the claims of those who sought to rule not on the basis of informed consent but by the virtue of some putative superiority in courage, wisdom, or physical force by holding all forms of rule to the standards of equity and consistency. While not diminishing the importance of human rulers or the role of discretion in the governing of a complex society, it did establish a basis to challenge any action which conflicted with a community's sense of fairness and procedural correctness. The need to limit government seemed more compelling than the need for effective government. In this perspective the rule of law became both the means to an end and the standard by which the legitimacy of government is judged.

The rule-of-law perspective is obliged to view the rise of the bureaucratic state with suspicion, as threatening constitutional values since the bureaucratic state appears to venerate discretion and the rule of the unelected official. It fears a new autocracy, one of expert civil servants rather than divinely-anointed kings. The Founders' scheme, on the other hand, is open to the possibility that the bureaucratic state can also be a constitutional state so long as its behavior conforms to the theory of political motivation and action underlying the Constitution. The Founders knew that a constitutional form of government must not only prevent the abuse of power, but is also obliged to make possible the use of necessary power. Some jobs must be done, occasionally done well, if a constitutional democracy is to survive. It was the Founders' intent that these jobs be done for the American nation while protecting individual freedoms from abusive government practices.

## Of Plastic Walls and Iron Triangles

The first half of the conventional critique of bureaucratic government appears faulty. Rather than being an aberration in the constitutional system, powers dispersed across institutional lines are consonant with the Founders' design. Separation of powers and checks and balances seek to breach the lines separating the departments of the national government, not to wall them off into detached, suspicious, and uncooperative parts.

But what of the second half of the conventional critique, the charge that both delegation of power and bureaucratic discretion have created self-governing bodies antithetical to the general interest? It may be that the *form* of the cross-institutional mechanisms, especially those popularly labeled "iron triangles," violates the Founders' scheme. At first glance, the existence of such self-interested and self-governing congeries of members of Congress, bureaucrats, and interest group representatives

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would seem to violate the proscription in *Federalist* 10 of a "multiplicity of factions" as the remedy to the "mischiefs of factions." Are not iron triangles the "cabals of a few" in which one or a few factions dominate policy making against which *Federalist* 10 warns the reader?[33]

The intentions of the Founders, at least as they are imperfectly reflected in the arguments of the *Federalist Papers,* are oblique to this question. The Founders did not anticipate the changes brought by the growth of modern bureaucracies with their special sources of power and knowledge. The Founders were more concerned with the need for an energetic president than with the implications of lower-level administrators exercising power.[34] But to say that the Constitution does not discuss American bureaucracy does not mean it is impossible to reconcile bureaucracy with American constitutional principles.

The first clue to a reconciliation of iron triangles with the Founders' plan emerges in paragraph eight of *Federalist* 10. The paragraph begins by echoing the rule that "no man is allowed to be a judge in his own cause." The rule seemingly deplores bodies such as iron triangles whose members are both "judges and parties." But the paragraph goes on to remind the reader that in a democracy, "the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail."[35] Publius here poses a fundamental conundrum of democracy: how to reconcile the right of the most directly affected to participate in matters which shape their lives with the need to guard against selfishness unwarrantly parading as the public good. The answer is offered in *Federalist* 41. Publius reveals that the new Constitution does not oppose discretion so long as it meets two measures. Discretionary power is defensible when it is "necessary to the public good" and there is an effective "guard . . . against a perversion of the power to the public detriment." And what shall protect against the "ambitious sacrifice of the many to the aggrandizement of the few"?[36] *Federalist* 44 cites the checks on institutional ambition, concluding that "in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers."[37]

We have already seen the rationale for the first protection unfold, relying on the salutary effects of institutional ambition. Publius makes an

33. *Federalist* 10, pp. 81–2; see also 77, p. 462.
34. *Federalist* 37, pp. 226–7; 70, pp. 423–31; and 72, pp. 435–40.
35. *Federalist* 10, pp. 79–80.
36. *Federalist* 41, p. 256; 57, p. 350.
37. *Federalist* 44, p. 286.

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addition to this argument in *Federalist* 72. Hidden in a discussion of why a president should be allowed to run for reelection is a brief investigation of how to ensure that administrators will pursue the "positive merit of doing good." The solution is permanence in government. "An avaricious man . . . , looking forward to a time when he must . . . yield up the advantages he enjoyed, . . . [might] make the best use of his opportunities . . . and might not scruple to have recourse to the most corrupt expedients to make the harvest as abundant as it was transitory." But were he to have "a different prospect before him, [he] might content himself with the regular perquisites of his situation, and might even be unwilling to risk the consequences of an abuse of his opportunities." In a curious reworking of the hope in *Federalist* 10 that ambition will counteract ambition, *Federalist* 72 hopes that "avarice might be a guard upon his avarice."[38] Once again, personal ambition and interest posed in the correct light can have public-spirited consequences.

Despite the Founders' trust in the workings of ambition, interest, and civic spirit, modern iron triangles may still overstep their boundaries. These triangles may be less ferrous than plastic, given Hugh Heclo's observation that as contemporary issues implicate a broader set of interests, a widening set of contending interest group representatives, bureaucrats, and legislators argue for the inclusion of their views.[39] But the ultimate protection against the overreaching ambitions of any interest lies in the electorate. *Federalist* 44 has confidence in the corrective influence of republican politics and returns the reader to *Federalist* 10 where Publius relies on "the republican principle" to defeat the "sinister views" of factions consisting of "less than a majority."[40] Publius foresees not a plebiscitary democracy but an informed democracy, one in which citizens, moved by outrage, reassert their final authority through the electoral control of Congress and the President and, by implication, the proliferating bureaucracies on and off Capitol Hill. Again, Publius calls on "the vigilant and manly spirit which actuates the people of America"[41] as the guarantee of a powerful but responsible government.

That the Founders' system can accommodate discretionary government replete with its large, powerful bureaucracies and iron triangles is not to argue that this system cannot be abused. Interest group greed,

38. *Federalist* 72, pp. 437–8.

39. Hugh Heclo, "Issue Networks and the Executive Establishment," in *The New American Political System,* ed. Anthony King (Washington, DC: American Enterprise Institute, 1979), pp. 87–124.

40. *Federalist* 10, p. 80.

41. *Federalist* 57, p. 353.

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stalemated policies, entrenched powers in low-visibility positions are all costs of the system. But these costs may be bearable when measured against the possible costs of imposing too unreflexively the reforms promoted by a rule-of-law perspective. Adverse outcomes to bureaucratic politics are not always the result of a failure to abide by specified standards. Sometimes, and perhaps increasingly, it is the overzealous application of rules before problems are fully understood, or efforts by groups within or outside a bureaucracy to impose too rigid a standard of legality, that produces the policy disasters decried as bureaupathologies.[42] Moreover, these costs are more the symptoms of governing a complex system than they are indictments of the failings of the Founders' premises. After all, polities which are more consciously rule-of-law in their structure, such as the Federal Republic of Germany, suffer these same afflictions.[43]

## The New Bureaucracy and the Old Constitutionalism

It is tempting to call for new ideas about the nature of constitutional government in the late twentieth century if we are to understand the perennial issue of how to make government strong enough to get its jobs done, but not so strong that it becomes overbearing and destructive of the very ends for which it is created. Rather than reforming the constitutional system to force bureaucratic policy makers to abide by the rule of law, however, it may be more prudent to recognize that the rule of law was never intended to be the primary measure of constitutional government in America. Rather than rewriting the American Constitution to make it compatible with the principles of liberal constitutionalism, it may be more prudent, and less exhausting, to recapture an older understanding of what constitutional politics strives to accomplish. The original premise of the Constitution has proven sufficiently flexible to nurture the rise of judicial review, to accept the organizing power of mass political parties, and to permit the reintegration of government through iron triangles or subgovernments. Only if the newer rule-of-law principle is applied must bureaucratic government seem at odds with constitutional government.

If big government and large, powerful bureaucracies are fixtures of modern politics, what might a constitutional reconciliation of

42. See R. Shep Melnick, *Regulation and the Courts* (Washington, DC: Brookings Institution, 1983).

43. Gerhard Loewenberg, *Parliament in the German Political System* (Ithaca, NY: Cornell University Press, 1967), pp. 343–4.

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bureaucratic power with limited government look like? One answer may lie in the historicity of the extraconstitutional mechanisms that coordinate American politics. Apart from an occasional flirtation with the idea of party government (the House under Speakers Thomas Reed and Joe Cannon in the late nineteenth and early twentieth centuries, Congress during Woodrow Wilson's first administration), the normal pattern has been to overcome the divisions within the governing process by joining the interests of each member to the common advantage of all. Except for particularly divisive issues such as slavery, the pattern has been to distribute authority and aid among state and local governments (patronage, Richard Nixon's and Ronald Reagan's "New Federalism"), to distribute government-controlled prizes broadly across the nation (public works and internal improvements), and to distribute power among the committees and subcommittees of the Congress. Thus, iron triangles which are thought to dominate modern government are not modern phenomena; American government has always attempted to induce cooperation within the political process by emphasizing distributive forms of policy making. At the same time, the political process has sought to remain faithful to the spirit of the constitutional system by encouraging the development of competing policy-making arenas to protect the process from certain kinds of centralized control. It is instructive to recall that the rise of the committee system in Congress, the basis of iron triangles and divided control over the bureaucracy, predates the rise of truly national interest groups and the growth of a national bureaucracy. This suggests that government has not been captured by interest groups or bureaucracies; rather, Congress and the Presidency have courted them in order to attain their own ends. The need to build ties among the disjointed parts of the constitutional system has demanded extraconstitutional mechanisms for coordinating government action.

We could build on this historical experience and recognize that the forces fragmenting and diffusing political authority within and among the constitutionally described institutions of American government also compel the many American bureaucracies to build political support for their goals and programs. Given our legacy of "decentralized bargaining parties and a decentralized bargaining legislature," we should not be surprised to discover that "the vast apparatus that grew up to administer the affairs of the American welfare state is a decentralized bargaining bureaucracy."[44] Indeed, the language we use to describe bureaucratic

44. Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), p. 145.

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policy making—fragmented, disjointed, incremental, interest group oriented—is similar to the language we employ to describe the most accessible institution in the national government: the Congress. Some studies indicate that American bureaucracies are susceptible to many of the same checks and incentives that the Constitutional Convention sought to create for the constitutionally described branches of the new government.[45] This suggests that bureaucracies are capable of assuming a democratic temper and, by implication, a constitutional one as well.

But recall that the Founders' intent was not to diffuse power so broadly that government is stalemated, but rather to diffuse it into many hands while providing the incentives for cooperation. The goal was not to create a medium to register popular opinions but a process to enlighten and uplift them. Their hope was that a process of study, discussion, and deliberation would encourage legislators and presidents to act for ends broader than those dictated by their own or their clientele's self-interest. Can bureaucracies share in this process of democratic self-education?

In another context, Hugh Heclo has identified a "constitutional lore," a "government community's self-understandings" about what is acceptable and unacceptable behavior and goals which serve as the "connecting tissue between ideas and institutions" in the United States and Great Britain. British lore permits enormous grants of power and decision making to bureaucrats held only to the standard of "the ultimate results of his stewardship."[46] American lore, forced by the late nineteenth and early twentieth century reformist enthusiasms for the rule of law, imposes a standard of "micro-accountability," reflecting one civil service reformer's belief "that the evils of government are always least where its powers are limited by certain fixed laws."[47] If Heclo is correct, the Founders would have been more at ease with the British than the current American practice, although the "big club" approach was as alien to them as is the strict rule-of-law criterion used to legitimate American bureaucracies as necessary evils. The British approach at least allows the possibility that the principled constraints felt by citizens are, by extension, felt by government officials. If the citizens can be self-governing and self-limiting, so can government officials, an assumption central to

45. Douglas Yates, *Bureaucratic Democracy* (Cambridge, MA: Harvard University Press, 1982).

46. Hugh Heclo, "Washington and Whitehall Revisited: An Essay in Constitutional Lore," (Paper presented at the British/American Festival, Durham, NC, June 12–13, 1984), pp. 4–4a, 26.

47. W. Dudley Foulke, quoted in ibid., p. 27.

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the Founders' political theory. It offers a middle ground between fixed rules and unbounded power, where discretion "challenges people to think about responsibilities."[48] It was with such a hope that the Founders permitted themselves to accept a democratic solution to the ills of democracy.

There is considerable evidence that the American bureaucracies do think about responsibilities. Despite academic and political protestations about the horrors of bureaucracy, most encounters with American bureaucrats are positive and end satisfactorily. Surveys conducted since 1929 show a consistently high level of citizen satisfaction with bureaucratic performance, with approval ratings clustering in the upper-60 through 80 percent range.[49] From a consumers' perspective, bureaucrats are doing something right, if only in terms of their responsiveness to citizen expectations.

American bureaucracies are not only responsive, they are accountable as well. As Herbert Kaufman's 1981 study found, bureau chiefs labor under a multitude of external checks—executive directives, congressional statutes, committee oversight, budgetary and appropriations accountings, and, least pertinent in their experience, judicial supervision—which in practice as well as theory keep them tightly constrained. "At one time or another, and to one extent or another, [the bureau chiefs] bowed to virtually all the groups with authority over them; the web of constraints was extremely confining."[50] Bureaucrats are held to standards not only by the threat of external sanctions but also by the ephemeral-appearing yet in fact powerful internal restraints of professionalism, prestige, and trust.[51] These external and internal checks and incentives are precisely the ones the Founders relied on to achieve decent and workable government. Their presence and efficacy also suggest that the rule of law as adumbrated through the courts and expressed through the power of formal rules and procedures has not played as crucial a role in guarding the Constitution from the bureaucracy as some of the proponents of juridical democracy claim. Indeed, studies of environmental regulation, an area in which American courts have been especially active as agents of control,

48. Heclo, "Washington and Whitehall," p. 30.

49. Gathered in Charles T. Goodsell, *The Case for Bureaucracy* (Chatham, NJ: Chatham House Publishers, 1983), pp. 18–28.

50. Herbert Kaufman, *The Administrative Behavior of Federal Bureau Chiefs* (Washington, DC: Brookings Institution, 1981), p. 161.

51. John Gaus, Leonard White, and Marshall Dimock, *The Frontiers of Public Administration* (New York: Russell and Russell, 1936), pp. 39–40; Jerry L. Mashew, *Bureaucratic Justice* (New Haven, CT: Yale University Press, 1983).

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indicate that policies have been no more effective but have exacted more tangible costs than the less court-oriented approach of Britain.[52] Unshackling the bureaucracy from the rule of law need not be a prescription for a lawless bureaucracy.

When the bureaucracy does act lawlessly, as the White House staff appears to have done during the Iran-contra affair, the rule of law provides no relief. It may punish, but it seems incapable of forestalling such abuses. The lawless bureaucracy is the politically unaccountable bureaucracy, one shielded from the external restraints and unmindful of the internal constraints the Founders intended the deliberative process to nourish. As the Tower Commission report portrays the Iran-contra policy process, the unwillingness among some cabinet officers to push for their perspectives, the disdain by National Security Council staffers for the views and concerns of other political actors, and their obliviousness to the usefulness of consulting pertinent members of Congress constituted precisely the prescription for disaster the Founders sought to prevent by requiring cooperation, not single-minded competition, within and among the separate branches of government.[53]

If the bureaucracies can engage with legislators, the President's staff, and interested citizens in an open discussion of public problems and the means to their solution—and the evidence suggests they can when they are pushed to do so—then we may have a bureaucratic government which is constitutional and discretionary. In recapturing the Founders' original vision, and unshackling bureaucratic policy making from simplistic rule-of-law standards, we may be able to involve bureaucrats in the desired process of an open assessment of our individual needs and common concerns. In an age in which the other principle of constitutional government seems to be in eclipse, as electoral accountability is diminished by incumbency victory rates in the House of Representatives and the growing power of an unelected and relatively insulated federal judiciary, there may be no other way to organize and use government power to meet our expectations about democratic equality and protection against tyrannical government. By recapturing the spirit of the original quest for a government of enlightened interests, we may discover how to make bureaucratic government accomplish constitutional ends.

52. David Vogel, *National Styles of Regulation* (Ithaca, NY: Cornell University Press, 1986), p. 283.

53. President's Special Review Board, *The Tower Commission Report* (New York: Bantam Books and *Times* Books, 1987), pp. 62–3, 66–70, 74–5, and 80–3.

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