

From Progressivism to Paralysis

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ABSTRACT. The Progressive Movement succeeded in replacing laissez-faire with public oversight of safety and markets. But its vision of neutral administration, in which officials in lab coats mechanically applied law, never reflected the realities and political tradeoffs in most public choices. The crisis of public trust in the 1960s spawned a radical transformation of government operating systems to finally achieve a neutral public administration, without official bias or error. Laws and regulations would not only set public goals but also dictate precisely how to implement them. The constitutional protections of due process were expanded to allow disappointed citizens, employees, and students to challenge official decisions, even managerial choices, and put officials to the proof. The result, after fifty years, is public paralysis. In an effort to avoid bad public choices, the operating system precludes good public choices. It must be rebuilt to honor human agency and reinvigorate democratic choices.

INTRODUCTION

In January 2020, University of Washington epidemiologists were hot on the trail of COVID-19.¹ Virologist Alex Greninger had begun developing a test soon after Chinese officials published the viral genome. But he needed Food and Drug Administration (FDA) approval to deploy his test in-house. Greninger spent 100 hours filling out an application for an FDA “emergency use authorization”

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1. See Shawn Boburg, Robert O’Harrow Jr., Neena Satija & Amy Goldstein, *Inside the Coronavirus Testing Failure: Alarm and Dismay Among the Scientists Who Sought to Help*, WASH. POST (Apr. 3, 2020), <https://www.washingtonpost.com/investigations/2020/04/03/coronavirus-cdc-test-kits-public-health-labs> [<https://perma.cc/ZSG2-JRUV>]; Sheri Fink & Mike Baker, *‘It’s Just Everywhere Already’: How Delays in Testing Set Back the U.S. Coronavirus Response*, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/2020/03/10/us/coronavirus-testing-delays.html> [<https://perma.cc/BT5U-GCJA>]; Julia Ioffe, *The Infuriating Story of How Government Stalled Coronavirus Testing*, GQ (Mar. 16, 2020), <https://www.gq.com/story/inside-americas-coronavirus-testing-crisis> [<https://perma.cc/WC4C-8EVW>].

(EUA). He submitted the application by email. Then he was told that the application was not complete until he mailed a hard copy to the FDA Document Control Center. After a few more days, FDA officials told Greninger that they would not approve his EUA until he verified that his test did not cross-react with other viruses in his lab, and until he also agreed to test for MERS and SARS. The Centers for Disease Control (CDC) then refused to release samples of SARS to Greninger because it is too virulent. Greninger finally got a sample of coronavirus that satisfied the FDA. By the time it arrived and his tests began in early March, the outbreak was well on its way.²

Modern government has a major flaw. It is structured to preempt the active intelligence of people on the ground. This is not an unavoidable side-effect of big government, but a deliberate precept of its operating philosophy. Law will not only set goals and governing principles, but it will also dictate exactly how to implement those goals correctly. The tools are familiar: volumes of detailed rules, mandatory procedural paths prior to approvals, and – when there is disagreement – adversarial proceedings aimed at discovering objective truths.

The effect is a kind of paralysis – specifically, an institutional inability to act in a timely and appropriate way in the particular situation. The complex shapes of life rarely fit neatly into legal categories. Decisions slow to a snail's pace as people are diverted towards compliance and anxiety about the legal correctness of choices. As a result, things do not work as they should in schools, in hospitals, in workplaces, on playgrounds, and especially, within the government itself. Permits for needed infrastructure can take upwards of a decade.³ People cannot grab hold of problems and solve them.

COVID-19 is the canary in the bureaucratic mine. Public-health officials across America were prevented from using their own tests, buying them overseas or using local labs.⁴ When the virus spread to New York and other cities, hospitals found they could not cope with the surge of cases except by tossing the rule-books to the winds.⁵ Providers did not have the time to keep track of or comply

2. See Boburg et al., *supra* note 1; Ioffe, *supra* note 1.

3. See Philip K. Howard, *Two Years Not Ten Years: Redesigning Infrastructure Approvals*, COMMON GOOD 1 (Sept. 2015), <https://static1.squarespace.com/static/5db4doeacb29b173254203d2/t/5ee3a6f2072df850bd9a0aa3/1591977716039/2YearsNot10Years.pdf> [https://perma.cc/ZMT3-9SSJ].

4. See Fink & Baker, *supra* note 1.

5. See, e.g., *List: 846 Regulations Waived to Help Fight COVID-19*, AMS. FOR TAX REFORM (Aug. 4, 2020), <https://www.atr.org/rules> [https://perma.cc/KEQ7-LFVW] [hereinafter *846 Regulations*]; Bill Mahoney, *Here's Every Law and Regulation Cuomo Had Suspended During Coronavirus Crisis*, POLITICO N.Y. (Mar. 19, 2020), <https://www.politico.com/states/new-york/albany/story/2020/03/19/every-law-and-regulation-suspended-by-cuomo-during-the-coronavirus-crisis-1268180> [https://perma.cc/8SKK-C2W2].

with the myriad of granular legal dictates⁶ – for example, maximum hospital capacity limits,⁷ staffing requirements,⁸ diet dictates,⁹ ambulance equipment regulations,¹⁰ restrictions on telemedicine,¹¹ and rules providing for same-sex attendants when transporting disabled patients from state facilities.¹²

The ripple effects exposed counterproductive rigidities in virtually all sectors of government. When schools were shut down because of coronavirus, needy students no longer had school meals.¹³ Katie Wilson, executive director of the Urban School Food Alliance and a former Obama administration official, quickly got an agreement in principle to transfer federal meal funding to a program that provides meals during summer months.¹⁴ But the red tape required a formal waiver by each state, which in turn required a formal waiver by Washington. The bureaucratic instinct was relentless even when waiving rules. Each school district in Oregon was first required “to develop a plan as to how they are going to target the most-needy students.”¹⁵ Meanwhile, as time went by, the needy children were getting no meals. *New York Times* columnist Bret Stephens, interviewing Wilson, summarized her plea to government: “Stop getting in the way.”¹⁶

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6. See, e.g., *846 Regulations*, *supra* note 5; Carrie Mendoza, *Commentary: ER Doctor: Next COVID-19 Fight Is to Flatten the Bureaucracy*, CHI. TRIB. (Apr. 6, 2020, 5:34 PM), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-coronavirus-hospital-doctor-family-20200406-q54vpax37varvnh5ztgnvhjgn4-story.html> [https://perma.cc/A7XN-XUHY].
 7. See, e.g., Julie Havlak, *North Carolina Temporarily Lifts Restrictions on Hospital Beds*, CAROLINA J. (Mar. 13, 2020, 11:13 AM), <https://www.carolinajournal.com/news-article/north-carolina-temporarily-lifts-restrictions-on-hospital-beds> [https://perma.cc/X3GS-9GWX].
 8. See, e.g., State of Connecticut, Exec. Order No. 7DD (Apr. 22, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7DD.pdf?la=en> [https://perma.cc/VJ8J-BY7C].
 9. See, e.g., Press Release, Office of the Governor of Iowa, Gov. Reynolds Signs New Proclamation Continuing State Public Health Emergency Declaration § 47 (Jul. 24, 2020), <https://governor.iowa.gov/press-release/gov-reynolds-signs-new-proclamation-continuing-state-public-health-emergency-6> [https://perma.cc/U9BE-DVWH].
 10. See, e.g., State of South Dakota, Exec. Order 2020-16 (Apr. 15, 2020), <https://sdsos.gov/general-information/executive-actions/executive-orders/assets/2020-16.PDF> [https://perma.cc/W5QK-XBAG].
 11. See, e.g., Ashley Lopez, *Texas Had Laws that Were Barriers to Telemedicine. The Coronavirus Changed That.*, KUT 90.5 (Mar. 20, 2020), <https://www.kut.org/post/texas-had-laws-were-barriers-telemedicine-coronavirus-changed> [https://perma.cc/4XVL-48SU].
 12. Mahoney, *supra* note 5.
 13. Bret Stephens, *Covid-19 and the Big Government Problem*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/opinion/coronavirus-FDA.html> [https://perma.cc/AB9A-G27N].
 14. *Id.*
 15. *Id.*
 16. *Id.*

There is a paradox here. COVID-19 illustrates the vital need for public oversight and action in an interdependent world, but it also illustrates the folly of thinking that rigid rules and procedures are the best way of achieving that oversight. Public frustration with government has rarely been higher. Sixty percent of Americans support “very major reform,” more than twenty points higher than two decades ago.¹⁷ But what should that reform be? The political parties focus on the goals of government and present-competing Manichean visions – either deregulate or add more programs to deal with inadequate healthcare coverage and other modern challenges.¹⁸ Neither party has a vision for fixing the operating system of government.¹⁹ Not one question in the 2020 Democratic presidential primary debates focused on how to make government work better.²⁰

Change is in the air. Americans are starting to take to the streets. But the unquestioned assumption of protesters is that someone is actually in charge and refusing to pull the right levers. While there are certainly forces opposing change,²¹ it is more accurate to say that our system of government is organized to prevent fixing anything. At every level of responsibility, from the schoolhouse to the White House, public officials are disempowered from making sensible choices by a bureaucratic and legal apparatus that is beyond their control.

Since the dawn of the Progressive Era in the late nineteenth century, government has assumed growing responsibilities to oversee public health, products

17. Paul C. Light, *The Coming Showdown over Government Reform*, BROOKINGS INST., at fig. 1 (Apr. 18, 2019), <https://www.brookings.edu/research/the-coming-showdown-over-government-reform> [<https://perma.cc/QHA2-JSAU>].

18. See *infra* Part II.

19. See generally PHILIP K. HOWARD, TRY COMMON SENSE: REPLACING THE FAILED IDEOLOGIES OF RIGHT AND LEFT (2019) (attacking the failed ideologies of the political parties and proposing that the U.S. government develop a system that focuses on public goals and holds officials accountable for realizing those goals).

20. For a compilation of 2020 Democratic primary debate transcripts, see *Democratic Debate Transcripts*, REV, <https://www.rev.com/blog/transcript-tag/democratic-debate-transcripts> [<https://perma.cc/PG82-JLRM>]. The ninety-two-page Democratic platform for 2020 contains no proposals to make government work better, except for one page on campaign finance and increasing transparency. See generally 2020 Democratic Platform, DEMOCRATIC PLATFORM COMMITTEE (July 27, 2020), <https://www.demconvention.com/wp-content/uploads/2020/08/2020-07-31-Democratic-Party-Platform-For-Distribution.pdf> [<https://perma.cc/2EMC-8YF4>]; see also Philip K. Howard, Opinion, *Centrist or Radical, the Democratic Nominee Must Pledge to Reboot Washington – or Leave Field Open to Trump*, NEWSWEEK (Feb. 17, 2020, 11:32 AM EST), <https://www.newsweek.com/reboot-washington-reform-democratic-nominee-bold-action-1487670> [<https://perma.cc/25Z7-8W5H>].

21. See, e.g., Marshall Cohen, Sara Murray, David Shortell, Katelyn Polantz & Mark Morales, *Police Unions Dig in as Calls for Reform Grow*, CNN (Jun. 8, 2020 9:18 PM ET), <https://www.cnn.com/2020/06/08/politics/police-union-reform-protests/index.html> [<https://perma.cc/S2DW-8VCZ>].

and markets, and to provide services and safety nets. Most of these goals, in my view, are essential to enhance freedom in the interdependent modern world. Individuals cannot readily check the purity of food and water or test for lead paint in toys. As the demand for public oversight and services has grown, however, there has been only episodic attention to how government does its work—even as public frustration has led to growing alienation and polarization.²² This Essay argues that the public operating system, as it has evolved since the Progressive Era and especially since the 1960s, is incapable of making practical public choices, responding to citizen needs, or promoting accountability in our democratic hierarchy. Part I traces changes in the bureaucracy’s “operating philosophy” since its inception during the Progressive Era—and details the flawed precepts, rooted in distrust of official authority, leading to our current discontent. Part II explains why prior reforms have failed. And Part III concludes by proposing a simplified framework, focused on goals and guiding principles, where clear lines of accountability replace detailed dictates and procedures for many public choices.

I. PUBLIC OPERATING PHILOSOPHY SINCE THE PROGRESSIVE ERA

Distrust of government is a consistent theme in American history. Americans “consider all authority with a discontented eye,” Tocqueville observed.²³ From the beginnings of the new country, the drive to disempower officials has been evident—for example, in the toothless Articles of Confederation. The main argument against the Constitution by the “Anti-Federalists” was that its powers were too vague and that it gave too much authority to the different branches of government—“like A Fiddle, with but few Strings,’ so that those in power might ‘play any tune upon it they pleased.’”²⁴ A few decades later, distrust of the permanent bureaucracy in Washington motivated Andrew Jackson’s introduction of patronage hiring. “The doctrine of rotation-in-office was thus in large part conceived as a sincere measure of reform,” according to historian Arthur Schlesinger, Jr.²⁵ The judicial philosophy of *laissez-faire*, in which courts struck down legislative efforts to regulate business during the nineteenth century, reflected a broad distrust of democratically elected legislatures.

22. For a discussion of how reformers have failed to consider governmental structure, see the discussion *infra* Part II.

23. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 1191 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010) (1840).

24. SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICAN, 1738-1828*, at 229 (1999) (quoting William Manning, *The Key of Liberty*, 13 WM. & MARY Q. 202, 234 (Samuel Eliot Morison ed., 1956)).

25. ARTHUR M. SCHLESINGER JR., *THE AGE OF JACKSON* 46 (1988).

Progressive Era reformers sought to minimize political authority, and conceived of the administrative state as a body of apolitical experts who could handle scientific and technical issues political bodies would be ill equipped to address.²⁶ Reformers in the 1960s went one giant step further and sought to guarantee neutral public choices by transforming regulation into a kind of software program: detailed rules would dictate proper compliance, overseen by public employees who, like technicians wearing white jackets, have no authority other than to guarantee strict compliance.²⁷ When a choice was necessary – for example, to use a local lab to test for a virus, or to give a permit for new infrastructure, or to maintain order in the classroom, or to fire a bad cop – extensive procedures would strive to protect against human error or bias.

Today, as a result of these reforms, governance takes place, not mainly in the halls of Congress or the Oval Office, but in dictates imposed by thick books of regulations, administered mechanically by public employees. The body of regulatory law – about 150 million words for federal law alone²⁸ – imposes detailed obligations upon citizens and limits on public authority. Together with detailed public-union collective-bargaining agreements, it also limits management authority over public employees.²⁹ Regulatory goals and principles make up only a tiny fraction of this dense legal framework; the majority of these regulations prescribe the one correct way how to achieve the goals.³⁰

26. See *infra* Section I.B.

27. See *id.*

28. See Philip K. Howard, *A Radical Centrist Platform for 2020*, HILL (Apr. 13, 2019, 3:00 PM EDT), <https://thehill.com/opinion/campaign/437963-a-radical-centrist-platform-for-2020> [<https://perma.cc/27SK-L93V>].

29. For the statutory framework underlying civil service regulation, see the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.). Dismissal procedures, too, are strictly prescribed by law. Compare 5 U.S.C. § 4303 (2018) (providing one set of exhaustive procedural requirements for dismissing federal employees), with 5 U.S.C. § 7513 (2018) (providing a competing set of requirements); see also 5 C.F.R. § 752.404 (2010) (explaining procedures for adverse actions against federal employees); 5 C.F.R. §§ 731.201-731.206 (2008) (setting out requirements for suitability actions); 5 C.F.R. §§ 451.101-451.107 (2007) (regulating employee awards).

30. See, e.g., 29 C.F.R. § 1926.56(a) (providing exact illumination requirements for various construction areas in foot-candles); Federal Acquisition Regulation, GEN. SERVS. ADMIN., DEP'T DEF. & NAT'L AERONAUTICS & SPACE ADMIN. (2019), <https://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf> [<https://perma.cc/2P39-M6V5>] (collating the majority of federal Title 48 procurement regulations in a document running to nearly 2,000 pages).

A report by the *New York Times* found, for example, that a family-owned apple orchard was subject to 5,000 rules from seventeen different regulatory programs.³¹ The regulatory programs are aimed at valid public goals, such as making sure apples are clean. However, most rules specify exactly how to achieve the goals.³² One regulation, for example, requires covering the cart of picked apples with a cloth to protect against bird droppings.³³ This level of granularity is hard to keep track of—the farmers have thirteen clipboards hanging in their office—and sometimes inspires ridicule. The apples in the cart, for example, have been growing on the trees for five months, fully exposed to birds.³⁴ A few minutes more on the trip to the barn is unlikely to advance public welfare.

The Progressive Era's premise of neutral government, untainted by the judgments of imperfect humans, was always flawed. The effort to avoid official judgment has resulted in a framework where the "merit system" has become a sinecure without merit and the drive to dictate correct regulatory choices has evolved into a paralytic version of central planning. This Part discusses each development in turn.

A. *The Failure of the Merit System*

The Progressive Era is best known for supplanting the laissez-faire governing philosophy with regulatory oversight—antitrust law in 1890,³⁵ the Pure Food and Drug Act in 1906,³⁶ the Federal Trade Commission in 1914,³⁷ and child-labor laws and other laws dealing with work conditions. The first major progressive reform was not about regulation, however, but rather about a better government operating system. Enacted a few years before the full age of reform, the Pendleton Act of 1883³⁸ created a federal civil service to reduce reliance on the

31. Steve Eder, *When Picking Apples on a Farm With 5,000 Rules, Watch Out for the Ladders*, N.Y. TIMES (Dec. 27, 2017), <https://www.nytimes.com/2017/12/27/business/picking-apples-on-a-farm-with-5000-rules-watch-out-for-the-ladders.html> [https://perma.cc/ZZ2Y-XM3R]; Telephone Interview by Matthew Brown, Exec. Dir., Common Good, with Peter Ten Eyck II, Owner, Indian Ladder Farms (Feb. 22, 2018).

32. *Id.*

33. *Id.*

34. *Id.*

35. Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-38 (2018).

36. Pure Food and Drug Act of 1906, Pub. L. 59-384, 34 Stat. 768 (codified in scattered sections of 21 U.S.C.).

37. Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58 (2018).

38. Pendleton Civil Service Reform Act of 1883, 22 Stat. 403.

“spoils system” in appointing federal officials. The main harm of the spoils system was that unqualified political hacks got public jobs as a kind of property right for their campaign help.

Civil service not only avoided the harm of spoils, but also provided a trusted way to expand the role of government. The regulatory oversight envisioned by progressives could not be achieved without a professional public service that could faithfully enforce new legal duties.³⁹ The Pendleton Act provided for hiring by competitive tests of initially about ten percent of the federal workforce.⁴⁰ There were no restrictions on firing, both because of constitutional concerns about interfering with the President’s executive powers under Article II and because a neutral hiring protocol was all that was needed to get rid of the spoils system. As reform leader George William Curtis said, “if the front door [is] properly tended, the back door [will] take care of itself”⁴¹:

[I]t is better to take the risk of occasional injustice from passion and prejudice, which no law or regulation can control, than to seal up incompetency, negligence, insubordination, insolence, and every other mischief in the service, by requiring a virtual trial at law before an unfit or incapable clerk can be removed.⁴²

Accountability for performance was a core assumption of civil service. Government employees would get and keep their jobs on the basis of merit—hence its shorthand name: the merit system.

The reform ideal, which remains with us today, was to purify and professionalize government. No longer would government suffer, as reformer Carl Schurz said, from the “demoralizing influence of the patronage.”⁴³ “Administration,” Woodrow Wilson wrote in 1887, “lies outside the proper sphere of politics.”⁴⁴ Instead of party hacks, the public would be served by officials with “skill, ability, fidelity, zeal, and integrity.”⁴⁵ Government would be run not by political leaders but by professionals, carefully organized to fulfill the designated tasks.

39. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 210 (1887).

40. PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* 105 (1958).

41. *Id.* at 102 (emphasis omitted).

42. George William Curtis, President, Nat’l Civil-Serv. Reform League, National Civil-Service Reform League, Address at the Annual Meeting of the National Civil-Service Reform League (Aug. 1, 1883), in *PROCEEDINGS AT THE ANNUAL MEETING OF THE NATIONAL CIVIL SERVICE REFORM LEAGUE* 3, 24-25.

43. VAN RIPER, *supra* note 40, at 83.

44. Wilson, *supra* note 39, at 210 (emphasis omitted).

45. DANIEL DISALVO, *ENGINES OF CHANGE: PARTY FACTIONS IN AMERICAN POLITICS, 1868-2010*, at 160 (2012) (quoting CONG. GLOBE, 39th Cong., 2d. Sess. 838-39 (1867)).

“A bureaucracy devoid of political appointees,” as historian Michael Nelson put it, “would be like a royal guard of eunuchs – an agency with no distracting wants of its own to impede the execution of its assigned tasks.”⁴⁶

Civil service had its critics. Opponents described the idea as “snivel service,”⁴⁷ filled with detached experts doing what they, rather than the public, wanted. But these critics were party hacks, ignored or derided by those devoted to good government.⁴⁸ After a few years, however, observers began to note an alarming truth in this critique, but not exactly for the anticipated reasons.

Civil service became permanent patronage. Although Congress initially “classified” only ten percent of federal employees as professional civil servants, it empowered the President to decide whether to increase the ranks.⁴⁹ Presidents Cleveland and Harrison made their usual political appointments and then “blanketed in” the party faithful by simply redesignating their patronage jobs as civil service.⁵⁰ By 1900, more than eighty thousand party hacks had become proud members of the merit system, representing half of all civil servants,⁵¹ virtually all without competitive examination. President McKinley, under pressure from their burgeoning ranks, then perfected this alchemy of civil service into super-spoils by closing the “back door” to give political supporters lifetime tenure.⁵²

Reformers who had struggled for the “merit system” barely knew what hit them. President Theodore Roosevelt, a longtime civil service reformer, “tried to increase presidential control over federal employees by, among other things, making dismissals for cause easier to obtain.”⁵³ But at this point, federal employees had become their own political force. And another change decades later made the problem worse: collective bargaining rights, further insulating civil servants from accountability.

Until the 1960s, even pro-union political leaders believed that, as President Franklin Roosevelt put it, “collective bargaining, as usually understood, cannot be transplanted into the public service”⁵⁴ because it pitted public servants against

46. Michael Nelson, *A Short, Ironic History of American National Bureaucracy*, 44 J. POL. 747, 764 (1982).

47. VAN RIPER, *supra* note 40, at 60.

48. *Id.*

49. Nelson, *supra* note 46, at 767.

50. *Id.*

51. *Id.*

52. VAN RIPER, *supra* note 40, at 154.

53. Nelson, *supra* note 46, at 766.

54. *Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/letter-the-resolution>

the common good. But President Kennedy's Executive Order 10988 allowed federal public unions to engage in collective bargaining.⁵⁵ The task force that recommended these changes, chaired by Arthur Goldberg, characterized collective bargaining as a way that unions could help make government work better,⁵⁶ but most knew that the task force was a fig leaf to disguise a political payback.⁵⁷ Once the federal government acceded to collective bargaining, it was only a matter of time before unions persuaded states to do the same. New York authorized collective bargaining in 1967, and California in 1968.⁵⁸

Collective bargaining was motivated not by practical problems with the prior framework, but by the political power of millions of public workers – representing fifteen percent of the total workforce⁵⁹ – and swept in by the powerful tide of the rights revolution. Public workers had not been at high risk of termination: public managers tended to avoid the potential for controversy in unpleasant personnel decisions. But the rights revolution presumed that the fair approach to any dispute is to favor the individual over the executive running a department. Without any controversy, Congress enshrined collective bargaining as a statutory right in the Civil Service Reform Act of 1978.⁶⁰ Representative Patricia Schroeder of Colorado, the lonely voice of caution, warned that “in years to come[,] [civil servants] will have to put up with colleagues who do not pull the load.”⁶¹ That proved to be a vast understatement.

Many government departments became virtually unmanageable. Contracts hundreds of pages long set out specific work rules and job descriptions, strictly controlled supervisory judgments on job performance, and provide pension and

-federation-federal-employees-against-strikes-federal-service [https://perma.cc/RCX6-X5XN].

55. Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 17, 1962); see DANIEL DiSALVO, GOVERNMENT AGAINST ITSELF: PUBLIC UNION POWER AND ITS CONSEQUENCES 48-50 (2015).

56. See PRESIDENT'S TASK FORCE ON EMP.-MGMT. RELATIONS IN THE FED. SERV., A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE 1185 (Nov. 30, 1961), <https://www.flra.gov/system/files/webfm/FLRA%20Agency-wide/50th%20Anniversary%20EO%2010988/Executive%20Order%2010988.pdf> [https://perma.cc/7HQE-XGZ3].

57. DiSALVO, *supra* note 55, at 49.

58. *Id.* at 50-53.

59. See GERALD MAYER, CONG. RESEARCH SERV., R41897, SELECTED CHARACTERISTICS OF PRIVATE AND PUBLIC SECTOR WORKERS 3 fig. 2 (2014).

60. Pub. L. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.); see Philip K. Howard, *Civil Service Reform: Reassert the President's Constitutional Authority*, AM. INT. (Jan. 28, 2017), <https://www.the-american-interest.com/2017/01/28/civil-service-reform-reassert-the-presidents-constitutional-authority> [https://perma.cc/RH2B-4GF8].

61. 124 CONG. REC. H8,473 (daily ed. Aug. 11, 1978) (statement of Rep. Schroeder), *reprinted in* H. COMM. ON POST OFFICE & CIVIL SERV., LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, VOL. 1, at 825 (1979).

other benefits far richer than provided by private employers. Featherbedding became common in some states, driving up the cost of governmental services. Construction of the Second Avenue Subway in New York City cost \$2.5 billion per mile, about five times the cost of a subway in Paris using similar machines, in part because union contract required twice as many people as needed.⁶²

Terminating poor performers was basically impossible. A negative comment in the file, for example, gives rise to a right to confront the supervisor and sometimes a challenge in an adversarial proceeding. As a result, over ninety-nine percent of federal civil servants receive a “fully successful” job rating.⁶³ The standard is not poor performance but whether the individual is that much worse than others, and the burden is on the supervisors. The need to build a record means, as a school superintendent put it, “dismissing a tenured teacher is not a process, it’s a career.”⁶⁴ California is able to dismiss for poor performance only two out of almost 300,000 teachers per year.⁶⁵ Civil service came full circle: where the progressive goal was to overcome public jobs as property of political spoils, public service after the 1960s became a property right of the public employees themselves. Public employees answer to no one.

The inability to manage public employees hit headlines when, in May 2020, an eight minute video showed the slow suffocation of George Floyd by Minneapolis policeman Derek Chauvin. Chauvin had been the subject to eighteen complaints over his career,⁶⁶ but, under the union collective-bargaining agreement, police supervisors had no practical ability to terminate him. Minneapolis, like most cities, has a poor record of holding police accountable. According to the *Wall Street Journal*, out of 2,600 complaints since 2012, only twelve resulted in an officer being disciplined.⁶⁷ The most severe penalty was a suspension for forty

62. Brian M. Rosenthal, *The Most Expensive Mile of Subway Track on Earth*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/nyregion/new-york-subway-construction-costs.html> [https://perma.cc/Z23V-73CL].

63. Memorandum from Robert Goldenkoff, Dir., Strategic Issues, Gov’t Accountability Office, to Ron Johnson, Chairman, Comm. on Homeland Sec. and Governmental Affairs 5 (May 9, 2016), <https://www.gao.gov/assets/680/676998.pdf> [https://perma.cc/RAS9-NF6J].

64. Amita Sharma, *Tenure a Double -Edged Sword for 80 Years*, SANTA CRUZ CTY. SENTINEL, April 8, 1999, at A1, A8.

65. See Vergara v. State, 202 Cal. Rptr. 3d 262 (2016); George F. Will, *The Injustice of California’s Teacher Tenure*, WASH. POST (July 13, 2016), https://www.washingtonpost.com/opinions/undoing-the-harm-of-californias-teacher-tenure/2016/07/13/ec56dd90-484b-11e6-bdb9-701687974517_story.html [http://perma.cc/A6LB-JB22].

66. Dan Frosch, Douglas Belkin, Zusha Elinson & Erin Ailworth, *The Minneapolis Police Chief Promised Change. He Got a Disaster*, WALL ST. J. (May 31, 2020, 8:37 PM ET), <https://www.wsj.com/articles/a-minneapolis-police-chief-promised-change-george-floyds-death-shows-hurdles-11590971860> [https://perma.cc/58PA-928F].

67. *Id.*

hours. Union rules protecting police – for example, restricting use of a prior record of misconduct – make it almost impossible to hold officers accountable for even extreme misconduct.⁶⁸

Critics of public unions focus on unaccountability as the key missing tool for managing police departments, schools and other public institutions.⁶⁹ Creating a public culture with energy and pride is also difficult when everyone within an agency knows that individual performance is optional.⁷⁰ But unaccountability had a larger system-wide effect – the inability to hold public employees accountable for actual results entrenched a rule-based regulatory structure where they are accountable instead for formal compliance. Instead of asking, “What’s the right thing to do here?” or, “What does it take to get this done?” the relevant inquiry is, “What does the rule require?”⁷¹

B. *The Rise of Rules over Responsibility*

A human longing for security, described by Plato in his allegory of prisoners not wanting to leave the cave, is reflected in the progressive reformers’ ideal of neutral government that could be run as a kind of legal machine. As philosopher David Hume observed, people “are mightily addicted to . . . rules.”⁷² Experts

68. See, e.g., Reade Levinson, *Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017, 1:18 PM GMT), <https://www.reuters.com/investigates/special-report/usa-police-unions> [<https://perma.cc/SMQ7-BX5T>].

69. See, e.g., Daniel DiSalvo, *Not Public-Spirited*, CITY J. (Jun. 8, 2020), <https://www.city-journal.org/government-employee-unions-public-interest> [<https://perma.cc/H7BP-27RS>]; Nicole Gelinis, *Stop This Runaway Train of Overtime Costs at MTA, LIRR*, N.Y. POST (Apr. 25, 2019, 10:26 PM), <https://nypost.com/2019/04/25/stop-this-runaway-train-of-overtime-costs-at-mta-lirr> [<https://perma.cc/34V4-9MF3>].

70. The second Volcker Commission in 2003 found deep resentment at “the protections provided to those poor performers among them who impede their own work and drag down the reputation of all government workers.” *Urgent Business for America: Revitalizing the Federal Government for the 21st Century*, NAT’L COMMISSION PUB. SERV. 12 (2003), <https://ourpublicservice.org/wp-content/uploads/2003/01/7dd93d98ebc51f44548885f502dd13a7-1414078938.pdf> [<https://perma.cc/4Q3N-WLMX>].

71. For a further discussion of how rules-based inquiries stifle responsibility, see PHILIP K. HOWARD, *THE RULE OF NOBODY: SAVING AMERICA FROM DEAD LAWS AND BROKEN GOVERNMENT* 29-43 (2014).

72. DAVID HUME, *A TREATISE OF HUMAN NATURE* 551 (L.A. Selby-Bigge & P.H. Nidditch eds., Oxford Univ. Press 1978) (emphasis omitted). “This passion for bureaucracy,” sociologist Max Weber said, “is enough to drive one to despair.” J. P. MAYER, *MAX WEBER AND GERMAN POLITICS* 97 (1944); see also F.A. HAYEK, *THE ROAD TO SERFDOM* 114 (2007) (noting that our age has a “passion for conscious control of everything”).

would oversee systems that, if managed properly, would run government automatically, neutrally and uniformly, “to straighten the paths of government,” as Woodrow Wilson put it, and to “purify its organization.”⁷³

As the industrial revolution matured into corporate combines, the power of organization became a belief system. Frederick Winslow Taylor’s influential 1911 book, *The Principles of Scientific Management*, taught that even the smallest choices could be organized into efficient patterns.⁷⁴ The assembly line’s efficiency became the model for organizing government. Progressives had championed for decades for a neutral administration to rid government of the taint of patronage and partisan politics. Due to scientific methods, we got both: government would be pure and it would be efficient. In 1923, Congress passed the Classification Act, dividing civil servants into grades with designated tasks and assigned salaries. New York State divides its workers into over 4,500 specific job categories.⁷⁵ Over time, as Paul Light has chronicled, government added layers of organizational complexity, based on models like “P.O.S.D.C.O.R.B.” (planning, organizing, staffing, directing, coordinating, reporting, and budgeting).⁷⁶

Organization only went so far, however. It did not remove the authority of officials to adapt to situations before them. Progressive reformers welcomed official discretion.⁷⁷ Consequently, most Progressive Era regulations set forth goals and principles, not detailed dictates, and could be enforced by officials using their judgment. Section 2 of the Sherman Antitrust Act, for instance, is only five lines long.⁷⁸ Such delegations were “so commonplace,” as Daniel Ernst describes, that in 1951 administrative law expert Kenneth C. Davis “could compile a long list, including grants of the power to set ‘just and reasonable rates,’ to remove ‘unreasonable obstructions’ to navigation, to end ‘unfair methods of competition,’ and to regulate broadcasters in accordance with ‘public convenience, interest, or necessity.’”⁷⁹

Traditionalists saw administrative decisions as undermining the rule of law, and had two main objections. The first was an inadequate focus on “whether

73. Wilson, *supra* note 39, at 201.

74. FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911).

75. Title and Salary Listing, N.Y. State Dep’t of Civ. Serv., (accessed on Aug.13, 2020), <https://data.ny.gov/Government-Finance/Title-and-Salary-Listing/t3vp-5tka> [https://perma.cc/49F3-N2G6].

76. PAUL C. LIGHT, *THICKENING GOVERNMENT* 2 (1995).

77. For instance, Roscoe Pound decried the “mechanical jurisprudence” of firm rules. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

78. 15 U.S.C. § 2 (2018).

79. Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932*, 23 STUD. AM. POL. DEV. 171, 171 (2009).

private interests are adequately safeguarded.”⁸⁰ The second was delegation of legal authority to nonelected officials. Their answer was to make law more prescriptive through legislative restrictions and judicial oversight.⁸¹ But their narrow focus on protecting private rights collided with the broader need for public oversight. Government needed to act. As then-Harvard professor and future Supreme Court Justice Felix Frankfurter put it: “After all, we *can’t* consider whether private interests are safeguarded without equally considering the public interests that are asserted against them.”⁸² Northwestern Law School Dean John Henry Wigmore concluded that the only way to achieve public goals was to give officials room to use their judgment: “The bestowal of administrative discretion, as contrasted with the limitation of power by a meticulous chain-work of inflexible detailed rules, is the best hope for governmental efficiency.”⁸³ Ultimately, New Dealers, such as James Landis, adopted and implemented these theories of discretion.⁸⁴

Debates over administrative power stalled during World War II, as wartime mobilization demanded delegation to a hierarchy of appointed officials and military officers.⁸⁵ When the debate revived post-war, all sides were more willing to compromise – and that compromise culminated in the 1946 passage of the Administrative Procedure Act (APA).⁸⁶ The APA basically incorporates into regulatory agencies all three branches of government – not only executive powers, but the legislative and judicial powers through regulations and adjudications.

The APA was intended to facilitate regulatory change; instead, it became a tool of the status quo. Procedural arguments began to trump substance, allowing officials to evade responsibility – and special interests to seize control of the regulatory process. By the 1960s, regulatory “capture” by airlines and other industries of the agencies supposedly regulating them became notorious.⁸⁷ Regulatory “capture” by airlines and other industries of the agencies supposedly regulating

80. Ernst, *supra* note 79, at 180 (quoting Ernst Freund).

81. HOWARD, *supra* note 71, at 101-02.

82. Ernst, *supra* note 79, at 180.

83. John H. Wigmore, Editorial Note, *The Dangers of Administrative Discretion*, 19 ILL. L. REV. 440, 441 (1925).

84. For a discussion on New Deal administrative theory, see HOWARD, *supra* note 70, at 102.

85. Cf. ARTHUR HERMAN, *FREEDOM’S FORGE: HOW AMERICAN BUSINESS PRODUCED VICTORY IN WORLD WAR II* (2012) (describing the American industrial process during World War II).

86. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); see George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558-61 (1996).

87. HOWARD, *supra* note 71, at 104.

them became notorious.⁸⁸ Washington began to settle into a comfortable equilibrium of regulators and regulated keeping public machinery predictably moving in the same direction.

Then came the 1960s. The tumult of that decade prompted new policies, many long overdue, such as civil rights and environmental protection. It also prompted radical changes in the operating framework of government, dramatically altering how public choices are made and introducing a new concept of individual rights over public authority. The debate in the New Deal over whether the executive branch or judicial branch should have final say was replaced by a new vision: No one would have authority. Detailed rules would prescribe exactly how to do things: “Between 1969 and 1979 the Federal Register nearly quadrupled in length, expanding not just the scope of regulation, but the granularity of its mandates.”⁸⁹

Some decisions can be preset by rules, whether to give a permit, for example. A new approach to governing philosophy, the “legal process movement,” suggested that right and wrong should be replaced by procedures in which the correct public choice could be shown by objective evidence in a hearing with public participation.⁹⁰ The need to demonstrate correct choices promoted even greater detail in rulemaking. What better justification than an explicit requirement in a rule?

Diminishing the authority of officials with rules and procedures, however, was not sufficient to salve the wounds of racism, pollution, unsafe cars, abuse of disabled children and lies about Viet Nam. In a decade where “Don’t trust anyone over 30!” was a popular refrain,⁹¹ reformers sought a way to guarantee that no public decisions would harm anyone. Charles Reich had an answer: make government decisions the “new property” of people who were affected.⁹² The

88. See Reuel Schiller, *The Curious Origins of Airline Deregulation: Economic Deregulation and the American Left*, 93 BUS. HIST. REV. 729 (2019) (recounting how a perception of widespread agency capture affected left-wing views of agencies).

89. HOWARD, *supra* note 71, at 143 (citing Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTERPRISE INST. 80-81 (2019), <https://cei.org/sites/default/files/10KC2019.pdf> [<https://perma.cc/XV3L-9PKE>]).

90. The book that articulated the new approach was HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

91. Malcolm Kaines, *Baby Boomers, Critics of Millennials, Once Advised: ‘Ignore Anyone Over 30,’* MEDIUM (July 29, 2018), <https://medium.com/@MKaines/baby-boomers-critics-of-millennials-once-said-ignore-anyone-over-30-9b2f694b8dec> [<https://perma.cc/5LY9-UGQT>].

92. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964) (“[The valuables dispensed by government] are steadily taking the place of traditional forms of wealth—forms which are held as private property.”).

distrust of government from the nineteenth century came full circle. A main precept of conservative laissez-faire jurisprudence had been “the freedom to challenge any administrators’ deprivation of a private right” in a court of general jurisdiction.⁹³ Then, in the early Twentieth Century, Ernst Freund and other legal traditionalists had battled, unsuccessfully, to focus judicial review of administrative action on the affected individuals. Now Reich and other liberals sought to reassert individual rights as the primary focus of judicial review.⁹⁴

The Supreme Court was not immune to the cultural upheavals, and issued a series of rulings expanding the rights of individuals over public officials. It embraced Reich’s theory that public jobs and benefits were a “new property,” and applied the constitutional protections of due process to public benefits, public jobs and school discipline.⁹⁵ Officials no longer had authority to make basic decisions unless they were prepared to prove why it was fair to whoever complained.

The governing philosophy of the New Deal—to give officials “grants of power with which to act decisively”⁹⁶—was turned upside down. Governing was too important to be left to officials exercising their judgment. Clear rules, extensive public procedures, and individual rights would guarantee that unfairness would be no more. Authority at all levels was put in the penalty box.

Scrutinizing official decisions through the lens of individual rights, we are taught, is the essence of the rule of law.⁹⁷ But there is a difference between protecting citizens’ liberty or property against state coercion—the stated purpose of the due process clause in the Fifth Amendment—and making judgments needed to manage a public agency or a school. Regulations to achieve public health and

93. Ernst, *supra* note 79, at 172.

94. See, e.g., Reich, *supra* note 92; see also, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (invalidating a law preventing pharmacists from advertising drug prices because consumers have a First Amendment right to access that information, in a case led by Public Citizen, the organization started by Ralph Nader). Along with an increased focus on individual rights came doctrinal changes that increased individuals’ ability to sue to protect those rights. See Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 73-79 (1984) (describing the liberalization in some areas of standing doctrine during the early 1970s); see also *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) (clarifying that aesthetic and environmental concerns, not just economic loss, could meet the injury-in-fact requirement for standing).

95. See Philip K. Howard, *History of American Law: Since 1968*, in *THE OXFORD COMPANION TO AMERICAN LAW* 392-96 (Kermit L. Hall et al. eds., 2002) (“Distrust of authority led to abandonment of the right/privilege distinction by the Supreme Court . . . and radical expansion of the due process [property and liberty] protection to daily government choices.”).

96. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 75 (1938).

97. See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* 11-12 (1985) (explaining the argument that individual rights, not public policy, must guide judicial review and are the cornerstone of the rule of law).

safety similarly cannot operate sensibly unless officials can balance the public need for oversight against individual burdens. Courts can oversee the fairness and regularity of these choices, applying well-known standards such as having “substantial evidence” for agency findings. Due process, however, embodies a presumption against state action – a prohibition until the state meets its burden. Sometimes that is appropriate, as, say, with criminal penalties or taking their property. In many cases, as with school discipline, the effect is to paralyze necessary choices.⁹⁸

Distrust of public choices has not produced a stable, if slow, governing framework. Putting almost any decision by a public employee under legal klieg lights on has set in motion a downward spiral of legal complexity, as new assertions of rights have led to greater granularity of regulations and more extensive processes. Environmental reviews mandated by the National Environmental Policy Act of 1970, for example, were supposed to illuminate key issues, and regulations stated that they should generally be no more than 150 pages long.⁹⁹ A proposal in 2009 to raise the roadway of the Bayonne Bridge to permit a new generation of “post-panamax” ships to use the port of Newark, required an environmental assessment of 10,000 pages, plus another 10,000 page appendix.¹⁰⁰ All this detail was provided not because it increased public transparency or informed public decisions, but to provide justification when, as occurred in that case, some group sued to stop the project, arguing inadequate review. An article co-authored by former Environmental Protection Agency General Counsel E.

98. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in part and dissenting in part) (“Students will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special. . . . [T]he more detailed the Court’s supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge’s chambers into the principal’s office.”); see also Max Eden, *School Discipline Reform and Disorder: Evidence From New York City Public Schools, 2012-16*, MANHATTAN INST. 5-6 (Mar. 2017), <https://media4.manhattan-institute.org/sites/default/files/R-ME-0217v2.pdf> [<https://perma.cc/B6EB-RMGG>] (finding that New York City’s discipline reform effort, which restricted teachers’ autonomy and imposed significant process requirements, led to increases in disorder).

99. 40 C.F.R. § 1502.7 (1978).

100. See U.S. Coast Guard, *Final Environmental Assessment-Table of Contents and Appendices*, REGULATIONS.GOV (May 16, 2013), <https://www.regulations.gov/document?D=USCG-2012-1091-0118> [<https://perma.cc/PA7J-W36A>].

Donald Elliott estimates that ninety percent of the detail in environmental reviews is included to mainly to provide arguments when someone sues.¹⁰¹

Officials' inability to use their judgment for the public good, in the name of protecting individual rights, has the unintended side effect of eroding citizen freedoms. The same rules that constrain officials also shackle citizens. Whether or not rules make sense, the farmer must cover the applecart and comply with thousands of other rules. The breakdown of discipline in schools, correlated directly with the rise of regulations designed to satisfy due process,¹⁰² compromises the ability of students to learn. Instead of advancing public goals, rigid regulations, untempered by judgment on the spot, often prove counterproductive. A study of nursing-home regulation, for example, concluded that quality suffers when aides focus on compliance instead of the needs of their residents.¹⁰³ A focus on compliance disempowers officials from using their best judgment at the point of implementation. Detailed rules also disempower citizens: What good are the parents' ideas if the principal cannot act on them? Finally, the rulebound state weakens democracy. Elections do not matter much if officials lack the authority to deliver on their promises.

What has gotten lost in this formalistic framework is the ability of officials to make judgments for the common good – the need, as Frankfurter put it, to do “substantive justice both to public and private interests.”¹⁰⁴

C. *The Flawed Premise of Progressive Reforms*

The progressive dream of neutral administration, untainted by partisan goals and human fallibility, was always doomed to failure. Governing requires officials to make choices, applying their values and judgment to try to arrive at fair and sensible choices. To keep environmental reviews focused on what's important, an environmental official must decide what the key issues are. To manage a community-friendly police department, the police chief must be able to decide which

101. Gail Charnley & E. Donald Elliott, *Risk Versus Precaution: Environmental Law and Public Health Protection*, 32 ENVTL. L. REP. 10363, 10364 (2002).

102. See generally RICHARD ARUM, *JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY* (2003) (discussing the impact of court involvement in disciplinary action on students and classrooms).

103. JOHN BRAITHWAITE, TONI MAKKAI & VALERIE BRAITHWAITE, *REGULATING AGED CARE: RITUALISM AND THE NEW PYRAMID* 7 (2007) (observing that the “expansive nature of nursing home regulation in the US” has led nursing homes to “secur[e] regulatory goals while losing all focus on achieving the goals or outcomes themselves.”); cf. John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 AUSTL. J. LEGAL PHIL. 47, 49 (2002) (seeking an empirical understanding of the “conditions where rules will deliver us more legal certainty” and “the conditions where principles will do so”).

104. Ernst, *supra* note 79, at 180.

police are able to earn local trust. The mismatch between the ideology and the reality of automatic government, purged of human judgment and partisan values, was a central theme of many wise observers of the twentieth-century state. Hannah Arendt saw evil in thoughtless acceptance of detailed rules, which she called “the rule by Nobody.”¹⁰⁵ Management expert Peter Drucker concluded that “government has outgrown the structure, the policies, and the rules designed for it,” with the result that it is “bankrupt, morally as well as financially.”¹⁰⁶ Czech President Vaclav Havel called for modern societies “to abandon the arrogant belief that the world is merely a puzzle to be solved, a machine with instructions for use waiting to be discovered, a body of information to be fed into a computer in the hope that, sooner or later, it will spit out a universal solution.”¹⁰⁷

The civil-service reformers, according to historian Henry Steele Commager, had “no real faith in democracy.”¹⁰⁸ Who else is going to hold the bureaucrats accountable but those we elect? What happens when a value judgment needs to be made? Almost every decision—indeed, even the timing of a decision—involves the exercise of personal judgment and values. Progressives thought that bureaucrats could pursue the “public interest” instead of partisan goals. But, as historian Alan Brinkley noted, “[t]he idea that a ‘public interest’ exists somewhere as a kernel of true knowledge, untainted by politics or self-interest, is an attractive thought. But it is also a myth. We cannot identify a public interest outside of politics.”¹⁰⁹

Government was bound to drift ever further from the needs of its citizens because no political leader had authority to make the value judgments needed to keep it aligned with the needs of citizens. As columnist Walter Lippmann put it in 1914,

[T]he confusion of political life . . . [comes from] insist[ing] upon looking at government as a frame and governing as a routine. . . . [P]olitics has such an unreal relation to actual conditions. Feckless—that is what

105. Hannah Arendt, *A Special Supplement: Reflections on Violence*, N.Y. REV. BOOKS (Feb. 27, 1969), <https://www.nybooks.com/articles/1969/02/27/a-special-supplement-reflections-on-violence> [https://perma.cc/C27X-RDNY].

106. Peter F. Drucker, *Really Reinventing Government*, ATLANTIC (Feb. 1995), <https://www.theatlantic.com/past/docs/politics/polibig/reallyre.htm> [https://perma.cc/9BDM-9XCC].

107. VACLAV HAVEL, *THE ART OF THE IMPOSSIBLE: POLITICS AS MORALITY IN PRACTICE—SPEECHES AND WRITINGS, 1990-1996*, at 91 (Paul Wilson et al. trans., Alfred A. Knopf 1997).

108. HENRY STEELE COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880S*, at 319 (1950).

109. Alan Brinkley, *What's Wrong with American Political Leadership?* 17 WASH. Q. 47, 50 (1994).

our politics is. . . . [I]t has been centered mechanically instead of vitally. . . . [W]e have hoped for machine regularity when we needed human initiative and leadership, when life was crying that its inventive abilities should be freed.¹¹⁰

By disconnecting public choices and accountability from decisions at the ballot box, we succeeded not in purifying government but in severing the cord connecting government to the country it supposedly serves. The idea of neutral civil service, historian Paul van Riper observed, ultimately “carried with it the seeds of its own potential destruction.”¹¹¹ Instead of neutrality, we got the pathology of a democracy purged of the beliefs of its constituents.

Government became accountable not to voters but to courts for compliance with the ever-thickening accretion of rules, rights, and restrictions. Slowly but inevitably a sense of powerlessness has pervaded the public and private institutions of our society. That’s a common thread of many of the frustrations that drove Americans to the streets in 2020.¹¹² The delayed responses to COVID-19; the inability to hold bad cops accountable; and the continuing failures to fix broken schools, infrastructure, and other public services all share a common flaw: the people with responsibility lacked the authority to get the job done. The discontent is not new, but it is reaching the breaking point. For decades, Americans and their elected leaders have pushed for bureaucratic reform but failed. The next Part explains why nothing much was fixed.

II. MARGINAL REFORMS AND GROWING FRUSTRATION

Every President since Jimmy Carter has promised to rein in bureaucratic excesses. But none has succeeded.¹¹³ Most proposed reforms have focused on reducing the size or scope of government. For instance, President Carter came to Washington promising “to reorganize a Federal Government which had grown

110. COMMAGER, *supra* note 108, at 320 (quoting Walter Lippman).

111. VAN RIPER, *supra* note 40, at 530-31 (describing the Pendleton Act of 1883, which, Van Riper argues, created an administrative confusion that undermined its own goals of improving civil-service personnel management).

112. See Philip K. Howard, *COVID-19 Shows Why We Need to Reboot Government in America. Here’s How We Can Do It.*, USA TODAY (July 27, 2020 6:00 AM ET), <https://www.usatoday.com/story/opinion/2020/07/27/covid-19-shows-why-government-reform-is-essential-heres-how-to-do-it-column/5500526002> [<https://perma.cc/YA8L-CND8>].

113. See Philip K. Howard, *Six Presidents Have Failed to Cut Red Tape. Here’s How Trump Could Succeed.*, WASH. POST (Dec. 13, 2016), https://www.washingtonpost.com/opinions/six-presidents-have-failed-to-cut-red-tape-heres-how-trump-could-succeed/2016/12/13/d8b4a9ae-bf1d-11e6-94ac-3d324840106c_story.html [<https://perma.cc/63DU-LX75>].

more preoccupied with its own bureaucratic needs than with those of the people.”¹¹⁴ He deregulated trucking, airlines, and other industries, to good effect.¹¹⁵ Carter also advocated sunset laws that would periodically clean up programs that were not working as intended.¹¹⁶ However, his reform efforts got sidetracked by problems with the economy and in Iran, and he ultimately proved unable to alter bureaucratic operation fundamentally. Carter’s successor, Ronald Reagan, famously said that “government is not the solution to our problem; government is the problem.”¹¹⁷ Reagan appointed the Grace Commission, which recommended nearly 2500 ways to reduce the bureaucracy, most notably by instituting a base-closing commission to make politically difficult decisions about which military bases to close.¹¹⁸ But at the end of his term, government was denser than before.

Reform efforts continued into the 1990s. Vice President Al Gore’s Reinventing Government Initiative streamlined internal processes and sponsored successful pilot programs for goals-oriented worker-safety regulation.¹¹⁹ Their idea was to treat citizens as “customers,” and use market-based mechanisms to achieve public results. But it had no theory of authority to replace red tape or to hold officials accountable, and, in the vast sea of federal government, the totality of its permanent reforms made only small ripples. President Obama appointed Cass Sunstein as his “regulatory czar” to promote simplifying regulation. Sunstein made sure new regulations were more coherent, but he did not have the time, staff, or political will to engage in much “retrospective review,” intended to make old programs work better.¹²⁰

114. President Jimmy Carter, Improving Government Regulations Statement on Executive Order 12044 (Mar. 23, 1978), <https://www.presidency.ucsb.edu/documents/improving-government-regulations-statement-executive-order-12044> [https://perma.cc/AT7L-RELU].

115. See STUART E. EIZENSTAT, *PRESIDENT CARTER: THE WHITE HOUSE YEARS* 11 (2018).

116. President Jimmy Carter, Sunset Review Legislation Statement by the President (May 23, 1979), <https://www.presidency.ucsb.edu/documents/sunset-review-legislation-statement-the-president> [https://perma.cc/LGX7-ZKM9].

117. President Ronald Reagan, Inaugural Address (Jan. 20, 1981), <https://www.presidency.ucsb.edu/documents/inaugural-address-11> [https://perma.cc/ZB2S-UR7S].

118. See Thomas M. Hill, *Trump’s 1st State of the Union: Will He Have a Plan to Reform the “Deep State?”*, BROOKINGS INST. (Jan. 24, 2018), <https://www.brookings.edu/blog/fixgov/2018/01/24/trumps-1st-sotu-does-he-have-a-plan-to-reform-the-deep-state> [https://perma.cc/Q8C7-T8PU].

119. See AL GORE, *COMMON SENSE GOVERNMENT: WORKS BETTER AND COSTS LESS* 5, 39-43 (1995).

120. Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 *YALE J. ON REG.* 57, 59 (2013) (lauding retrospective review but describing it as “ad hoc and largely unmanaged”).

And, of course, President Trump was elected on a campaign promise to “drain the swamp.”¹²¹ But Trump decided early on to focus on unilateral executive orders, not statutory overhaul. He immediately reversed many of Obama’s executive orders¹²² and initiated some reforms to simplify interactions with government, including for infrastructure permitting,¹²³ nutritional compliance in schools,¹²⁴ and regulation of small banks.¹²⁵ But like his predecessors, he proposed no new operating vision that might make government more responsive and less intrusive.

In hindsight, Republican presidents since Reagan failed to fix broken government because they focused on getting rid of programs altogether. Deregulation sounds good on the stump, but when push comes to shove, voters want clean air and Medicare, and they do not want to deregulate. Democrats failed because they cloaked themselves in the virtuous goals of government programs, without acknowledging the operational failures of a framework designed to avoid official judgment. Democrats instead tried to alleviate voter frustrations by striding into the legal thicket with pruning shears. But pruning the jungle has no demonstrable impact except to a few insiders and, often, creates new ambiguities that lead to more rules.

What both sides share is the operational frame of reference: that good government requires avoiding human agency in implementation of public decisions. Both sides assume that public choices should be laid out in advance, to achieve neutrality, or proved to be correct in formal hearings. Letting officials take responsibility to achieve public goals and abide by governing principles is beyond their comprehension. So is letting other officials have authority to hold subordinates accountable, or to provide checks and balances.¹²⁶ The ideal structure is what they call “clear law.” There will be little or no room for government overreach, the theory goes, when human judgment is purged from daily public choices. Because accountability of public officials has not been possible since the

121. See HOWARD, *supra* note 19, at 30.

122. See, e.g., Exec. Order No. 13,812, 82 Fed. Reg. 46,367 (Sept. 29, 2017) (nullifying executive branch labor management forums); Exec. Order No. 13,802, 82 Fed. Reg. 28,747 (June 21, 2017) (revoking elements of an Obama-era executive order on visa processing); Exec. Order No. 13,782, 82 Fed. Reg. 15,607 (Mar. 27, 2017) (revoking several Obama-era executive orders on federal contracting).

123. See, e.g., Exec. Order No. 13,766, 82 Fed. Reg. 8,657 (Jan. 24, 2017).

124. Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements, 7 C.F.R. pts. 210, 215, 220, and 226 (Nov. 30, 2017).

125. See, e.g., Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. 115-174, § 104, 132 Stat. 1296, 1300-01 (2018) (exempting small lenders from Home Mortgage Disclosure Act reporting requirements).

126. See HOWARD, *supra* note 19, at 30-36.

turn of the last century, the only tools available to reformers are either to get rid of government programs altogether, or to compound the complexity with new legal rules and procedures. Distrust of any modicum of authority has welded shut the door to the reforms that could fix broken government.

III. RETRACING OUR STEPS: THE PATH TO GOOD GOVERNMENT

Democracy is supposed to be a system that authorizes officials to use their judgment, not to bar them from using it. The idea of a “republic” was grounded in the precept that elected representatives would serve the public by acting on their best judgment. Officials in the executive branch were to have a similar responsibility. As Madison put it,

It is one of the most prominent features of the constitution, a principle that pervades the whole system, that there should be the highest possible degree of responsibility in all the executive officers thereof; any thing, therefore, which tends to lessen this responsibility is contrary to its spirit and intention¹²⁷

A functioning democracy requires two gears that the giant bureaucratic machine is designed to avoid. The first is to give back to officials and citizens the authority needed to do their jobs. What is needed is an open framework of goals and principles, such as the Constitution, that re-empowers Americans, at all levels of responsibility, to roll up their sleeves and start getting things done.

Re-empowering officials to make common choices is, as noted, the key to our own freedoms. The authority of officials, judges, and others with responsibility to assert and act on norms of reasonableness is what liberates everyone else to act reasonably. Students will not be free to learn unless the teacher has authority to maintain order in the classroom. To get a permit in a reasonable time frame, the permitting official must have authority to decide how much review is needed and to resolve disputes among different agencies. To prevent judicial claims from being a weapon for extortion, the judge must have authority to draw lines on whether a claim is excessive or far-fetched. To contain a virulent virus, the public-health official must have authority to respond immediately.

The second gear needed for a functioning democracy is an unbroken chain of accountability. There’s no need for detailed dictates if officials can be accountable when they abuse the public trust. That requires returning the original principles of the merit system. For democracy to be responsive, elected leaders must have the ability to manage the officials actually doing the work. As Madison put

127. JAMES MADISON, *Speech in Congress on the Removal Power, May 19, 1789*, in WRITINGS 435 (Jack N. Rakove ed., 1999).

it, the President must “possess alone the power of removal from office,” in order to create an unbroken “chain of dependence . . . the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President.”¹²⁸ The possibility of abuse of personnel authority for partisan reasons can be protected against by giving an independent personnel agency the authority to protect against partisan reprisal, as was provided in the Lloyd-LaFollette Act of 1912.¹²⁹

Migrating from a command-and-control legal framework to responsibility-for-results would be as liberating to Americans as it would be historic. But designing simplified structures defies the laws of legislative physics, and would quickly get bogged down in the horse-trading among numerous interest groups crowding the halls of Congress. The mechanism for overhauling dense legal structures, used throughout history,¹³⁰ is to delegate the job of making proposals to small committees of experts. Just as it delegates to an independent commission decisions on which Department of Defense bases to close,¹³¹ Congress should appoint recodification commissions to propose simplified codes.

The last major recodification in America was the Uniform Commercial Code, created in the 1950s by a small committee led by Karl Llewellyn.¹³² Replacing the tangle of separate state contract laws with one set of understandable principles provided a reliable platform for the post-war growth of interstate commerce.¹³³ The transformative effects of recodifications have been demonstrated since ancient times.¹³⁴ In the 1980s, Australia replaced its prescriptive regulations for nursing homes with thirty-one general principles—for example, to provide a “homelike environment,” and to respect the “privacy and dignity” of residents.¹³⁵ Within a short period, nursing homes had dramatically improved, researchers

128. 1 ANNALS OF CONG. 518 (1789) (Joseph Gales ed., 1834).

129. 5 U.S.C. § 7511 (2018). There are many ways of restoring a hierarchy of authority while also safeguarding against abuse of authority. Private employers, for example, sometimes provide safeguards against unfairness by having coworkers review dismissals. *See, e.g.*, JEFFREY LIKER & MICHAEL HOSEUS, TOYOTA CULTURE 414-19 (2008) (describing the Toyota corrective action procedure).

130. *See* HOWARD, *supra* note 71, at 148; *see also* KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 98-99 (Tony Weir trans., Clarendon Press 3d ed. 1998) (1977) (listing important studies on the effects of the Code Civil); Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073 (1988) (discussing major codification projects throughout history);

131. CHRISTOPHER T. MANN, CONG. RESEARCH SERV., R45705, BASE CLOSURE AND REALIGNMENT (BRAC): BACKGROUND AND ISSUES FOR CONGRESS 2 (2019).

132. *See, e.g.*, LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 379 (2002).

133. *See* HOWARD, *supra* note 71, at 147; FRIEDMAN, *supra* note 132, at 380.

134. *See* HOWARD, *supra* note 71, at 147-51.

135. *See* JOHN BRAITHWAITE, TONI MAKKAI & VALERIE BRAITHWAITE, REGULATING AGED CARE: RITUALISM AND THE NEW PYRAMID 176-216 (2007).

found, because the aides were focusing on the needs of the residents instead of keeping track of detailed rules.¹³⁶

Simplifying structures to give officials the needed authority does not require trust of any particular person. Responsibility will prove far less dangerous, as studies on official corruption have found,¹³⁷ than bureaucratic labyrinths that serve to obscure wrongdoing. What's needed is to trust the overall system and its hierarchy of accountability – as, for example, most Americans trust the protections and lines of accountability provided by the Constitution. There is no detailed rule, or objective proof, that ultimately determines what constitutes an “unreasonable search and seizure” or “freedom of speech.” Those protections are nonetheless reliably applied by judges who, looking to guiding principles and precedent, make a judgment in each disputed situation.

But the idea of giving anyone authority is like poking a raw wound. What if they are venal, or worse? The answer to distrust is also authority – give other people the authority to hold them accountable. Holding people accountable is even more terrifying to the modern mind. Who are you to judge?

We cannot have it both ways. Without traffic cops saying “stop and go,” a crowded society is soon stuck in gridlock. Instead of moving forward, people honk their horns and blame others for not getting anywhere. Our choice is to wallow in distrust and accept paralysis by red tape, or to get society moving forward by restoring clear lines of authority.

A. Cutting Loose from the Progressive Myths of Neutral Government

Breaking free of the current public operating system will be difficult, notwithstanding popular pressure for change. The natural instinct of reformers is to focus instead on unmet public challenges such as climate change or income stagnation. But much of the public frustration stems from government's inability to deliver. That operational failure cannot be reformed within the existing framework. Nothing much can work sensibly because no one is free to make it work. We must acknowledge that the progressive reformers' dream of pure public choices, unsullied by human judgment on the spot, produces failure and frustration.

The giant bureaucratic framework designed to replace human responsibility cannot be repaired. It must be replaced. Releasing the legal stranglehold on official responsibility will be difficult, especially to experts who live in the legal

^{136.} *Id.*

^{137.} See generally FRANK ANECHIARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* (1996) (describing how anticorruption regulations actually make governance worse).

thicket. They must come to grips not only with the failure of this system, but with two misconceptions about the rule of law. The first is that law should strive to dictate correct choices and judgments in advance. The second is the belief that so-called “clear law” avoids abuse and enhances freedom.

1. *Dictating One Correct Action Is Central Planning, Not Law*

The goal of law, broadly, is to protect and enhance our freedom. It does this by prohibiting bad conduct, such as crime or pollution, not (generally) by prescribing correct conduct. Think of law as a corral surrounding the field of freedom. The legal fence protects against outside misconduct and defines the open field within which people can act freely without being unduly fearful or defensive. As Isaiah Berlin put it, law provides “frontiers, not artificially drawn, within which men should be inviolable.”¹³⁸

The modern bureaucratic state, too, aims to be protective. But it does this by reaching into the field of freedom and dictating how to do things correctly. Instead of protecting an open field of freedom, modern law replaces freedom.

The logic is to protect against human fallibility. But the effect, as discussed, is a version of central planning. People no longer have the ability to draw on “the knowledge of the particular circumstances of time and place,” which Nobel laureate Friedrich Hayek thought was essential for most human accomplishment.¹³⁹ Instead of getting the job done, people focus on compliance with the rules.

At this point, the complexity of the bureaucratic state far exceeds the human capacity to deal with it. Cognitive scientists have found that an effect of extensive bureaucracy is to overload the conscious brain so that people can no longer draw on their instincts and experience.¹⁴⁰ The modern bureaucratic state not only fails to meet its goals sensibly, but also makes people fail in their own endeavors. That is why it engenders alienation and anger, by removing an individual’s sense of control of daily choices. This anger is unlikely to dissipate until there’s a new framework of law that honors human agency.

138. ISAIAH BERLIN, *Two Concepts of Liberty*, in *THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS* 191, 236 (Henry Hardy & Roger Hausheer ed., 2000).

139. Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 *AMERICAN ECON. REV.* 519, 521 (1945).

140. See Philip K. Howard, *Bureaucracy vs. Democracy: Examining the Bureaucratic Causes of Public Failure, Economic Repression, and Voter Alienation* 16-21 (Columbia University Center on Capitalism and Society, Working Paper No. 113, 2019), https://capitalism.columbia.edu/files/ccs/workingpage/2019/center_working_paper_no._113_-_bureaucracy_vs._democracy.pdf [<https://perma.cc/NG2H-2JZC>].

2. “Clear Law” Is Not Effective for Many Regulatory Goals

It is received wisdom that detailed law achieves better clarity. Sometimes law can be both precise and clear, as with speed limits or effluent discharge limits. But no human can comprehend, much less comply with, thick rulebooks, such as the thousands of detailed rules mandated by federal worker safety law.¹⁴¹

For most human activity, clarity in law is usually achieved not with precise rules but with goals and principles that people can readily understand and internalize. As Richard Posner observes in *The Problems of Jurisprudence*, “Standards that capture lay intuitions about right behavior . . . may produce greater legal certainty than a network of precise but technical, non-intuitive rules”¹⁴²

Precise law, conservatives believe, prevents officials from acting arbitrarily or corruptly. To the contrary: the inability of mortals to comply with thousands of rules puts arbitrary power into the hands of each official. That is part of why Americans go through the day looking over their shoulders. Is your paperwork in order?

Uniform application of clear rules is also believed to guarantee fairness. But circumstances matter, and mechanical application of clear rules often guarantees unfairness. Disciplining an eight-year old under “zero tolerance” laws for bringing to school plastic soldiers carrying rifles is absurd.¹⁴³ So too is a life prison sentence for someone who stole three golf clubs, under a “three strikes and you’re out” law, because of prior theft convictions.¹⁴⁴ As Benjamin Cardozo put it, “Justice . . . is a concept by far more subtle and indefinite than any that is yielded by mere obedience to a rule.”¹⁴⁵

Law achieves trust and supports practicality only when applied with human values and understanding. “The first requirement of a sound body of law,” Oliver Wendell Holmes wrote in *The Common Law*, “is[] that it should correspond with the actual feelings and demands of the community”¹⁴⁶ The way law achieves this is that people are able to draw on norms of fairness and reasonableness at the point of implementation. Otherwise law is brittle, and words of law are

141. Worker safety regulations are codified at 29 C.F.R. pts. 1902-1990.

142. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 48 (1990).

143. See Associated Press, *School Bans Hat Over Toy Soldiers’ Guns*, CBS NEWS (June 18, 2010, 4:27 AM), <https://www.cbsnews.com/news/school-bans-hat-over-toy-soldiers-guns> [<https://perma.cc/K7Q4-D3UV>]; see also HOWARD, *supra* note 19, at 77-82.

144. Linda Greenhouse, *California’s 3-Strikes Law Tested Again*, N.Y. TIMES (Nov. 6, 2002), <https://www.nytimes.com/2002/11/06/us/california-s-3-strikes-law-tested-again.html> [<https://perma.cc/74UC-H3RV>].

145. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 87 (12th prt. 1963).

146. O.W. HOLMES, JR., *THE COMMON LAW* 41 (The Lawbook Exch., Ltd. 2005) (1881).

parsed for selfish purposes. Legal philosopher Jeremy Waldron puts it this way: “[T]he Rule of Law is, in the end . . . a human ideal for human institutions, not a magic that somehow absolves us from human rule.”¹⁴⁷

CONCLUSION: AMERICAN GOVERNMENT AT A CROSSROADS

No one designed this bureaucratic tangle. No experts back in the 1960s dreamed of thousand-page rulebooks, ten-year permitting processes, doctors spending up to half of their workdays filling out forms, entrepreneurs faced with getting permits from a dozen different agencies, teachers scared to put an arm around a crying child, or a plague of legal locusts demanding self-appointed rights for their clients. America backed into this bureaucratic corner largely unthinkingly, preoccupied with avoiding error without pausing to consider the inability to achieve success.

We tried to create a government better than people. Without our noticing, the quest for hands-free government started paralyzing daily choices. Now the broad sense of powerlessness is causing frustrated Americans to pound the table for change. America is at a crossroads. Just as when the Progressive Era, the New Deal, and the 1960s rights revolution caused tectonic changes in how government worked, American government seems ripe for overhaul. What is missing is any vision for a new operating vision. To do so, we must return to first principles and rebuild government on the Framers’ vision of a republic activated by human responsibility and accountability.

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¹⁴⁷. Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in *GETTING TO THE RULE OF LAW* 3, 25 (James E. Fleming ed., 2011).