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The Myth of Accountability and the Anti-administrative Impulse

Edward Rubin
Vanderbilt University Law School

THE MYTH OF ACCOUNTABILITY AND THE ANTI-ADMINISTRATIVE IMPULSE

*Edward Rubin**

The idea of accountability is very much in fashion in legal and political thought these days. To be sure, the term is used in a variety of different ways, but that is the nature of fashion. Colored cloth ponchos may be in fashion this season, for example, but they can be shaped and colored in a variety of different ways. It is differences of this sort that sustain a fashion trend. If the only poncho available were red and square, the fashion trend would display an impressive unity, but it wouldn't last very long. In order to make sales, clothing designers need a style that is recognizable but vague enough to include a lot of variation. And once this style takes off, gaining popularity from the many different designs available within it, the manufacturers can cash in by taking the tired old designs that weren't selling last year and producing them as colored ponchos. It is pretty much the same with accountability.

Accountability can be roughly defined as the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation. This Article focuses on two of the leading uses of this term in contemporary scholarship, two uses that have contributed heavily to the current fashion for accountability. The first is based on the idea that elected officials — legislators and the chief executive — are accountable to the people, while officials who obtained their position by appointment or examination are not.[1] From this, some observers have concluded that authority should be shifted to elected officials: that policy decisions should be made by legislators, not administrators, that all administrators should be controlled by an elected chief executive, and that the federal government should not intrude on the authority of elected officials in the states. The second use of accountability is that local institutions are more accountable to the people or that people should be given the opportunity to be accountable for themselves.[2] From this, other observers have

* Dean and John Wade-Kent Syverud Professor of Law, Vanderbilt University Law School. J.D. 1979, Yale; A.B. 1969, Princeton. — Ed. I would like to thank Michael Dowdle for his assistance and advice on this project.

1. *See infra* notes 7-9 (citing sources).

2. *See infra* notes 82 & 101 (citing sources).

concluded that authority should be devolved from the central government to localities and individuals, and that policy should be made by officials at the local level or by private parties.

Some of the proposals that have been associated with these two ideas of accountability have obvious merits, some have subtle merits, and some have obvious or subtle demerits. Very few of them, however, have very much to do with the concept of accountability. Invocation of this concept confers a certain cachet on these proposals — it makes them fashionable — but it neither justifies nor illuminates them. One goal of this Article to is reveal the conceptual and empirical defects in these two uses of accountability. The ideas of shifting authority to elected officials and devolving it to localities and individuals will not be critiqued in general, although there is much to be said on this subject. Rather, the argument is that neither of these two ideas is entitled to invoke the notion of accountability. They are old, frumpy garments, and we should not allow them to disguise themselves as modern by taking on the external appearance of a current fashion.

One would expect that a discussion of these two disparate uses of accountability would necessarily be a bifurcated one. After all, the idea that elected officials are accountable rests on the principle of election, where one chooses another to express or represent her views, while the idea that local institutions and individuals are accountable rests on the principle of devolution, where power is shifted to local institutions or private parties so that people make their voice known more effectively or take responsibility for their own actions. But these concepts, although divided in their rationale, are unified in their most serious defect. What they share is a preanalytic hostility to the modern administrative state, an anti-bureaucratic pastoralism that feeds on nostalgia for simpler, more integrated times.[3] The instinct is understandable, but it represents a genuine intellectual sin because it distracts our attention from the government we actually possess. That government can be altered and improved, of course — sometimes in the ways that the proponents of accountability suggest — but there is no foreseeable possibility that it will undergo an essential alteration, and none of those who express hostility toward it have advanced any realistic scenario by which such an alteration could occur. Any proposal that avoids this ineluctable reality of modern government runs a serious risk of doing more harm than good.[4]

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3. Regarding the pastoral impulse, see RAYMOND WILLIAMS, THE COUNTRY AND THE CITY 13-45 (1973).

4. Regarding the "escape proof" nature of administrative government, see 3 MAX WEBER, ECONOMY AND SOCIETY 987-89 (Guenther Roth & Claus Wittich eds., 1968); *id.* app. II at 1393, 1401-02.

Because the two approaches to accountability share the same defect, a criticism of them on the basis of this defect can generate the unified theory of political-legal accountability that their more fashionable uses fail to provide.[5] One reason that these anti-administrative ideas about elections and participation invoke the term accountability, apart from its cachet, is that they are attempting to expropriate a concept that is essentially administrative in nature, to inoculate themselves against administrative realities by adapting some of those realities for their own anti-administrative purposes. As stated, both approaches spring from the observer's unanalyzed hostility to the administrative state. But true accountability, in the realm of law and politics, involves many of the features that are central to the administrative state and that people find so unattractive about it — hierarchy, monitoring, reporting, internal rules, investigations, and job evaluations. Far from being the warm and fuzzy notion that some of its proponents seem to envision, accountability flows along the complex, hierarchical pathways that structure modern government, and reveals the managerial mechanisms of a people who are, in Genet's words, "no longer childlike but severe."[6]

Part I of this paper critiques the idea that accountability can be secured by elections. Part II critiques the idea that it can secured by devolution to localities or private parties. Part III then presents the remaining and, it will be argued, only coherent concept of accountability and argues that it is intrinsically bureaucratic or administrative in character.

I. ACCOUNTABILITY AND ELECTIONS

As just discussed, accountability clearly means something distinctly different, at the operational level, when used as argument for the authority of elected officials, than it does when used as an argument for devolution to localities or private parties. But the election-related arguments for accountability, although they are readily distinguished from the devolution-related ones, do not display any particular conceptual unity among themselves. There are at least three such arguments: first, that legislators, being elected officials who are accountable to the people, should make basic policy decisions and not

5. The arguments to be critiqued lie in this area of law and politics, and the alternative that will be proposed is limited to this area as well. No effort will be made to consider issues of accountability in personal life. For an illuminating discussion of this issue, see Anita L. Allen, *2003 Daniel J. Meador Lecture: Privacy Isn't Everything: Accountability as a Personal and Social Good*, 54 ALA. L. REV. 1375 (2003).

6. JEAN GENET, THE THIEF'S JOURNAL (Bernard Frechtman trans., Bantam Books 1965) (1949).

delegate extensive authority to administrators;[7] second, that the president, being an elected official who is accountable to the people, should control all executive agencies, including those that are currently independent;[8] and third, that elected state officials, because they are accountable to the people, should not be subject to policy control by the federal government.[9] For convenience, these arguments can be divided into two separate sub-categories, the first involving federal officials and their control of the bureaucracy, the second involving state officials and their relationship to the federal government as a whole. These will be considered in turn.

A. *Federal Officials and Control of the Bureaucracy: The Nondelegation and Unitary Executive Arguments*

Even within the subcategory of accountability arguments that involve elected federal officials, the arguments themselves are not consistent. The idea of legislative accountability opposes open-ended delegations of authority to administrative agents, but the idea of presidential accountability derives its justification from the existence of such delegations and the need for an elected official to control their exercise. To put this another way, more detailed and definitive legislation would place agencies under greater Congressional control and thus detract from the president's ability to guide these agencies in furtherance of his policy objectives. This contradiction already points to a certain vagueness and instability in the concept of accountability. Despite this conflict, however, the two arguments are united in their

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7. JOHN ELY, DEMOCRACY AND DISTRUST 131-34 (1980); FRIEDRICH HAYEK, THE ROAD TO SERFDOM (1968); THEODORE S. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 92-126 (2d ed. 1979); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (1995); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807 (1999); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

8. Steven G. Calabresi & Saikrishna B. Prakash, *The president's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Lawson, *supra* note 7; Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41.

9. Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle*, 111 HARV. L. REV. 2180, 2195-2205 (1998); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 890 (1979); D. Bruce La Pierre, *Political Accountability in the National Political Process — The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577 (1985); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994).

primary defect. Both rest on the assumption that elections provide accountability, that is, that an elected official must answer to his constituents for his actions. A realistic, contemporary consideration of elections suggests that this relationship to accountability, although not entirely absent, is a relatively minor aspect of the electoral process.

One of the most important functions elections do serve is to solve the problem of succession.[10] Dictatorships are virtually guaranteed to undergo a succession crisis with the death of the dictator, if not before; hereditary monarchies undergo such crises when the monarch fails to produce an heir or when a rival claimant exists. At best, succession crises of this sort disrupt orderly government relations; at worst, they lead to civil war. Moreover, the looming threat of a succession crisis tends to undermine the effectiveness of government. Those who aspire to succeed the ruler must build their own power base, withdrawing their resources from the collectivity, devoting their efforts to self-aggrandizement, and attracting allies to their cause.[11] This activity is often regarded as disloyal by the ruler, and with good reason, since the same actions that position someone to succeed the rule can position that person to stage a coup while the ruler is alive. Thus, these actions must be conducted clandestinely, and the ruler is induced to devote much effort to discovering and combating this potentially threatening activity.

A functioning electoral democracy provides a remarkably successful solution to this problem. The regular election of political leaders assures an orderly succession and generally avoids difficulties resulting from the death or incapacity of the existing leaders. It replaces the disruption and inefficiency produced by efforts to succeed the leader with a constructive process. Positioning oneself for succession in an electoral regime, far from being regarded as disloyal, is a highly acceptable activity that confers prestige on any plausible candidate. The best way to do so, moreover, is to offer criticisms that significant parts of the populace regard as helpful or to demonstrate that one can govern by acting effectively in one's present position. These strategies need not be conducted secretly; in fact, they are generally most effective when openly pursued. The leader may choose to combat them but does so most effectively by open debate or efficient governance; more disruptive efforts to thwart opposition are disfavored and expose the leader to serious political risk. Well-established electoral democracies achieve these beneficial results habitually and irenically. Although much effort, and often much anguish, is expended on the contest between opposing candidates for office, the process of holding the election and the succession that it

10. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001).

11. *See* PETER F. DRUCKER, THE NEW SOCIETY 210-212 (1951); H.R. TREVOR-ROPER, THE LAST DAYS OF HITLER 3-10 (1947).

determines occur as a matter of course, so much so that people often forget that the greatest virtue of elections is that they solve the problem of succession.

A second crucial function of elections is to produce a government that is responsive to the people's basic desires. They achieve this through the process of representation that is central to our conception of elections,[12] although not to elections in general.[13] In voting for candidates in a general political election, people tend to choose the person whom they believe will represent their interests most effectively[14] — this often means a person of their own ethnic background or a person who can convincingly demonstrate that she has the same attitudes and beliefs as the voters. Background and beliefs are influential because voters want someone to represent them, that is, to re-present their views in government decisionmaking situations.

This is not accountability, but the opposite of accountability. Voters want to choose a like-minded person because they believe that such a person will take the actions they prefer, even though they are not able to supervise or monitor the person. They know that government policy will involve a succession of quotidian decisions, complex judgments, recondite bargains, and other actions that will be beyond their understanding and attention span. When someone is choosing a subordinate who is truly accountable — whom the person can monitor on a continuous basis — there is at least a tendency to choose the most talented or capable individual, regardless of his personal views, and rely on instructions to make sure he does what his superior wants. In elections, on the other hand, people generally prefer to choose someone who will act in their interests because she shares their perspective.

Holding the representative accountable is a third function of elections, but it is subsidiary to succession and representation. There is an ongoing debate about whether elected officials are more motivated by ideological considerations or by the desire to be re-elected.[15] Even

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12. *See* HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1972).

13. Some of the medieval models from which modern elections derive, such as the election of the Pope or the Holy Roman Emperor, were not conceived in representational terms. *See* PAULA SUTTER FICHTNER, THE HABSBURG MONARCHY, 1490-1848: ATTRIBUTES OF EMPIRE (2003).

14. Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 AM. POL. SCI. REV. 175 (1983).

15. *See* RICHARD F. FENNO JR., CONGRESSMEN IN COMMITTEES (1973) (ideological motivation); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989); LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS (2000) (ideological motivation); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974) (re-election motivation); WILLIAM K. MUIR JR., LEGISLATURE: CALIFORNIA'S SCHOOL FOR POLITICS (1982) (ideological motivation). The re-election approach is associated with public choice analysis. *See* DANIEL A. FARBER &

if one assumes that electoral considerations predominate, however, their effect is likely to be attenuated by a variety of factors. Incumbents are difficult to defeat, which means that the electorate's initial choices tend to become locked in place.[16] In addition, the president is often a lame duck, as are a number of senators. Most important, however, is that intermittent, highly contested elections are simply very poor devices for holding a person accountable. Most electoral democracies present the voters with only two or three realistic choices, which means that a multitude of issues must map into a small decision set. This is the result of party politics, a feature of democracy that generally develops outside the constitutional structure but is just as central to its operation as the constitutional provisions. A small decision set means that even perfectly informed voters must make their choice on the basis of the few issues they regard as most important and then accept their representative's decisions on the other issues, whether they approve of her decision or not.[17]

Most voters, moreover, are not perfectly informed about the issues, and the evidence suggests that they often suffer from apocalyptic levels of ignorance.[18] Some classic voter studies conclude that people's choices can generally be predicted from their social characteristics, without regard to any particular features of the person they are voting for.[19] More recent studies grant a larger role to attitudes but identify these attitudes as very general party affiliations or impressions of the candidate's personality.[20] Even if voter attitudes are issue-oriented, they tend to be stable, long-term preferences on

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PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); DENNIS C. MUELLER, PUBLIC CHOICE III (2003).

16. *See* GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS (5th ed., 2001); JONATHAN S. KRASNO, CHALLENGERS, COMPETITION AND REELECTION (1994); John R. Alford & David W. Brady, *Personal and Partisan Advantage in U.S. Congressional Elections, 1846-1990*, *in* CONGRESS RECONSIDERED 141, 149 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 5th ed. 1993); Gary W. Cox & Jonathan N. Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?*, 40 AM J. POL. SCI. 478 (1996); Morris P. Fiorina, *The Case of the Vanishing Marginals: The Bureaucracy Did It*, 71 AM. POL. SCI. REV. 177 (1977).

17. A related, although somewhat more extreme version of this point is that politics is predominantly symbolic. *See* JEAN BAUDRILLARD, IN THE SHADOW OF THE SILENT MAJORITIES (1983) [hereinafter BAUDRILLARD, SILENT MAJORITIES]; JEAN BAUDRILLARD, SIMULATIONS (1983); MURRAY EDELMAN, CONSTRUCTING THE POLITICAL SPECTACLE (1988).

18. Larry M. Bartels, *Uninformed Votes: Information Effects in presidential Elections*, 40 AM. J. POL. SCI. 194 (1996).

19. *See* BERNARD R. BERELSON, PAUL F. LAZARSFELD & WILLIAM N. MCPHEE, VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN (1954); PAUL F. LAZARSFELD, BERNARD BERELSON & HAZEL GAUDET, THE PEOPLE'S CHOICE (1948).

20. *See* Donald R. Kinder, Mark D. Peters, Robert P. Abelson & Susan T. Fiske, *presidential Prototypes*, 2 POL. BEHAV. 315 (1980); Theresa E. Levitin & Warren E. Miller, *Ideological Interpretations of presidential Elections*, 73 AM. POL. SCI. REV. 751 (1979).

leading issues, rather than detailed assessments of particular decisions;[21] in fact, voters often base their decision on the candidates' perception of problems, rather than their actual or proposed solutions.[22] Finally, if an issue becomes truly salient — if it is something that voters become truly exercised about — they are likely to hold those in power responsible for the decision, without making fine distinctions about who actually made the relevant decision.

The highly attenuated nature of electoral accountability means that it will be of limited value for the purposes that proponents of accountability have recommended, that is, arguing against open-ended delegations by the legislation or in favor of a unitary executive. To begin with the delegation issue, compelling legislators to make more policy decisions, rather than deferring such decisions to administrative agencies, will not mean that these decisions are being more closely monitored or controlled by voters.[23] Even at their most extreme, such decisions are simply too fine-grained to become factors in an electoral campaign. Consider, for example, the delegation of authority to the Federal Communications Commission (FCC).[24] This is probably as broad a delegation as exists in modern government, and it involves a subject matter about which most Americans are seriously concerned, since they spend four hours each day watching television. But the breadth of this delegation, or the specifics of communications policy that the FCC is authorized to determine in accordance with it, are unlikely to become issues in an election. Even if the election is highly contested, and even if the candidates had differing views on this issue, its salience to the voters is likely to be so low that it would simply disappear from view. Suppose, moreover, it did become salient; suppose the FCC licensed a broadcaster who chose programs recommending Islamic fundamentalist terrorism, for example. Would the electorate's response be determined by the scope of delegation, or

21. BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES (1992).

22. WARREN E. MILLER & J. MERRILL SHANKS, THE NEW AMERICAN VOTER 326-413 (1996). Moreover, voters who are interested in proposed solutions can often be satisfied with unsubstantiated claims because their knowledge of the actual situation is so limited. *See* DEREK BOK, THE TROUBLE WITH GOVERNMENT 129-32 (2001).

23. *See* JERRY L. MASHAW, GREED CHAOS AND GOVERNANCE 152-56 (1997); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999).

24. The Communications Act of 1934, 47 U.S.C. §§ 151-614 (2000). The Act created the Federal Radio Commission and instructed it to grant broadcast licenses to advance "the public interest, convenience and necessity." 47 U.S.C. §309(a) (2000). Not only is this language extremely broad (what does it exclude?) but its few whiffs of operative criteria are not even relevant. Public interest makes sense, but what is either necessary or convenient about a radio license? In fact, this language was taken from the Interstate Commerce Act, where it applied to railroads.

rather by the candidates' ability to align themselves against the agency in some general and essentially symbolic manner?

In fact, elected representatives often monitor administrative agencies quite closely, and hold them responsible for their actions,[25] but this has very little to do with their accountability to the electorate. Rather, it is the result of their hierarchical position, the fact that they function as agencies' structural superiors in our system. They have this position because they are the primary policy makers of American government, and the significance of elections to this function is that we use elections to select our primary policy makers. Their monitoring activities are rarely based on any direct accountability to the voters, but rather are carried out to do their job, to fill their representative role, and to provide favors to important contributors. And even in a rare case where their monitoring was based on accountability, it would not be governed by the breadth of the delegation to the agency involved, but rather by the amount of constituent ire that particular agency actions incited, whether that actions were taken pursuant to a broad or narrow delegation.

Similar problems beset the accountability arguments in support of a unitary executive, that is, an executive who has direct supervisory authority over all administrative agencies. In many cases, proponents of this view argue, on either constitutional or policy grounds, that the president should be in control of all administrative agencies because he is elected and therefore accountable to the voters.[26] The sort of control that the president would exercise over a presently independent agency, however, will rarely have the political salience that would make a difference in a general election. To be sure, Ronald Reagan ran on a platform that prominently featured deregulation, and it is possible that public approval of this position was a factor in his landslide electoral victory. This was, however, a broadly stated political position, not the sort of quotidian supervision of administrative practices that would be facilitated by eliminating agency independence. In fact, it was the incumbent whom Reagan so resoundingly defeated, Jimmy Carter, who was actually the most effective deregulator, before or since. Carter's deregulatory program was not limited to the quotidian level but in fact involved rather

25. *See* JAMES R. BOWERS, REGULATING THE REGULATORS: AN INTRODUCTION TO THE LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING (1990); MORRIS S. OGUL, CONGRESS OVERSEES THE BUREAUCRACY (1976); Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA*, LAW & CONTEMP. PROBS., Autumn 1991, at 205; Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 167 (1984); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast ("McNollgast"), *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

26. *See supra* note 8 (citing sources).

sweeping policy changes.[27] In addition, most of it was directed toward independent agencies, which tends to contradict the idea that the president must possess the removal power in order to exercise control over these agencies.[28] None of this intensive deregulation, however, seems to have made much of an impression on the electorate. It was Reagan, who accomplished less but spoke about it more, and certainly more effectively, who was apparently able to attract whatever votes this issue was able to produce.

The crucial issue, therefore, once one goes beyond succession, is representation, not accountability. It is not the process of supervising government agencies that attracts the electorate's attention but a candidate's ability to align herself with or against the agency in some symbolic manner. Thus, if an issue involving some particular action taken by an administrative agency were to rise to the level of political salience, it would probably do so in representational terms that had little to do with the president's actual ability to supervise the agency. This is essentially what happened in the Willie Horton case that proved so important in the 1988 election. No one cared whether Michael Dukakis had granted a broad or narrow delegation of authority to the Corrections Department to establish a furlough program. Had he closely monitored the program — an entirely unrealistic possibility — the political consequences for him would have been the same. George Bush was able to get political mileage out of the incident because he connected it to the more essential, representational function of elections — he claimed it revealed the sort of person that Dukakis was, and many of the voters believed him.

None of the foregoing arguments are meant to deny that the president plays an enormously important role in supervising federal

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27. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 2493, 92 Stat. 1705 (1978); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-511, H.R. 4986, 94 Stat. 132 (1980). For descriptions, see MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985) (describing the deregulation of trucking); THOMAS K. MCCRAW, PROPHETS OF REGULATION 259-99 (1984) (describing deregulation of airline rates).

28. Carter achieved his effects upon independent regulatory agencies by proposing or supporting legislation or by appointing regulators with well-established perspectives. With respect to airline deregulation, for example, he appointed Alfred Kahn as chairman of the Civil Aeronautics Board ("CAB"). Kahn had a well-developed theory about rate regulation, which he had expressed in print, *see* ALFRED E. KAHN, THE ECONOMICS OF REGULATION (1970), as well as a proven track record as an effective and deregulation-oriented administrator at the New York Public Service Commission. *See* MCCRAW, *supra* note 27, at 226-59. There was not the slightest possibility that he would not adopt the vigorous deregulatory program that Carter had in mind, and after Carter appointed another deregulator, Elizabeth Bailey, to the CAB, *see id.* at 273, there was little likelihood that he would not succeed in implementing it. The changes that he instituted were soon extended, and made permanent, by the Airline Deregulation Act. When Kahn left the CAB for another (non-independent) administrative post, Carter wrote to him that he had "presented my Administration with one of its great success stories." *Id.* at 295.

agencies. While he does not enjoy the absolute authority over executive agencies that the Constitution seems to contemplate, he certainly takes an active role, and often achieves the results he desires. Similarly, he does not suffer from the lack of authority over independent agencies that proponents of the unitary presidency sometimes suggest, and he frequently achieves his desired results in this case as well.[29] But, as with legislative oversight, the president achieves these results in his capacity as the structural superior of executive agencies, and as the person who appoints the leaders of both executive and independent agencies.[30] He exercises this control because it is his job, because he has a set of beliefs that he wants to implement, and sometimes because he wants to do favors for large contributors. Thus, control over the bureaucracy is exercised by the president according to the succession principle, that is, his accession to the job through an election, and according to the representation principle, that is, the views that enabled him to be elected, but not according to the electoral accountability principle. This control is simply to fine-grained, too recondite, to produce an impact on the voters. There may be good reasons why the president should be in direct control of all federal agencies, but his accountability to the voters is not one of them.

B. *State Officials and Autonomy of Action: The Federalism Argument*

A third representation-related use of accountability in contemporary political and legal scholarship is the claim that elected state officials, because they are accountable to the people, should not be subject to policy control by the federal government. This is, of course, an argument in favor of federalism, and it is part of the general upsurge in enthusiasm for that idea on the part of both the Supreme Court[31] and the scholarly community.[32] Federalism can be defined as a

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29. *See* JAMES G. BENZE, JR., PRESIDENTIAL POWER AND MANAGEMENT TECHNIQUES: THE CARTER AND REAGAN ADMINISTRATIONS IN HISTORICAL PERSPECTIVE (1987); RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN (1990); RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP WITH REFLECTIONS ON JOHNSON AND NIXON (2d ed. 1976) (1964); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH (1993); DAVID M. WELBORN, GOVERNANCE OF FEDERAL REGULATORY AGENCIES (1977); Elena Kagan, *presidential Administration*, 114 HARV. L. REV. 2245 (2001); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

30. The president does not appoint the entire board of multi-member independent agencies, at least at first, but he typically has the authority to appoint the Chair.

31. For recent federalism decisions by the Court, see, for example, United States v. Morrison, 529 U.S. 598 (2000) (federal statute criminalizing gender-motivated violence

political system where subsidiary units of the nation exercise exclusive jurisdiction over some set of issues, that is, where there are some types of decisions that are reserved to the subsidiary governmental units, and that the central government may not displace or countermand.[33] This structure is often described by saying that the subsidiary units possess rights against the central government.

Arguments for federalism can be either formal, that is, based on an interpretation of the Constitution,[34] or functional, that is, based on pragmatic considerations that emerge from concerns about fair or effective governance.[35] The accountability of state elected officials is a functional argument for federalism, and its most direct embodiments are the anti-commandeering cases such as *Printz v. United States*[36] and *New York v. United States*.[37] Anticommandeering is the idea that state officials, being accountable to their constituents, should retain exclusive jurisdiction over the issues on which their constituents will

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exceeds federal Commerce Clause authority); Printz v. United States, 521 U.S. 898 (1997) (federal requirement that local law enforcement officers perform background checks on gun purchasers commandeers state officials in violation of Constitution's federalism provisions); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (extension of federal jurisdiction to suits against states to enforce duties under Indian gaming law violates Eleventh Amendment); United States v. Lopez, 514 U.S. 549 (1995) (federal statute criminalizing gun possession near schools exceeds federal Commerce Clause authority); New York v. United States, 505 U.S. 144 (1992) (federal statute requiring states to develop plans for disposal of radioactive waste commandeers state officials in violation of federalism provisions); and Gregory v. Ashcroft, 501 U.S. 452 (1991) (federal age discrimination statute must be interpreted as inapplicable to state officials in order to avoid conflict with federal provisions).

32. For recent scholarship favoring federalism, apart from accountability-related arguments, see *supra* note 9. *See also* Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793 (1996); Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069 (2001); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

33. *See* WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE (1964); Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, *in* PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 73 (Dennis C. Mueller ed., 1997); William H. Riker, *Federalism*, *in* HANDBOOK OF POLITICAL SCIENCE: GOVERNMENTAL INSTITUTIONS AND PROCESSES 93 (Fred I. Greenstein & Nelson W. Polsby eds., 1975).

34. *See, e.g.*, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

35. *See, e.g.*, Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341; Merritt, *supra* note 32.

36. 521 U.S. 898 (1997).

37. 505 U.S. 144 (1992).

judge them.[38] For the federal government to commandeer them, to compel them to implement federal statutes, undermines them unfairly because their constituents may hold them accountable for decisions that were forced upon them. As Justice Scalia said in *Printz*, the Constitution "contemplates that a State's government will represent and remain accountable to its own citizens."[39] A secondary concern of this accountability argument is for the voters, who will be misled by federal commandeering and may then fail to hold their officials accountable for matters that these officials decide on their own.[40]

It is important, in assessing this argument, to distinguish between federalism and decentralization.[41] The idea of decentralization plays an important role in arguments for accountability based on devolution to local authorities,[42] but federalism is a different notion. As stated, federalism grants subsidiary units a final say in certain areas; that is, it grants these governments definitive rights against the center. Decentralization, in contrast, is a managerial strategy by which a centralized regime can achieve the results it desires in a more effective manner.[43] The effectiveness of any decisionmaking unit depends on a variety of factors, including the information available to it, the quality

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38. *See* Caminker, *supra* note 9; Jackson, *supra* note 9; Merritt, *supra* note 9; Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

39. 521 U.S. at 920.

40. *Cf.* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (arguing that electoral accountability serves as an alternative to judicial enforcement of federalism); La Pierre, *supra* note 9 (same). When this argument is framed in terms of state voters' ability to protect their state from unwanted federal intrusions, it is not very convincing, for reasons stated above. When the argument is framed in terms of state officials' ability to do so, it is more plausible. The latter position is the basis of the classic legal process school statements of this idea. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 192-93 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

41. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 180-88 (1998); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483 (1991); Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994) [hereinafter Briffault, *Contemporary Federalism*]; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

42. *See infra* Part II.A.

43. For discussions of decentralization from a managerial perspective, see PETER M. BLAU & W. RICHARD SCOTT, FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH (1962); MANFRED KOCHEN & KARL W. DEUTSCH, DECENTRALIZATION: SKETCHES TOWARD A RATIONAL THEORY (1980); WALTER T. MORRIS, DECENTRALIZATION IN MANAGEMENT SYSTEMS (1968); and Kenneth J. Arrow & Leonid Hurwicz, *Decentralization and Computation in Resource Allocation*, *in* ESSAYS IN ECONOMICS AND ECONOMETRICS: A VOLUME IN HONOR OF HAROLD HOTELLING 34 (Ralph W. Pfouts ed., 1960).

of its personnel, its level of control over its subordinates, and its prestige among those who must follow its commands. These factors sometimes suggest that the most effective decisions will be made by the central government, and sometimes suggest that it will be made by a geographical subdivision. A central government can achieve uniformity and may be able to command greater resources and prestige. A subdivision may be able to gather information more effectively, to control street-level employees, and to respond to circumstances that are specific to its locality. The choice between these two alternative strategies, that is, the particular allocation of responsibility within the overall structure, is determined by the effectiveness of each strategy in achieving the desired result. But it is the central government that identifies this result in a decentralization strategy, and thus defines the criteria for success or failure. And it is the central government that decides how decisionmaking authority will be divided between itself and the geographical subdivisions and when that allocation will be changed.

With this distinction in mind, the idea that federalism is partially justified by the need to secure the accountability of elected state officials can be assessed. The first difficulty with it is that it depends on the same unrealistic beliefs about elections that were discussed with respect to the non-delegation and unitary executive ideas. It assumes that voters can distinguish between state and federal areas of jurisdiction as long as the federal government is not allowed to intrude upon the state's prerogatives. This is not an easy thing to do, however, because federal and state responsibility overlap in so many areas of governance.[44] Consumer sales practices, food quality, securities offerings, worker safety, civil rights, environmental protection, agriculture, mining, and numerous other areas are regulated by the federal government under the Interstate Commerce Clause, banks are chartered under the Money Clause, roads are built under the national defense power. Most of these functions are decentralized within the federal government, which means that there are regional, state or local offices carrying out the federal functions. States regulate the same areas, charter banks and build roads as part of their general police power. The result is a complex pattern of overlapping jurisdiction. Once again, the matter is too technical, too

44. *See* DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (3d ed. 1984) [hereinafter ELAZAR, AMERICAN FEDERALISM]; DANIEL J. ELAZAR, EXPLORING FEDERALISM (1987) [hereinafter ELAZAR, EXPLORING FEDERALISM]; W. BROOKE GRAVES, AMERICAN INTERGOVERNMENTAL RELATIONS: THEIR ORIGINS, HISTORICAL DEVELOPMENT, AND CURRENT STATUS (1964); MORTON GRODZINS, THE AMERICAN SYSTEM (1966); RICHARD H. LEACH, AMERICAN FEDERALISM (1970); Morton Grodzins, *The Federal System*, *in* AMERICAN FEDERALISM IN PERSPECTIVE 256 (Aaron Wildavsky ed., 1967). Grodzins proposes the image of a marble cake to describe the way state and federal authority are mixed together. *See* GRODZINS, *supra*, at 60-88.

fine-grained to be salient to voters, except under the most extraordinary circumstances.

But the accountability argument for federalism indulges in an even greater level of implausibility than this. Having assumed that the average voter can distinguish between federal and state authority, despite all these overlapping jurisdictions, it then assumes that the voters will be fooled when the federal government gives orders to state officials in one of these areas. In other words, these amazingly sophisticated voters — who understand that some federally insured banks are chartered and supervised by the state while others are chartered and supervised by the Treasury Department, or that the quality of the food served in a restaurant is monitored by state officials, but the quality of the packaged food sold at the counter is monitored by federal officials — are unable to understand that the federal government is compelling the state to take certain actions. Moreover, the elected officials who are so compelled are absolutely unable to explain this fact to these sophisticated voters. This mélange of contradictory arguments gives rise to the suspicion that accountability is a post hoc rationalization invoked by proponents of federalism because of its current cachet.

Nor does this intricate overlap of jurisdiction account for the full complexity of federal-state relations. The federal government plays an active role in many areas that are primarily regulated by the states, such as education, local policing, welfare, public housing, and health, by providing monetary aid to the states and attaching conditions to the grants.[45] In other areas, or sometimes the same areas, it delegates federal regulatory authority to state administrative agencies, provided that those agencies comply with federal standards. These mechanisms, generally described as cooperative federalism,[46] are a means of simultaneously extending the reach of federal authority and decentralizing its management to state-level institutions. In theory, they do not violate the rights of states because state acceptance of the funds, or of federal authority, is voluntary. The Supreme Court upheld the validity of conditional funding programs in

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45. For an exploration of the federalism concerns that this practice raises, see Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS 104 (2001); Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003); and Baker, *supra* note 32.

46. *See* ELAZAR, AMERICAN FEDERALISM, *supra* note 44; ELAZAR, EXPLORING FEDERALISM, *supra* note 44; GRODZINS, THE AMERICAN SYSTEM, *supra* note 44.

South Dakota v. Dole[47] and recently reconfirmed that conclusion by unanimous vote in *Pierce County v. Guillen*.[48]

Cooperative federalism, like overlapping jurisdiction, tends to obscure any separation between state and federal authority, thus demanding even more spectacular levels of sophistication from voters if they are to hold state officials accountable within their area of sole authority. In addition, it tends to undermine the idea that such areas of sole authority exist. The entire theory of American government is one of checks and balances, overlapping authority, legally compelled cooperation, and legally authorized dispute. This dynamic tension between the state and federal governments is a pervasive feature of American government, and many proponents of federalism argue that it is desirable, as a means of diffusing power and securing liberty.[49] Electoral accountability is simply too attenuated to justify some complex determination like the boundaries of federal-state relations, just as it is too attenuated to justify nondelegation or a unitary chief executive.

A third difficulty with the accountability argument for federalism, apart from the existence of overlapping jurisdictions and cooperative governance, is that its essential claim tends to be refuted by the interaction between state and local government. The American people are governed by a vast array of local authorities — villages, towns, cities, counties, and special purpose districts. According to long and essentially unchallenged doctrine, these authorities have no constitutional status of their own; they are creatures of the state.[50]

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47. 483 U.S. 203 (1987) (condition that states could only receive highway funds if they prohibited anyone below the age of 21 from buying alcohol does not violate Constitution's federalism provisions).

48. 537 U.S. 129 (2003) (condition that states could only participate in federally funded highway safety program if they kept the accident reports generated pursuant to that program confidential does not violate Constitution's federalism provisions). The decision was not only unanimous, but was written by Justice Thomas.

49. Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63 (1987); Kaden, *supra* note 9; Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990); Robert F. Nagel, *Federalism as a Fundamental Value:* National League of Cities *in Perspective*, 1981 SUP. CT. REV. 81; Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329 (2003).

50. Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907). For subsequent reaffirmations, see Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 70-72 (1978); Sailors v. Bd. of Educ., 387 U.S. 105, 108 (1967); Reynolds v. Sims, 377 U.S. 533, 575 (1964); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933); and City of Trenton v. New Jersey, 262 U.S 182 (1923). *See generally* JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (5th ed. 1911); ELAZAR, AMERICAN FEDERALISM, *supra* note 44, at 202-08; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980). Indeed, it might be regarded as a violation of the Constitution, specifically its federalism provisions, for the federal government to intrude in the relationship between a state and its localities.

Moreover, within states, the general legal principle that controls state-local relations is Dillon's rule, which is that local governments possess only those powers that have been granted them by state authorities.[51] Some state constitutions provide certain forms of autonomy for local jurisdictions, but others do not, and there is certainly no uniform pattern.[52] Thus, state governments are authorized, by both the federal Constitution and their own constitutions, to commandeer local officials, that is, to use these employees of the state's creatures to carry out state programs. The pattern, moreover, is enormously complex. Even those sophisticated voters who can disentangle the strands of federal-state relations may have difficulty knowing precisely where state initiatives end and local ones begin. But the absolute subjugation of some local governments to state authority and the high level of incomprehension regarding the scope of autonomy possessed by others do not appear to have prevented American cities and towns from developing vigorous political scenes with intense competition for electoral office. Elections are still used to determine succession, voters still choose candidates to represent them, and candidates are still held accountable on a few salient issues. The fact that local officials are regularly compelled to implement state programs, to an extent that goes beyond anything in federal-state relations, does not seem to interfere at all with the electoral process for these officials.

A fourth and final point, and in a sense the most important, is that the invocation of accountability on behalf of state officials assumes the very point at issue in the federalism debate, namely, the proper balance between state and federal authority. After all, citizens vote for federal officials as well as state officials, and the type of officials for whom they vote at the state and federal levels is generally analogous. Which of these sets of elections provides more accountability in a situation where the authority to decide is a matter of debate? Granting authority to the state allows the state voters to control the issue, but it simultaneously denies a voice to voters in the other states. Whether those out-of-state voters should be given a voice — whether the decisionmaker should be accountable to them in addition to the in-state voters — is precisely the issue at stake in the federalism debate. The general idea of electoral accountability, which can be invoked on each side, does nothing to resolve the issue, even assuming that it is an

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51. *See* GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY 70 (1985); Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1363-65 (1997); Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991).

52. Briffault, *Contemporary Federalism*, *supra* note 41; Richard Briffault, *Our Localism: Part I — The Structure of Local Government*, 90 COLUM. L. REV. 1 (1990) [hereinafter Briffault, *Our Localism*].

operative principle with respect to these relatively recondite and complex matters.

Consider two examples. A large portion of the State of Colorado consists of National Forest land, with valuable stands of timber. The majority of voters in Colorado, let us assume, would like to grant licenses to loggers so that this timber can be harvested — to use the polite term for cutting — thereby creating jobs, bolstering the state's economy, and generating tax revenue. The majority of voters in Connecticut, let us also assume, regard the National Forests as wilderness, not timber land, and would prefer that they be left undisturbed. The Colorado voters could argue that the National Forest land is their land, within their state, and that if the people of Connecticut want wilderness, they can preserve their own; with a lower per capita income than Connecticut, their state needs the jobs and the tax revenue. Colorado voters want decisions about the National Forests made by elected officials whom they alone choose and who, in theory, are accountable only to them. The Connecticut voters could respond that their state suffers from a lack of spectacular scenery, and that Colorado's represents a valuable treasure that belongs to all Americans. If Colorado residents want higher paying jobs, they are free to move to Connecticut. Connecticut residents want the decision about the National Forests made by elected officials at the federal level, who are, collectively, chosen by all Americans including themselves. How can this dispute be resolved without some preliminary determination on the merits of these two positions?[53] How can the concept of accountability be of assistance when it can be so readily invoked on either side?

Now consider gun control, the substantive issue in both *Printz* and *United States v. Lopez*.[54] The voters in Colorado, let us assume, want

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53. Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1233 (1992) argues that states or localities are as likely to protect the environment as the federal government. This position has of course been challenged. *See* William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 27-46 (1997); Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is it "To the Bottom"?*, 48 HASTINGS L.J. 271 (1997); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67, 91-94 (1996). The point here, however, is that merely that the federal government and a particular state government are likely to have different policy positions, a point that seems irrefutable since state government positions vary, and federal policy that agrees with one must disagree with the others. Given these differences, the scope of the electorate is clearly of critical importance to the idea that elections achieve accountability. Federalism cannot solve this problem. It simply offers one particular solution, empowering some voters and disenfranchising others.

54. 514 U.S. 549 (1995). *Lopez* struck down the Gun-Free School Zones Act of 1990, which criminalized possession of a gun within 1,000 feet of a school, on commerce clause grounds. *See* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995).

lenient gun control laws and therefore want the issue of gun control decided by people whom they choose and, again in theory, are accountable to them. They realize that this could lead to more tragedies like Columbine, but they point out that all the Columbine victims were Coloradans, and that they are willing to accept the risk in order to retain their freedom to own guns. The voters in Connecticut, again by assumption, want to have a voice in the decision about gun use in Colorado and therefore want this decision made at the federal level.[55] They assert that Columbine traumatized all Americans and made their own children feel less safe in school. Moreover, the Coloradan children who died at Columbine, and who will die if there are future incidents of this sort in Colorado, are Americans, after all, and although Colorado voters do not want to protect them, they are nonetheless deserving of protection. Perhaps the case for federal control is stronger with respect to National Forests than with respect to gun control, although the gun control debate is essentially similar in structure to the debate over slavery, which plunged the United States into a civil war. Some people will think differently about the two issues, some will think that both should be a matter for the states, and some will think both should be determined on the federal level. But this sort of conflict will be present in virtually every federalism issue. There is no point on which accountability concerns lie only on one side of the debate, and there is thus very little insight to be gained from invoking them, even if they were plausibly involved.

C. *What Lies Beneath*

As suggested at the outset, the accountability arguments for non-delegation and a unitary executive, although they both recommend increased authority for federal elected officials, are not consistent with each other. The accountability argument for federalism, which recommends invalidation of statutes enacted by federal elected officials in order to protect the jurisdiction of state elected officials, is inconsistent with both. Taken together, these arguments favor increased authority for Congress, the president, and state officials, three groups that regularly compete with each over about allocations of authority. The conflicts and inconsistencies among these various electoral accountability arguments suggest that accountability is not a coherent concept but a fashionable term that judges and scholars are

55. They may also assert that lenient gun laws in Colorado will make it easier for people to bring guns into Connecticut, but let us assume, since this is a hypothetical, that this claim can be proven false, so that Connecticut citizens have a pragmatic claim in one case (we want to see the trees) and a symbolic or moral claim in the other (the gun-toting mayhem in Colorado upsets us).

invoking whenever they have a position which favors elected officials in some way.

If that were true, it would certainly count against the coherence of accountability as a concept, and it might compel one to choose between the rival versions of this concept in specific situations, but it would not, by itself, suggest that all these uses of accountability are ill-advised. It might be the case, for example, that the nondelegation and federalism arguments are weak but that the unitary executive argument stands on a firm foundation and should not be criticized because it conflicts with unconvincing arguments that use the same terminology. In fact, the problem with accountability arguments is more severe. Despite their differing recommendations, electoral accountability arguments are united by a similar vision, a vision that is unacknowledged but that explains why such questionable arguments possess so much contemporary appeal. That vision is a pre-analytic and essentially unrealistic hostility to the government we actually possess — the modern bureaucratic or administrative state.

Let us try to imagine a situation where all three recommendations were accepted, where legislators did not delegate policy decisions, where the president was in direct control of the executive branch, and where the states were largely free of federal interference. What would such a situation look like? Well, it might just look like American government in the 1820s. At that time, indeed, Congress did not delegate extensive authority to executive officials, there were no independent agencies, and there were very few federal incursions on state authority.[56] As modern people, beset by the infinitely complex problems of a mass society, look back upon that time, at least if they are white, it seems simpler, less troubled, and infinitely more appealing. In addition, for Americans, pre-modern government is proximate to the founding of our nation and thus to what we think of as the source of our political legitimacy. Most important of all, there was virtually no administrative governance in the United States.[57] Our attitudes about this mode of governance are generally so negative — the term bureaucracy itself is so close to an imprecation — that any

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56. *See generally* GEORGE DANGERFIELD, THE ERA OF GOOD FEELINGS (1952); ROBERT V. REMINI, THE JACKSONIAN ERA (1989); GLYNDON G. VAN DEUSEN, THE JACKSONIAN ERA 1828-1848 (1959); GLYNDON G. VAN DEUSEN, THE RISE AND DECLINE OF JACKSONIAN DEMOCRACY (1970).

57. With respect to the development of the administrative state in the United States, see RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877 (1990); HAROLD U. FAULKNER, THE DECLINE OF LAISSEZ FAIRE, 1897-1917 (1951); WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900 (1982); JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE (1986); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982); and CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 12-31 (1990).

era where bureaucracy did not exist seems to possess an ineffable charm.[58]

The nondelegation doctrine is antibureaucratic in its insistence that legislators make all the basic policy decisions in the modern state. Bureaucracy was assimilated into the three-branch model that provides an organizing principle for the Constitution[59] and that serves as our prevailing metaphor for governmental structure, by treating it as part of the executive.[60] This means, according to the traditional allocation of responsibility to the three branches, that the bureaucracy, as a whole, is supposed to implement the laws that the legislature passes. If one elevates this metaphor into obligatory doctrine — a position for which there is little historical justification[61] — one comes

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58. For negative depictions of bureaucracy, see MICHAEL BARZELAY, BREAKING THROUGH BUREAUCRACY (1992) (bureaucracy creates rigid, unimaginative governance); F.A. HAYEK, THE ROAD TO SERFDOM (15th ed. 1994) (bureaucracy destroys personal freedom); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994) (bureaucracy suppresses beneficial public and private initiatives); HENRY JACOBY, THE BUREAUCRATIZATION OF THE WORLD (Eveline L. Kanes trans., 1973) (bureaucracy displaces diversity of culture); LEON TROTSKY, THE REVOLUTION BETRAYED: WHAT IS THE SOVIET UNION AND WHERE IS IT GOING? (Max Eastman trans., 1937) (bureaucracy destroys genuine Communism); and David Luban et al., *Moral Responsibility in an Age of Bureaucracy*, 90 MICH. L. REV. 2348 (1992) (bureaucracy breeds fascism).

59. For the origin of the three branch metaphor, see ARISTOTLE, THE POLITICS 264-72 (T.A. Sinclair trans., Penguin Books 1981); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 82-84 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690); MONTESQUIEU, THE SPIRIT OF THE LAWS 156-66 (Anne Cohler et al. eds. & trans., Cambridge University Press 1989) (1748); and M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967) (discussing English Civil War writers).

60. On the incorporation of the metaphor into the U.S. Constitution, see W.B. GWYN, THE MEANING OF SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION (1965) and PAUL MERRILL SPURLIN, MONTESQUIEU IN AMERICA 1760-1801 (1940).

61. All that can be said is that the Framers used the three branch model as a heuristic for conceptualizing the structure of government. There is no indication that they intended to give that heuristic any legal force beyond the structural provisions that were explicitly adopted. At the time the Constitution was being drafted, several states, including Virginia and Pennsylvania, had followed the more radical Civil War writers and enacted constitutions that specifically declared the three branches of government to be entirely separate. Bruce A. Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317 (1992); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 209 (1989); Louis Fisher, *The Allocation of Powers: The Framers' Intent*, *in* SEPARATION OF POWERS IN THE AMERICAN POLITICAL SYSTEM 19 (Barbara B. Knight ed., 1989). The authors of the federal Constitution were certainly aware of these provisions, but they were more immediately concerned about the ineffectiveness of the central government than about its potential threat to liberty and never seriously considered a provision of this sort. Indeed, the First Congress, in which many of them sat, rejected a separation of powers amendment when James Madison, apparently experiencing regrets about his draftsmanship, proposed it together with the Bill of Rights. *See* 12 PAPERS OF JAMES MADISON 202 (Charles F. Hobson et al. eds., 1984); *see also* EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 33-44 (1957); Richard S. Kay, *Adherence to The Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 271-72 (1988).

to the conclusion that administrative agencies are not supposed to enact laws but only enforce those laws that have been enacted by the legislature. By parallel reasoning, of course, one could also conclude that agencies are not supposed to adjudicate the legal status of individuals.

These positions have been rendered obsolete by the advent of the administrative state; to take them seriously would be to reverse an entire century of political developments and seriously disrupt our political system.[62] In fact, administrative agencies make the majority of our rules and carry out the majority of our adjudications.[63] They constitute the basic, operational structure of modern government, and this role necessarily involves a considerable amount of policymaking. The president and his immediate staff, Congress, and the federal courts function mainly to control and direct the bureaucracy, rather than performing basic governmental operations.[64] They make policy in certain areas, and when they do so, that policy usually prevails, but they could not possibly make all the policy-level decisions that modern government requires.

Proponents of the nondelegation doctrine, fully aware of the irreversibility of administrative government, often insist that their recommendations would not necessarily cause a reduction in the scale of the administrative state, that Congress could make all the basic policy decisions if its members only worked harder, were better informed, and possessed more political resolve.[65] But of course, the nondelegation doctrine would lead to a massive retrenchment of administrative government, beyond anything that any mainstream politician has proposed. For Congress to increase its policymaking activities by such a vast amount would entail vast political costs, and vast monetary costs in staff resources.[66] When costs go up, and the

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62. Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981): Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343 (1989); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989).

63. *See generally* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY (1994); JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).

64. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

65. *See* 1-3 FREDERICK AUGUST VON HAYEK, LAW, LEGISLATION, AND LIBERTY (1973-79); LOWI, *supra* note 7; SCHOENBROD, *supra* note 7; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Lawson, *supra* note 7.

66. The result of this expenditure, moreover, would be the creation of a vast staff operation, inevitably organized along bureaucratic lines that would be no more accountable to the elected representatives than existing agencies.

scale of the producer's basic operation does not change, the quantity of production will inevitably decline. For these reasons, enforcing the nondelegation doctrine is politically unrealistic, as the federal courts have long recognized[67] and the Supreme Court has recently reconfirmed.[68] Academic writing urging its enforcement is essentially an expression of hostility toward the administrative state.

Proposals for a unitary presidency are less openly hostile to the administrative state but ultimately rest on a similar instinct. These proposals, while acknowledging the crucial role that agencies play in modern government, insist that these agencies must be controlled by the president, as an elected and presumably accountable official. But there is no particular reason why Congress, as our primary policy maker, cannot deploy the device of independence that the Constitution deploys for the judiciary.[69] The mere fact that the president cannot remove the top political appointees, which is the hallmark of independence, does not mean that the agency is out of control. A so-called independent agency is generally subject to Congressional and judicial control to the exact same extent as an executive agency. It is equally subject to control by private parties, both through the legally established mechanisms of the Administrative Procedure Act,[70] and through the informal contacts that one court described as the "bread and butter" of the administrative process.[71] It is even subject to control by the president, through his appointment of the Chair and through his influence as the most important person in the government.[72] The idea that an agency is out of control simply

67. Mistretta v. United States, 488 U.S. 361 (1989); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971). The only statute that was ever struck down on nondelegation grounds was the National Industrial Recovery Act. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). Not only were these decisions handed down by a Court whose decisions are no longer regarded as precedents, but the NIRA was atypical in that it delegated extensive governance authority to private parties as well as executive officials.

68. *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001) (rejecting nondelegation challenge to Clean Air Act's requirement that EPA set air quality standards without regard to costs).

69. *See* Lawrence Lessig & Cass R. Sunstein, *The president and the Administration*, 94 COLUM. L. REV. 1 (1994); Edward Rubin, *Independence as a Governance Mechanism*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 56 (Stephen Burbank & Barry Friedman eds., 2002).

70. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 4301, 5355, 5372, 7521 (2000). The statute, as amended, incorporates the Freedom of Information Act, *see id.* § 552, which enables private parties to exercise control by monitoring based on information.

71. Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

72. *See* WELBORN, *supra* note 29; Kagan, *supra* note 29; Verkuil, *supra* note 29.

because it is not subject to the direct commands of the chief executive betrays a underlying fearfulness of the administrative process.[73]

Finally, federalism arguments often possess an equally anti-administrative tone. It is true that shifting authority from the federal government to the states often means shifting authority from a federal to a state administrative agency.[74] But the growth of administrative government is generally connected to the nationalization process, a connection that is unambiguously true in unitary regimes.[75] In the United States, regulation tends to be associated with federal incursions into state affairs, and arguments for state autonomy are often couched in quasi-deregulatory terms.

There are at least three reasons for the association between regulation and the federal government. First, in federalism-related conflicts between the federal government and the states, the conflict usually manifests itself when the federal government attempts to regulate either the state itself[76] or some entity within the state.[77] To be sure, other federalism cases involve federal legislation establishing court-enforced rights or punishments,[78] but regulatory

73. There are also arguments for a unitary executive based on textual or structural arguments about the president's possession of all executive power. *See* Miller, *supra* note 8. These are not as anti-administrative in tone, but they do not depend on the idea of accountability and are thus beyond the scope of this discussion.

74. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601-617 (2000) (shifting administration of welfare payments from federal to state agencies, and establishing criteria for monitoring state agencies).

75. *See, e.g.*, ERNEST BARKER, THE DEVELOPMENT OF PUBLIC SERVICES IN WESTERN EUROPE 1660-1930 (1966); HOWARD G. BROWN, WAR, REVOLUTION, AND THE BUREAUCRATIC STATE (1995); SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES (1968); GIANFRANCO POGGI, THE DEVELOPMENT OF THE MODERN STATE (1978); THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE (Charles Tilly ed., 1975); EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870-1914 (1976).

76. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (effort to apply federal labor regulation regarding disabled workers to state employees struck down on federalism grounds); New York v. United States, 505 U.S. 144 (1992) (effort to regulate disposal of radioactive waste by compelling states to create facilities within their borders struck down on federalism grounds); Gregory v. Ashcroft, 501 U.S. 452 (1991) (effort to apply federal labor regulation involving retirement age to state judges rejected by interpreting statute in light of federalist principles); Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (effort to apply federal labor regulation involving minimum wages to state employees struck down on federalism grounds).

77. *See, e.g.*, Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (effort to regulate disruption of water used by migratory birds rejected by interpreting statute in light of federalism principles); Hammer v. Dagenhart, 247 U.S. 251 (1918) (effort to regulate ages at which children could be employed in a factory struck down on federalism grounds).

78. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (statute granting victims of gender-oriented crime the right to sue for money damages struck down on federalism grounds); City of Boerne v. Flores, 521 U.S. 507 (1997) (statute requiring courts to strike down infringements on free exercise unless supported by a compelling state interest struck

cases predominate. Second, while the federal government does not necessarily take the lead in developing administrative programs,[79] it generally finds itself in the role of imposing regulations on the less progressive states, and often on the majority of states. Given the variations in state adoption of regulatory programs, there will almost always be some states that have not acted by the time the federal legislation passes.[80] The impact of the legislation on these states will be more salient than its lack of impact on the states that have already enacted similar legislation.[81] Third, and closely related to the second, many states are simply too small to develop and operate the kinds of regulatory programs that the federal government imposes. Some thirty American states have fewer than five million people. Program drafting and design costs tend to be somewhat constant, rather than varying with scale, and these states, particularly given the American reluctance to tax, will often find themselves unable to initiate regulation on their own.

To summarize, accountability arguments for nondelegation, a unitary executive, and federalism may seem to be inconsistent because these arguments recommend increased authority for groups of elected officials who may be in conflict with each other. But all these arguments possess an underlying unity in their hostility to modern administrative government. The conflict among their beneficiaries can be resolved if all three groups of elected officials gain power at the expense of the bureaucracy. Nondelegation can be viewed as a transfer of authority from the bureaucracy to Congress, a unitary executive can be viewed as a transfer of authority from independent agencies to the president, and federalism can be viewed as a transfer of authority from federal administrators to elected state officials. What underlies accountability arguments for in these three areas, therefore, is a nostalgic desire for the days when elected officials were the primary governmental actors, and administrative agencies were nascent or, even better, nonexistent. This is an unrealistic and indeed irrational impulse, however. Deregulation is certainly possible in certain areas, but modern government cannot function without extensive reliance on administrative agencies. Given the scale and

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down on federalism grounds); United States v. Lopez, 514 U.S. 549 (1995) (criminal law against possession of firearms near school struck down on federalism grounds).

79. On the origins of regulatory commissions, see MCCRAW, *supra* note 27, at 17-44 (1984) (describing Massachusetts Board of Railroad Commissioners, a precursor of the Interstate Commerce Commission).

80. *See* Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745 (2004) (discussing judicial reaction to this phenomenon).

81. Indeed, sometimes there will be no impact at all on the more regulation-oriented states, because the federal statute will defer to states that have already adopted an equivalent or higher level of regulation.

complexity of the tasks to be accomplished, moreover, any effort to decrease such reliance by transferring authority away from agencies will merely lead to the creation of new bureaucratic structures in Congress, the White House, state government, or any other recipient of such authority, without altering the essential reality of the modern administrative state.

II. ACCOUNTABILITY AND DEVOLUTION

The second major category of accountability arguments that appear in modern political science and legal scholarship is that related to the devolution of authority from the central government to local institutions or to private persons. These arguments can also be divided into two separate sub-categories, the first focusing more on politics, and the second focusing on the enforcement process. The political one, sometimes identified with the idea of federalism and sometimes with the idea of participatory democracy, argues that local institutions are more accountable to the people than centralized ones and that devolution of power to such institutions will therefore improve the quality of government. The enforcement subcategory argues that private institutions and individuals can be accountable for their own behavior, and that the government's efforts to enforce the law should allow people to play an active role. Again, these two arguments will be considered in turn.

A. *Political Devolution: Federalism, Decentralization, and Participatory Democracy*

Accountability arguments for the devolution of authority from the central government to localities are based on the idea that a political entity that governs a small group of people can be more readily controlled by those people than one that governs a larger group. In other words, small governmental units are more accountable to their constituents.[82] Implicit in this claim are at least three different thoughts. First, a government is more accountable to those it governs if it is small, because it will need to be more attentive to the concerns of its constituency. Second, a government is more accountable to those it governs if the governed group is small, because the members of this group can communicate more readily with each other, and more

82. *See* HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY (1996); WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001); Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y. 23 (1996); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987); Deborah Jones Merritt, *supra* note 32.

readily organize political action. Third, a government is more accountable to those it governs if its decisionmakers are physically closer to those whom it governs, because such proximity causes the government to be more attentive and facilitates communication from the constituency.

These arguments, it should be noted, are distinct from the arguments about the accountability of elected officials that were discussed in the previous section. They would apply even if the central government were controlled by elected officials and, indeed, even if the local government were not. The central government's lack of accountability, according to this view, comes from its size, the tremendous physical and organizational distance that separates the leaders of continent-wide nation of three hundred million people from any of its citizens. The asserted accountability of local officials is not necessarily based on elections but can result from the familiarity of the officials with their constituents and their vulnerability to personal influence or organized protests by those constituents. While it might be argued that an elected local government is more accountable than a non-elected one, the devolution argument allows for other forms of accountability that function on the local level.

It should also be noted that devolution arguments are distinct from federalism and rely only on the more general principle of decentralization.[83] One reason for this is the obvious one that federalism protects the rights of regional political entities — states, in the American system — rather than localities. Regional governments, however, do not display the small-scale features on which the devolution argument depends. A more general reason is that devolution, or decentralization, is a managerial policy that does not depend on the kind of rights that federalism guarantees. Of course, the policy might be more difficult to alter if it were secured by a right, but that is a very different consideration. Many policies that are widely regarded as desirable, such as unemployment compensation, environmental protection, or the regulation of securities markets, are not secured by rights because they lack the moral texture that rights seem to possess and because the considerations that support them might change in the future. Localism seems to belong in this category because arguments for it are almost exclusively functional, not moral, and because these arguments could conceivably change, perhaps as a result of the Internet.

Whatever the virtues of localism, the concept of accountability provides very little support for it. The main difficulty with it involves salience. How many people pay much attention to the political events

83. *See supra* note 41 (citing sources for the distinction between federalism and decentralization).

that occur in their locality? To begin with, many Americans pay relatively little attention to politics at any level; they may have some strongly held beliefs, but their levels of knowledge and their levels of participation are extremely low.[84] One reason for this is that many political issues in a modern administrative state are technical and complex, which not only makes them seem daunting but also dull. Another is that people have so many other sources of stimulation these days, including movies, television, recorded music, spectator sports, participatory sports, the Internet, and convenient travel. Most of these activities, moreover, tend to draw one's attention away from the locality. The entertainment industry is national; the Internet connects people to those with similar interests anywhere in the world; spectator sports often involve professional or Division I college teams that draw fans from large geographic areas.

Even when people are interested in politics, it is often politics at the state or national level. For many people, large-scale politics are much more interesting, because of the issues involved or the sense of significance that they convey. One simply cannot save the blue whale, protect Israel, privatize social security, or eliminate abortion through actions taken in one's own community. While a person can undertake local actions to oppose abortion or protect the environment or alleviate hunger or improve education in a single school, the positions that people formulate on issues such as these are often conceived in comprehensive or national terms. Social movements that generate relatively high levels of political involvement are generally national in scope.[85] This is readily explained by either of the two dominant explanatory theories for these movements, the American or resource-mobilization approach, and the Continental, or identity-oriented approach.[86] According to the resource-mobilization approach, social movements are generated by leaders using a variety of instrumentally

84. *See* RUY A. TEIXEIRA, THE DISAPPEARING AMERICAN VOTER (1992); G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, *in* CONTROVERSIES IN VOTING BEHAVIOR 56 (Richard G. Niemi & Herbert F. Weisberg eds., 3d ed. 1993). For classic statements of this point, see WALTER LIPPMANN, THE PHANTOM PUBLIC (1925), and JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942).

85. For general definitions of social movements, see DONATELLA DELLA PORTA & MARIO DIANI, SOCIAL MOVEMENTS: AN INTRODUCTION (1999); BARBARA EPSTEIN, POLITICAL PROTEST AND CULTURAL REVOLUTION: NONVIOLENT DIRECT ACTION IN THE 1970S AND 1980S (1991); and JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978).

86. For discussions of the difference between these two approaches, see Jean L. Cohen, *Strategy or Identity: New Theoretical Paradigms and Contemporary Social Movements*, 52 SOC. RES. 663 (1985); Bert Klandermans, *New Social Movements and Resource Mobilization: The European and American Approach Revisited*, *in* RESEARCH ON SOCIAL MOVEMENTS: THE STATE OF THE ART IN WESTERN EUROPE AND THE USA 17 (Dieter Rucht ed., 1991); and Sidney Tarrow, *Comparing Social Movement Participation in Western Europe and the United States: Problems, Uses, and a Proposal for Synthesis*, *in* RESEARCH ON SOCIAL MOVEMENTS, *supra* at 392.

rational strategies such as fundraising, dramatic events, and media access.[87] Clearly, these sorts of activities are best organized on the national level and often depend on their ability to draw support from a large number of widely dispersed people for their effectiveness. According to the identity approach, social movements spring from people's changing self-conceptions, from trends within civil society that generate new opinions and beliefs.[88] Again, such ideological transformations tend to occur on a society-wide level, and most social movements, unless they have overwhelming support, can only flourish by uniting all the widely dispersed people who have developed a novel self-conception.

There is, moreover, a close interconnection between the national character of people's nonpolitical interests and the kinds of political interests they develop. As just noted, entertainment in our society — motion pictures, television, popular music, spectator sports — is often national in scope. As a result, the common inclination to treat politics as a form of entertainment, as a set of contests one watches on television,[89] reinforces the tendency to focus on national, rather than local politics. The dominance of the representation principle in electoral politics that was discussed in the preceding section, that is, the tendency of people to vote for the sort of person they want without detailed consideration of the issues, reflects a similarly entertainment-oriented, nonpolitical approach to politics, because people are more entertaining and comprehensible than issues. This also orients the average citizen toward national politics, since it is national figures who receive media attention and thereby become identifiable. Most Americans know who the president is, and many

87. *See, e.g.*, WILLIAM A. GAMSON, THE STRATEGY OF SOCIAL PROTEST (2d ed. 1990); GERALD MARWELL & PAMELA OLIVER, THE CRITICAL MASS IN COLLECTIVE ACTION: A MICRO-SOCIAL THEORY (1993); JOHN D. MCCARTHY & MAYER N. ZALD, THE TREND OF SOCIAL MOVEMENTS IN AMERICA: PROFESSIONALIZATION AND RESOURCE MOBILIZATION (1973); ANTHONY OBERSCHALL, SOCIAL CONFLICTS AND SOCIAL MOVEMENTS (1973); CHARLES TILLY, FROM MOBILIZATION TO REVOLUTION (1978); J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527 (1983).

88. *See, e.g.*, HANSPETER KRIESI, POLITICAL MOBILIZATION AND SOCIAL CHANGE: THE DUTCH CASE IN COMPARATIVE PERSPECTIVE (1993); ALBERTO MELUCCI, NOMADS OF THE PRESENT: SOCIAL MOVEMENTS AND INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY (John Keane & Paul Mier eds., 1989); JAN PAKULSKI, SOCIAL MOVEMENTS: THE POLITICS OF MORAL PROTEST (1991); ALAIN TOURAINE, THE VOICE AND THE EYE: AN ANALYSIS OF SOCIAL MOVEMENTS (Alan Duff trans., 1981); Claus Offe, *New Social Movements: Challenging the Boundaries of Institutional Politics*, 52 SOC. RES. 817 (1985).

89. BAUDRILLARD, SILENT MAJORITIES. *supra* note 17; BAUDRILLARD, SIMULATIONS, *supra* note 17; RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE (1996); EDELMAN, *supra* note 17, at 102; DOUGLAS KELLNER, TELEVISION AND THE CRISIS OF DEMOCRACY (1990); NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS (1985).

know their senators or representatives, but how many know even the names of their town supervisors or local legislators?[90]

If people fail to attend to local politics, the devolution of political authority to local entities cannot produce decisionmaking that is more accountable to those subject to the decision. Rather, decisions taken at the local level will be opaque to their subjects. They will be low-visibility events, because they are not reported in the media that people watch and do not involve the issues that people regularly follow. Instead of being controlled by ordinary citizens, these decisions will be controlled by local elites, that is, those who are already in control and thereby benefit from the devolution of additional authority, or those who are unusually motivated to participate because they have a high economic stake in the outcomes of local decisions. Studies of local government suggest that there may be several different elites competing with each other for control,[91] but these will be elites nonetheless and not the mass of ordinary citizens that would support an accountability argument for devolution.[92]

Robert Putnam's *Bowling Alone* provides an historical explanation of this present reality.[93] According to Putnam, the American people's sense of social solidarity, their level of participation in all aspects of political and civil society, has been declining precipitously in recent years. We have less contact with our neighbors, we join fewer organizations, we spend less time socializing with our friends, and we often go bowling alone. The culprits are suburbanization, an obsessive dependence on automobiles, and the increasing influence of the mass media, most notably television.[94] Putnam paints a grim picture of

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90. Similar observations about the low salience of state elections have been raised in connection with the idea that state judges should be elected so that they will be accountable to the electorate. *See, e.g.*, PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980); Alex B. Long, *"Stop Me Before I Vote for This Judge Again": Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. VA. L. REV. 1 (2003); Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137 (2003); *see also* Glenn R. Winters, *Selection of Judges — An Historical Introduction*, 44 TEX. L. REV. 1081, 1082-83 (1966).

91. *See* ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY (1961); FLOYD HUNTER, COMMUNITY POWER STRUCTURE (1953); NELSON W. POLSBY, COMMUNITY POWER AND POLITICAL THEORY (1963).

92. *See* RICHARD E. FOGLESONG, MARRIED TO THE MOUSE: WALT DISNEY WORLD AND ORLANDO (2001); PAUL E. PETERSON, CITY LIMITS (1981); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 63-76 (1999); William W. Buzbee, *Accountability Conceptions and Federalism Tales: Disney's Wonderful World?*, 100 MICH. L. REV. 1290 (2002) (review of Foglesong, *supra*, emphasizing the theme that citizens were ignored in the effort by local elites to attract Disney World to central Florida).

93. ROBERT D. PUTNAM, BOWLING ALONE (2000).

94. Putnam's idea that television destroys political and social culture is shared by many other commentators. *See, e.g.*, COLLINS & SKOVER, *supra* note 89, at 9, 13 ("Both

modern society, but it is difficult to imagine how it could be reversed. The causes he identifies are not likely to be abolished or even abated for the foreseeable future. Indeed, contemporary demographic trends emphasize their inevitability. Putnam identifies several states that continue to display the sort of communal life he asserts we are losing, such as North Dakota, South Dakota, Montana and Vermont. He identifies several other states that typify contemporary political disconnection and social dissociation, such as Nevada, Texas, Georgia and Florida.[95] The fact that people, particularly young people, are fleeing from Putnam's genial, well-integrated states to those he identifies as cauldrons of anomie suggests that the trends he observes will continue,[96] as well as raises the question whether the experience of modernity is quite as miserable as Putnam suggests.

The important point is that small-town America is largely gone. The kinds of localities that could exercise increased authority in an accountable manner have been ripped apart by skeins of superhighways, telecommunications networks, and the mass media.[97] Local jurisdictions that would serve as the recipients of devolved authority are no longer self-contained towns, surrounded by ten thousand acres of farmland or forest, but segments of suburban and exurban sprawls demarcated by invisible and arbitrary legal lines. In the modern world, these localities are no more salient than the technical issues that confront elected officials. Thus, they are of little use for increasing the accountability of government, and, in fact devolution of government decisions to this level are more likely to increase its opacity.

The accountability argument for devolution of authority to local governments is conceptually connected to the principle of participatory democracy, as opposed to the principle of federalism. That is, devolution has nothing to do with the rights of states, qua states, and little to do with the rights of any governmental entity but rather draws its conceptual force from the idea that citizen participation is essential if democracy is to prosper, or perhaps even

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television's technological nature and its commercial use disfavor sustained concentration as attention is grabbed by a dynamic, fast-moving, and ever-changing series of images" that "helps to erode a continuous and critical social perspective."); JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY 379 (John Wilkinson trans., Alfred A. Knopf 1964) (1954) ("television even more than the radio, shuts up the individual in an echoing mechanical universe in which he is alone"); TODD GITLIN, THE WHOLE WORLD IS WATCHING: MASS MEDIA IN THE MAKING AND UNMAKING OF THE NEW LEFT (1980).

95. PUTNAM, *supra* note 93, at 287-363.

96. *See* U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: POPULATION PROFILE OF THE UNITED STATES, 1999, at 7, 15 (2001).

97. *Id.* at 12 ("The 219 million people living in metropolitan areas in 1999 accounted for 80 percent of all people living in the United States."). *See* Briffault, *Our Localism*, *supra* note 52; Briffault, *Contemporary Federalism*, *supra* note 41.

survive. Participatory democracy is a very fashionable idea these days,[98] but it presents rather formidable difficulties when considered from either a descriptive or prescriptive point of view. Descriptively, the difficulty is the one just given: people in modern American society are generally nonparticipants, particularly in politics. As Putnam has observed, there is an increasing trend toward an atomized social existence, linked to the outside world through passive media such as television. We simply cannot rely on participation at the local level to provide accountability for government. In fact, the devolution of authority to local governments may well produce the opposite effect. If only a minority of Americans in any given locale choose to participate in politics, effective participation may require that this relatively small and generally dispersed group be aggregated at the national level if it is to be effective. For example, the number of people in any locality who are concerned about distant environmental disasters like the destruction of the rain forests or the extinction of the baleen whales is likely to be quite small, too small to influence any public official. It is only when all these dispersed people manage to combine into a nationwide movement that they can generate the resources and obtain the media attention that is necessary to influence public policy.

Participatory democracy fares no better as a normative idea. Imposing a moral or legal obligation on people to participate in government conflicts with our basic commitment to liberty, as Bruce Ackerman points out.[99] Citizens should be free, if they choose, to be politically inactive, and they should be safe from being reviled as unpatriotic or from being oppressed for failing to protect their interests, if they make that choice. Of course, if government becomes oppressive, if it denies all the people civil liberties or permits mistreatment of an unpopular minority, citizens may have a moral obligation to resist, perhaps even to engage in open disobedience at the risk of their lives, liberty or livelihoods. But one of the greatest

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98. *See, e.g.*, JOHN BURNHEIM, IS DEMOCRACY POSSIBLE? (1985); CAROL C. GOULD, RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMY AND SOCIETY (1984); PAUL HIRST, ASSOCIATIVE DEMOCRACY: NEW FORMS OF ECONOMIC AND SOCIAL GOVERNANCE (1994); ALAIN TOURAINE, WHAT IS DEMOCRACY? (David Macey trans., Westview Press 1997) (1994). It is related, moreover, to the equally fashionable idea of deliberative democracy. *See* JOHN S. DRYZEK, DISCURSIVE DEMOCRACY: POLITICS, POLICY AND POLITICAL SCIENCE (1990); JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM (1991); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); JURGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., MIT Press 1996) (1992); JOHN RAWLS, POLITICAL LIBERALISM (1993); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993) [hereinafter SUNSTEIN, PARTIAL]; Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 67 (James Bohman & William Rehg eds., 1997).

99. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

gifts that a well-ordered, morally just regime can grant its citizens is exemption from such onerous demands. However inspiring it may be to see people take great risks for freedom and justice, the need to risk one's very existence in this world to secure these benefits that every human being deserves is simply awful. The devolution of authority to local government in the interest of accountability, by relying on participation to control decisions that were originally made at another level, denies people the liberty that they deserve from such demands and effectively punishes people for their nonparticipation.

None of this is to suggest that local communities never become mobilized about a given issue, or that local governments are never held accountable. Such events occur, and they may count as some of the more dramatic cases of political participation in our governmental system. But the accountability argument for devolution of authority to local governments cannot rest on intermittent eruptions of political involvement, no matter how dramatic. Rather, the argument depends on continual involvement and constant vigilance of local populations, their ability to monitor the quotidian decisions that constitute the bulk of virtually every assignment of government authority. Without such vigilance, the devolution of authority to local government will, on the whole and with few exceptions, decrease government accountability.

B. *Devolution to Private Parties: The Enforcement Process*

Unlike the accountability arguments for political devolution, the accountability arguments for devolution to private parties do not focus on the structure of government but rather on the government's relationship to citizens. These arguments begin with the recognition, which other accountability arguments so often ignore, deny, or condemn, that enforcement of public policy directives is a crucial task of modern government.[100] The basic idea is that enforcement will be more effective, that it will better accomplish its ultimate purpose, if private parties, whether organizations or individuals, are accountable for their own actions. Such accountability can be achieved by transferring, or devolving, power from administrative agencies and other governmental institutions to these private parties.[101] Thus,

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100. That is not to say that this literature is restricted to administrative agencies. It also discusses courts and legislatures. *See, e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). The point is simply that this literature, unlike other bodies of legal scholarship, takes agencies fully into account and gives them their proper place in modern government.

101. JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION (2002); BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME, AND ACCOUNTABILITY (1993); MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002); L. David Brown & Mark H. Moore, *Accountability, Strategy and International Nongovernmental Organizations*, 30 NONPROFIT & VOLUNTARY SECTOR

accountability arguments for enforcement devolution recommend that classic command-and-control regulations be replaced with a more cooperative and collaborative approach. The resulting mode of governance is sometimes described as New Public Governance, or the post-regulatory state.

Arguments for devolving enforcement to private parties draw on some of the most convincing and illuminating insights in modern social science. Human behavior and human institutions, we have learned, are enormously complex. They are grounded on an intersubjective process that creates the interpretive framework, or structure of meaning, that makes individual thought possible, and that generates social institutions. These institutions then become part of the intersubjective process by which new interpretive frameworks and structures of meaning are created.[102] Thus, social scientists are beginning to connect the growth and operation of institutions with the internal experience of individuals, demonstrating that individual motivation and construction of meaning generate institutions and that institutions affect individual motivation and meaning. Much of this process occurs in civil society, that is, in the set of interactive relationships among people that is separate from either the economic or political systems.[103] Rejecting the Hobbesian view that society is essentially political and the Marxian view that society is essentially economic, modern social scientists have revealed the truly social character of the process that underlies all human behavior and human institutions.

One of the most important lessons that has been derived from these insights is that neither individual nor institutional behavior can be readily altered by simple government ukase. The intersubjective processes of civil society are generally too robust to be effectively controlled in this manner, particularly in an open, nonrepressive

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Q. 569 (2001); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Jerry L. Mashaw, Contracting Out and the Structure of Accountability (Sept. 9, 2003) (unpublished manuscript, on file with author); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422 (2003).

102. *See generally* PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966); RICHARD S. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM (1983); NELSON GOODMAN, WAYS OF WORLDMAKING (1978); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); ALFRED SCHUTZ, THE PHENOMENOLOGY OF THE SOCIAL WORLD (George Walsh & Frederick Lehnert trans., 1967); PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY (1958).

103. *See generally* JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY (1992); HABERMAS, *supra* note 98, at 359-87; JOHN KEANE, DEMOCRACY AND CIVIL SOCIETY (1988); NIKLAS LUHMANN, THE DIFFERENTIATION OF SOCIETY (Stephen Holmes & Charles Larmore trans., 1982); ADAM B. SELIGMAN, THE IDEA OF CIVIL SOCIETY (1992).

system like our own.[104] Sometimes government commands will provoke resistance because they conflict with personal attitudes, institutional structures and patterns of meaning in civil society. More often, they will be ignored or reinterpreted in a manner that undermines their intended purpose. To be sure, the government can impose sanctions on those who violate its commands, but sanctions are too costly, both politically and economically, to be relied on in the face of widespread noncompliance.

On the basis of these insights, social scientists and legal scholars have begun to develop new approaches to the implementation of social policy and administrative programs.[105] This literature is too subtle and complex to be briefly summarized, but it will be enough for present purposes to note some of its major themes. First, it argues that effective implementation cannot be based on commands issued by a government agency that emerge from the agency's own needs and modes of thought, without paying any attention to the subjects of the program. Rather, the agency must take cognizance of the organizational structure of the firm, or the meaning structure of the individual. Second, the best way to take cognizance of these complex matters is to open a dialogue with the firm or individual, to learn about them through what Weber called *verstehn*, or empathetic understanding.[106] Third, in order to implement the program, to obtain compliance with its essential features, the firm or individual should be allowed to play an active role in the implementation process. This is

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104. The vigor of the black market in the Soviet Union suggests that even enormously repressive regimes have difficulty controlling people by direct command. *See* JÁNOS KORNAI, THE SOCIALIST SYSTEM (1992).

105. *E.g.*, IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); BRONWEN MORGAN, SOCIAL CITIZENSHIP IN THE SHADOW OF COMPETITION: THE BUREAUCRATIC POLITICS OF REGULATORY JUSTIFICATION (2003); WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY (2001); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); Daniel A. Farber, *Revitalizing Regulation*, 91 MICH. L. REV. 1278 (1993); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Neil Gunningham & Darren Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Protection*, 21 LAW & POL'Y 49 (1999); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minn. L. Rev. 324 (2004); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159 (2000); Sturm, *supra* note 100; Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-regulatory Law*, *in* DILEMMAS OF LAW IN THE WELFARE STATE (Gunther Teubner ed., 1986).

106. 1 WEBER, ECONOMY AND SOCIETY, *supra* note 4, at 8-9; MAX WEBER, *"Objectivity" in Social Science and Social Policy*, *in* THE METHODOLOGY OF THE SOCIAL SCIENCES 49, 50-85 (Edward A. Shils & Henry A. Finch eds. & trans., Free Press 1949) (1917)[hereinafter WEBER, *Objectivity*]; MAX WEBER, *The Meaning of "Ethical Neutrality" in Sociology and Economics*, *supra*, at 1, 40-43. *See* FRITZ RINGER, MAX WEBER'S METHODOLOGY: THE UNIFICATION OF THE CULTURAL AND SOCIAL SCIENCES 92-121 (1997).

partially achieved by the dialogue established by the agency but more effectively pursued by allowing the firm or individual to develop its own strategies for compliance. Fourth, these strategies will be most effective if the firm or individual internalizes them, that is, absorbs them into its meaning structure so that they become part of its mode of operation or existence. Fifth, this process can be tied into the layered or interactive character of civil society. Instead of interacting directly with the subject, in the manner just described, the agency can interact with an intermediate institution, and that institution, once it has developed and internalized a compliance strategy, can then interact with the subject. In doing so, it can use the same process, often in a more subtle and effective manner than the agency. In summary, new approaches to implementation often devolve the authority to devise implementation techniques to the subject or to an intermediate institution.

There is widespread enthusiasm for implementation programs of this sort at present. Several have already been enacted into law, while others now serve as a modus operandi for administrative agencies. The U.S. Organizational Sentencing Guidelines, adopted in 1991,[107] recommend greatly reduced penalties for corporate violations if the corporation has developed and implemented its own program for enforcing ethical business conduct. The Guidelines list minimum requirements for an effective program, including promulgating a written code, communicating the code to employees, establishing monitoring systems to detect violations, encouraging employees to report such violations, responding to any violations that are detected, and taking all reasonable steps to prevent future violations. The Sarbanes-Oxley Act of 2002,[108] passed in response to the Enron scandal, relies heavily on the Guidelines, requiring that all companies subject to the Act file reports describing their internal ethics codes and increasing the penalties for firms that fail to meet the criteria specified in the Guidelines.

The term accountability is sometimes used to describe the subject's reaction in this New Public Governance mode of implementation.[109] The subject, it is said, becomes accountable for its actions by participating in the implementation process. Rather than being told what to do, the firm or individual develops its own approach, through an open dialogue with the agency, and then takes responsibility for

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107. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 8A.1.2 (2001). *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

108. 15 U.S.C.A. §§ 7201-7266 (West Supp. 2004).

109. *See supra* note 105 (citing sources).

implementing or internalizing the approach that it developed. Thus, there has been a devolution of authority from the implementing agency to the subject. Rather than being given a command to end discrimination or control unethical business practices, the firm is invited to develop its own strategy and is described as becoming accountable for either the strategy itself or the results that it achieves. Similarly, rather than simply being subject to a prescribed punishment, a miscreant individual may be invited to propose a plan for altering his behavior and then be described as having become accountable for either the plan or the behavior.[110]

To describe implementation programs of this sort in terms of accountability is usually inaccurate and potentially dangerous as well. The firms and individuals who are subject to these programs are not being made accountable for their own actions or making their own choices; they are being manipulated by the administrative state. These modern implementation strategies may be more effective, but if so, they are effective because they get inside the firm's internal structure, or the individual's head, and alter their behavior to achieve a collectively established social purpose. Far from granting the subject autonomy or making it accountable for its own actions, they undermine its will to resist, making it an accomplice in the governmental effort to control it.[111] The devolution of authority is set within a larger framework of continued supervision. Of course, there may be no supervision, but in that case, there is no accountability in any real sense.[112] This is also dangerous, as it misleads us into thinking that the firm is being supervised or controlled, while in actuality it can violate applicable public norms with impunity.

If the subject firm or individual is truly accountable to the implementing agency in the standard bureaucratic sense that it must answer for disobedience, then it will be punished if it does not behave

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110. *See* JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION (2002); JOHN BRAITHWAITE, REGULATION, CRIME, FREEDOM (2000); FISSE & BRAITHWAITE, *supra* note 101; LAWRENCE W. SHERMAN, EVIDENCE-BASED POLICING (1998), *at* http://www.policefoundation.org/pdf/Sherman.pdf.

111. *See* NORMAN B. MACINTOSH, MANAGEMENT ACCOUNTING AND CONTROL SYSTEMS: AN ORGANIZATIONAL AND BEHAVIORAL APPROACH 246-49 (1994) (discussing pseudo-empowerment).

112. Michael Trebilcock and Edward Iacobucci argue that the market provides accountability for private firms because of the discipline imposed by market competition, so that accountability can be achieved without any supervision. *Supra* note 101, at 1447-51. But, while there are certainly issues of bureaucratic accountability within the hierarchical structure of every firm of significant size, *see* RICHARD M. CYERT & JAMES G. MARCH, A BEHAVIORAL THEORY OF THE FIRM (1963); OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975), market competition does not make the firm answerable to anyone; it is simply a constraint on its actions which sometimes works to the benefit of consumers and sometimes works to their detriment. Their claim is equivalent to saying that Newton's laws of motion make drivers accountable to pedestrians.

the way the agency wants. It is true that what the agency wants has become less specific and more rational in the New Public Governance Model. Instead of identifying a goal, choosing the implementation strategy it thinks will work, and then requiring the subject to obey that implementation strategy, whether it works or not, the agency now identifies a goal, lets the subject choose part or all of the implementation strategy, and evaluates the success of its efforts by determining whether or not it has achieved its goal. But this does not alter the basic reality that the agency is imposing a particular goal on the firm or individual. It simply means that instead of making unnecessary and possibly counterproductive demands for compliance, it can now avoid making these demands because it has the sophistication to get inside the subject and enlist it in achieving the agency's objectives.

Consider the example of combating drug abuse through treatment and rehabilitation programs that ask the individual to propose his own strategy for getting and staying off drugs.[113] Such programs are undoubtedly more humane than incarceration without treatment, and they are almost certainly more effective. They exist, however, in a context where the government is compelling the individual — albeit in a more humane and effective way — to do what the government wants, not what the individual wants. It is possible that the individual really does want to stop using drugs and welcomes criminal culpability as a means of compensating for a weakness of the will. More often, however, what the individual wants is to be in the same situation regarding his chemical stimulant of choice as alcohol users are regarding theirs, namely to be able to indulge his habit cheaply, safely, and in peace. Society, in its collective wisdom, has decided that he may not do so, however. Given this prohibition of his real desires, the addict probably prefers the rehabilitation program to incarceration, but that does not mean that he has been made accountable or responsible for his actions. Rather, he has been compelled and given a choice about the method of compulsion.

To be sure, the subject of the implementation program may ultimately accept the government's goal as its own. That is certainly the intention, and it is certainly the most effective implementation strategy, since compliance will then be voluntary and require far fewer government resources to achieve the same results. But one must be careful about the way one characterizes this process, since it poses real dangers. Our theory of government is based, at least in part, on the idea that people's views are exogenous to their interaction with the government, that the government is supposed to respond to their

113. *See* Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000).

desires, not create them. Our electoral process provides some guarantee that the new implementation techniques will be used to support collective purposes and against only those firms and individuals who violate those purposes. Nonetheless, a large enough number of actions taken at the individualized level can have systemic consequences, so that governmental action directed against those actions can serve as a means of altering widely held beliefs. One does not need to endorse Genet's view of the criminal as an existential hero[114] to perceive a real danger in the government's ability to alter collective norms through individualized sanctions.

The danger can be highlighted by considering Pavlovian thought reform, an early but still important effort to achieve voluntary compliance from a recalcitrant subject. Although Pavlov is associated, in the popular mind, with having trained dogs to salivate at the sound of a bell, he did not discover this technique but was simply using it to produce saliva for his experiments on digestion. What he did discover was that, when he rescued his dogs from near death in a flood, their conditioned reflex was gone. Further experimentation revealed that the application of stress, if continued long enough, could extirpate a good deal of learned behavior and leave the subject ready to be taught new behaviors by the experimenter.[115] Use of this technique on human beings in the Soviet Union and China revealed that the stress had to be applied beyond the point when the subject ceased resisting and said what he thought he was supposed to say, and up to the point when the subject ceased thinking for himself, and asked his interlocutor what he was supposed to think.[116]

It is not hard to imagine a variant of this technique being used with a recalcitrant firm. Implementation theorists have suggested that the most effective strategy that an agency can use to obtain compliance from a large group of regulated entities is the "nice" strategy of Tit for Tat, which applies punishment only in response to disobedience and ceases as soon as the disobedient behavior stops.[117] In a case of

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114. JEAN GENET, OUR LADY OF THE FLOWERS (Bernard Frechtman trans., Grove Press, 1963) (1952). *See* JEAN-PAUL SARTRE, SAINT GENET: ACTOR AND MARTYR 60-154 (Bernard Frechtman trans., George Braziller 1963) (1952).

115. 2 IVAN PETROVITCH PAVLOV, LECTURES ON CONDITIONED REFLEXES: CONDITIONED REFLEXES AND PSYCHIATRY (W. Horsley Gantt ed. & trans., 1941); IVAN PETROVITCH PAVLOV, ESSENTIAL WORKS OF PAVLOV (Michael Kaplan ed., 1966); YURI P. FROLOV, PAVLOV AND HIS SCHOOL: THE THEORY OF CONDITIONED REFLEXES (C.P. Dutt trans., 1937); WILLIAM SARGANT, BATTLE FOR THE MIND 51-75 (1957).

116. ROBERT JAY LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF "BRAINWASHING" IN CHINA (1989); SARGANT, *supra* note 115, at 77-101; EDGAR H. SCHEIN ET AL., COERCIVE PERSUASION (1961). The classic fictional portrayal is ARTHUR KOESTLER, DARKNESS AT NOON (Daphne Hardy trans., 1941).

117. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 20-27 (1992); Robert A. Kagan & John T. Scholz, *The "Criminology of the Corporation" and Regulatory Enforcement Strategies, in*

genuine recalcitrance, however, the agency might begin imposing sanctions and then continue imposing them until there is a breakdown in the structure of the firm and a new structure could be put in place. This is essentially what happened in the prison reform cases that the federal courts decided during the 1970s and 1980s, where the federal courts imposed a set of constitutional standards on state prisons. Confronted with recalcitrant state prisons, the judges moved from case-by-case adjudication to continuous monitoring. Retaining jurisdiction of the initial claim, sometimes for as long as a decade, they imposed a continuing stream of orders and sanctions until the old system simply broke down, the warden retired, and new officials who would voluntarily comply with the constitutional standards were installed in his stead. By that point, the prison had, through a process of internal reform triggered by the stress of judicial supervision, become a different institution.[118]

There is probably nothing objectionable about what the federal courts did in the prison cases. Prisons are public institutions that do not themselves have rights, and the prisons that were the subject of this intensive supervision were imposing truly barbarous treatment on individuals who, despite their incarcerated status, did have rights. The mere fact that the approach used by the courts can be analogized to Pavlovian thought reform does not render it invalid. But it cannot truly be said that the prisons became accountable for their actions or took responsibility for them. Rather, these institutions were transformed by a severe and effective method, a method that reflects sophisticated current thinking about governmental implementation strategies.

It is theoretically possible that administrative agencies or other public institutions would encourage genuine accountability on the part of private actors. To do so, they would need to abandon their fixed commitments to particular goals, as well as to particular techniques, and open themselves to a genuine dialogue about the purposes that regulation was designed to achieve. This would make the private actor an equal partner in the regulatory enterprise, rather than a subject to

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ENFORCING REGULATION 67 (Keith Hawkins & John M. Thomas eds., 1984); John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 LAW & SOC'Y REV. 179 (1984); John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 LAW & POL'Y 385 (1984). *See generally* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) (general analysis of Tit for Tat as an optimal strategy in repeated games).

118. For general discussions of the prison reform process, see BRADLEY STEWART CHILTON, PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS (1991); BEN M. CROUCH & JAMES W. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS (1989); FEELEY & RUBIN, *supra* note 41; STEVE J. MARTIN & SHELDON EKLAND-OLSON, TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN (1987); and LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF THE FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM (1989).

be manipulated, however subtly. But government agencies are unlikely to adopt this approach, and it would not be normatively desirable for them to do so. Agencies are part of a hierarchically organized government apparatus that transmits goals and expectations from one level to another, a system of superiors and subordinates where subordinates are held accountable in the true, bureaucratic sense of this term. It is not likely that a subordinate official could tell his superior, or his superior tell the president or a congressional committee, that he had changed the purpose of the regulatory program after consultation with the subjects of the regulation. Moreover, these purposes represent the collective decisions of a democratic government. They are not typically selected by the voters, for reasons described above, but they are selected by elected officials who represent the voters. To allow those purposes to be so readily undermined would raise much more serious normative problems than are raised by the flexible strategies that modern implementation theory recommends.[119] In summary, the devolution of enforcement to private parties has certain virtues as a governance technique, but describing it as making those parties accountable either conceals government manipulation of behavior behind a façade of apparent cooperation, or threatens to undermine the collective goals that the government is morally entitled to pursue.

C. *What Lies Beneath*

Accountability arguments for devolution of authority to local government or private parties are distinctly different from each other, but they spring from the same source, and that source is the same as the source that unites electoral accountability arguments for nondelegation, the unitary executive and federalism. It is an abiding hostility toward the administrative state, a desire to deny or dissipate its all-too-evident reality. The idea of accountability serves as an alternative to administration in these arguments; if local governments or private persons are accountable for their actions, then they do not require the sort of regulation, or ongoing supervision, that has fueled the expansion of modern bureaucracy. As before, this is not to say that devolving authority to local government or private parties are necessarily bad ideas, but rather that these ideas must rest on other grounds, and cannot be bolstered by arguments based on accountability. Use of the accountability concept in these contexts is alluring, but because it is essentially political escapism, it will ultimately mislead us, encouraging the adoption of policies that will

119. Even flexible strategies may raise serious concerns that need to be addressed. For an attempt to do so, see FEELEY & RUBIN, *supra* note 41, at 362-88.

produce effects quite different from those we seek when we invoke accountability.

The idea that devolving authority to local government will increase accountability does not appear to be anti-administrative on its face. After all, the authority might be transferred to localities from elected officials at the state or federal level, that is, from precisely those officials who were described above as the beneficiaries of our anti-administrative instincts. For example, one could recommend, in theory, that the increased responsibility for making public policy — having been transferred to Congress, or the president, or state officials on accountability grounds by the nondelegation doctrine, the unitary executive idea, or federalism — should now be transferred to local officials on the same grounds. But accountability arguments for transfer of authority to elected officials generally envision that the authority will rest with these officials. The arguments favor elected officials because they are selected by a process of collective choice, not because they can serve as a convenient way station for some further transfer of authority. As discussed above, these arguments are fanciful, but the one bit of realism they contain is that they recognize the national character of modern politics. To abandon that recognition is to descend into an even deeper political fantasy. It is truly difficult to imagine that local governments could make basic decisions regarding foreign policy, monetary policy, or even agriculture policy, particularly by some means that could be described as accountable to their citizens, and that these local decisions could be somehow aggregated into national action.

In fact, hardly anyone argues for the devolution of high-level policy making, of the sort that elected officials are supposed to formulate, to local entities. Accountability arguments regarding high-level policy typically seek to transfer authority to elected officials at the national level, specifically Congress and the president, in the manner that was discussed above; at their furthest reach, these arguments recommend transfer of authority to elected state officials. Recommendations to devolve government authority to local government almost always refer to administrative authority, the authority to implement public policy or to establish policy relating to more local matters, such as policing, health care, welfare, housing, or education. Because these functions are typically carried out by administrative agencies at the state or federal level, their devolution to localities represents the transfer of authority from administrative agencies, and accountability arguments in their favor convey a distinctly anti-administrative tone.

Just as it is possible to imagine that the devolution to localities is not anti-administrative because it represents a transfer of authority from elected officials, it is possible to imagine that it is not anti-administrative because the local organizations to which authority is

transferred would be essentially administrative in character. This has a certain realism to it, particularly when the locality is a place like New York City or Los Angeles. But in fact, the devolution of authority to localities and certainly the accountability arguments in favor of such devolution typically do not envision bureaucratic agencies as the recipients of the transferred authority. Indeed, they do not typically imagine New York or L.A. as the localities. What is typically envisioned is the transfer of authority to a relatively simple structure in a relatively small locality. This is the only situation where the newly exercised authority could be reasonably regarded as transparent to the citizens, and thus represent an increase in accountability.

The reasons why increased accountability is unlikely to result from this scenario have been discussed above. The further point that is being argued here is that the entire concept is inherently anti-administrative and is suspect on that basis. It is sustained by the desire to escape the administrative structure of modern government and to implement public policy through simple, small-scale structures that communicate directly with the governed. There is thus a strong link between the idea of devolving authority to localities and the essentially antiadministrative idea of communitarianism.[120] Both these notions envision small, self-contained political entities, where people's attention is focused on local events and people's energies are directed to participation in those events. It is an idyll of small-town America, a pastoral vision that beckons to us from our nostalgia for a bygone, non-administrative past.

Clearly, there is a close, albeit complex, relationship between bureaucratization and scale.[121] Large institutions, at least in the modern world, are almost always organized bureaucratically, while small ones can be organized on different principles, some of which may render them more accountable to those they serve. The devolution of authority to local authorities can thus be viewed as an alternative to bureaucratization. It is also an invitation to nostalgia. During the early Middle Ages, Europe was divided into rather large political entities — the Holy Roman Empire, France, the Angevin

120. *See* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA (1993); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996); PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY (1992). For a critique, see Kathryn Abrams, *Kitsch and Community*, 84 MICH. L. REV. 941 (1986), and Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992).

121. *See* JACOBY, *supra* note 58; WOLFGANG J. MOMMSEN, THE AGE OF BUREAUCRACY: PERSPECTIVES ON THE POLITICAL SOCIOLOGY OF MAX WEBER (1974); WEBER, *supra* note 4, at 971-87.

Empire, and England.[122] But the administrative apparatus needed to govern entities of this size was beyond the reach of Europeans at the time. Instead, control was decentralized through the device of feudalism, which granted virtual autonomy to subsidiary units in exchange for loyalty to the regime.[123] This complementary relationship between bureaucracy and devolution continues to the present day. Bureaucratization follows almost inevitably from large-scale institutions, and the devolution of authority to smaller units represents the only realistic possibility of avoiding it.[124] Such devolution, for reasons already discussed, will not lead to any real increases in accountability. The claim that it will, however, gains increased appeal from the implicit understanding that devolution is an alternative to the administrative state.

The inclination to describe flexible implementation techniques in terms of accountability also reflects an abiding discomfort or hostility to the realities of the administrative state.[125] If flexible implementation truly made the private parties involved accountable for their actions, then the process could not properly be described as regulation. Rather, it would be a truly collaborative enterprise, where individualized interactions replaced hierarchy and a spirit of benign camaraderie replaced the instrumental rationality of the Weberian state. This seems appealing at first, and all sorts of positive terms such as cooperation, mutual respect, egalitarianism, and open mindedness come to mind as descriptions of it. The difficulty is that this approach

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122. Europe was also divided into a welter of smaller political entities. What defined the large ones, however, was that they all recognized the authority of a single king or Emperor. *See* JANET L. NELSON, POLITICS AND RITUAL IN EARLY MEDIEVAL EUROPE (1986).

123. GEOFFREY BARRACLOUGH, THE ORIGINS OF MODERN GERMANY (1984); HEINRICH FICHTENAU, THE CAROLINGIAN EMPIRE (Peter Munz trans., 1978); F.L. GANSHOF, THE CAROLINGIANS AND THE FRANKISH MONARCHY: STUDIES IN CAROLINGIAN HISTORY (Janet Sondheimer trans., 1971); FRANÇOIS LOUIS GANSHOF, FRANKISH INSTITUTIONS UNDER CHARLEMAGNE (Bryce Lyon & Mary Lyon trans., 1968).

124. The problem, of course, is that such avoidance comes at an unacceptably high cost. In medieval Europe's case, it cost a thousand years of internal disorder and bloodshed; in our case, it leads to the abandonment of our collective goals, the dismantling of the welfare state, and a probable descent into that same condition of disorder.

125. See, for example, Trebilcock & Iacobucci, *supra* note 101, at 1448-49, which argues against public supervision of firms by declaring that government bureaucracy involves "rigid job classification systems, lockstep and seniority-based systems of promotion, a lack of pecuniary or nonpecuniary reward systems for superior individual performance or for innovative or productivity-enhancing ideas, high levels of job security, rigid line-item budget constraints, budgeting cycles that entail forfeiture of unspent monies and reduced future budget allocations that create incentives to 'move the money' at the end of the cycle — in general, a web of bureaucratic red tape driven by concerns over process and inputs and not outcomes." This tirade is not only overstated — and recognized since 1932 as applicable to private firms as well, *see* ADOLPH BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1991) — but largely beside the point. The accountability issue is not whether private firms are taken over and run as government institutions, but whether they are regulated.

to governance represents a major retrenchment of our ability to achieve collective goals. The majority would no longer be able to deploy the machinery of government to impose its desires on the economic or social system. Instead, each private person or institution would have the opportunity to establish its own goals with help, guidance, and advice from the unbureaucratic agents of the collectivity.[126]

To find a government such as this in American history, we must return again to the 1820s, and perhaps earlier. At this preregulatory time, government rarely interfered with private enterprise.[127] If one wanted to start a bank, for example, one simply collected some capital and started one. If one had enough capital, one would locate the new bank in a city. If one did not and feared that depositors and payees would make use of their common-law right to come in and demand their money over the counter, then one would start a wildcat bank, that is, a bank located somewhere in the woods, where the wildcats lived.[128] Individuals were subject to coercive laws, of course, but, as Hegel noted, if one did not like these laws, one could move to the frontier and live beyond the effective reach of legal rules.[129] The picture is not exact, to be sure, but it seems as close to a nonregulatory state as we have gotten, or are likely to get.

What the bitter experience of the nineteenth century taught us is that a modern economic system of industrial production, when granted such latitude, will lead to grinding oppression, inequality, and social dislocation at a level that the majority of people — those who do not own the means of production — will find unacceptable. Denied the franchise, they will rebel; granted the franchise, they will vote for public officials who will create an administrative state and impose

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126. *Cf.* DRUCKER, *supra* note 11, at 281-98 (explaining the need for centrally-established goals in private firm setting).

127. The origins of bureaucratic government in the United States are usually placed during the Jacksonian era. *See* MATTHEW C. CRENSON, THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA (1975); WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY 1830-1900 (1982); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971); LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-61 (1954). The development of a federal bureaucracy is generally dated somewhat later. *See* RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-77 (1990); BRIAN J. COOK, BUREAUCRACY AND SELF-GOVERNMENT 79-86 (1996); MCCRAW, *supra* note 27. This even applies to the military bureaucracy. *See* WILLIAM H. RIKER, SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY (1957).

128. *See* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR (1957).

129. GEORG WILHEIM FRIEDRICH HEGEL, PHILOSOPHY OF HISTORY 86 (J. Sibree trans., 1956). Because of this lack of population pressure, and, in his view, the consequent lack of regulatory governance, Hegel dismisses the United States as a useful example in his theory of state development. *Id.* at 87; *see also* FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY (1920).

their goals on the owners.[130] One hundred years later, this state, with its health and safety legislation, unemployment compensation, labor regulation, environmental protection, social security, public housing, and innumerable other regulatory programs, is so well established that it is easy to overlook its general significance, and concentrate on its specific and apparent failures. None of its regulatory programs work perfectly, and some do not even work particularly well. But abandoning the entire apparatus is not only infeasible, but inconceivable; it is not on the current political agenda of any industrialized nation.

The creative regulatory techniques described as New Public Governance are a promising way to improve the performance of our regulatory apparatus. Many regulatory programs still bear the imprint of their gestation; they still embed the adversarial, contentious quality that regulation first displayed when it was being advanced in opposition to the prevailing traditional or laissez-faire approach to governance.[131] They treat the regulated party as an opponent, employing commands backed by sanctions in an unsophisticated attempt to compel specified behaviors. These features can now be modified and, in many cases, should be. There are more effective ways to obtain compliance and more cooperative means for defining the behaviors that will lead to the desired results. But this promising reformulation of our regulatory system crosses the line into the abandonment of collective goals at precisely the point where we begin to think of regulated parties as responsible for their own actions. At that point, regulation is no longer achieving the long-term goals that the majority of citizens desire. Rather, it is being undermined by the conflicting goals of the regulated parties.

In the final analysis, the modern regulatory state is not only bureaucratic, impersonal, and unpoetic, but also uncomfortably partisan. It imposes the desires of the majority on the elites who can advance perfectly plausible claims to their own social vision. It reflects the fact that a political struggle took place in which salaried people triumphed and owners of capital were defeated. Although our democratic political ideology endorses this result, it has some disconcerting features, features to which the Supreme Court

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130. *See* REINHARD BENDIX, NATION-BUILDING AND CITIZENSHIP (1977); JÜRGEN HABERMAS, LEGITIMATION CRISIS (Thomas McCarthy trans., Beacon Press 1975) (1973); GILES MACDONOGH, PRUSSIA: THE PERVERSION OF AN IDEA (1994); ADAM PRZEWORSKI, CAPITALISM AND SOCIAL DEMOCRACY (1985); Seymour Martin Lipset, *Radicalism or Reformism: The Sources of Working-class Politics*, 77 AM. POL. SCI. REV. 1 (1983).

131. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978); Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986); Teubner, *supra* note 105.

reacted in the substantive due process cases,[132] and that still trouble many observers, to say nothing of those who are subject to its consequences.[133] But that is the political world that we inhabit. Adding the idea of accountability to current regulatory reform efforts goes beyond the effort to improve our regulatory system and expresses an underlying hostility toward that system that few people would be willing to defend in explicit terms. Like accountability arguments for devolution of authority to local government, accountability arguments for devolving authority to private parties express a counterproductive nostalgia for a world that we have lost, and that we would be both unable and unwilling to retain.

III. THE REAL ROLE OF ACCOUNTABILITY

If, as argued above, the concept of accountability cannot be used to describe elected officials' relationship to voters or the devolution of authority to local institutions or to private persons, does this familiar concept have any meaning at all? In fact, it has a well-established meaning and serves as a useful concept for describing certain relationships in modern government. As used in ordinary language, accountability refers to the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation. The concept is useful because it is a basic mechanism of administrative or bureaucratic government, that is, of the mode of government that is dominant at the present time and shows no sign of being displaced. It is precisely this connection to administrative government that makes the term accountability such an appealing device for expressing anti-administrative impulses such as nondelegation, localism, and the devolution of public authority. And it is precisely this connection that makes these efforts to use the term for anti-administrative purposes so incoherent.

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132. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905). *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA (1993); SUNSTEIN, PARTIAL, *supra* note 98, at 40-67 (1993); Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489 (1998).

133. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

A. *The Basic Concept*

The real role of accountability in a modern state must be sought within the complex structure of the administrative hierarchies that constitute our basic mechanism for governing ourselves. Accountability is one means by which superiors control subordinates, and thus a means by which policies promulgated at the highest levels of government — the president, the legislature, or the heads of agencies — are translated into governmental action.[134] It is not the only means of supervision, however. An understanding of accountability thus requires us to determine when it is being used, when it is not being used, and why this choice has been made. Such organizational issues are crucial to the performance of the governmental agencies that we rely on so heavily in the modern administrative state.[135]

Consider a simple governmental task — maintaining the lawns in front of the public buildings in a city. This task involves, at a minimum, cutting the grass, removing weeds, cleaning up trash, and replacing grass that has been destroyed by foot traffic. It might also include planting and maintaining ornamental flowers or adding aesthetic elements like outdoor sculptures. Initial responsibility for this task, as for virtually any other governmental task, has been assigned to an agency, which I will call the Bureau of Public Buildings. The chief administrator of this bureau, called the superintendent, has a subordinate who is specifically charged with maintaining the lawns, and the subordinate has a group of manual laborers under his control who perform the actual maintenance functions. This is the Grounds Department, and he is the department chief. We will assume that the superintendent, the chief, and all the relevant employees are civil servants; the superintendent may have appointed the chief, or the chief may have already been in his position when the superintendent arrived. The chief might have some professional subordinates between him and the manual laborers or he might not, depending on the size of the city.

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134. *See* David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353 (2003). In response to MINOW, *supra* note 101, who argues that privatization can be disciplined through democratic accountability, *see id.* at 1259-71, Saperstein points out that the real mechanism of accountability is administrative, and, as a result, Bush's faith-based initiative program will inevitably lead to regulatory supervision of religious institutions. Minow does acknowledge administrative supervision as one form of accountability, *see id.* at 1268-69, but her primary emphasis is on democratic processes such as election and public debate.

135. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 3-24 (1989). *See id.* at 14 ("The German army, the Texas prisons, and Carver High School did a better job than their rivals because they were, or became, better organizations.").

Ordinary language, as well as a more reflective analysis, indicates that the superintendent is the person who is in a position to hold the chief accountable for his actions. Other people might be in this position as well — the superintendent's superior, the chief executive of the city, the city council, or a special assistant appointed by any of these entities — but the most obvious person to hold the chief accountable is the superintendent, his immediate hierarchical supervisor. In order to hold the chief accountable, the superintendent must then tell the chief what she wants him to do, that is, she must issue some sort of instructions to him. Accountability, then, involves two elements: first, a hierarchical relationship, and second, a standard that the hierarchical superior imposes on a subordinate.

With respect to the first element of accountability, a recent discussion of the subject by Mark Seidenfeld is particularly helpful.[136] Relying on psychological studies, Seidenfeld suggests that accountability can improve decisionmaking by reducing some of the heuristic biases on which decisionmakers frequently rely.[137] For accountability to produce this effect, psychological studies suggest, the decisionmaker must be aware that he will be held accountable before he decides, and he must accept the legitimacy of the person imposing the standard. It is the purpose of an administrative hierarchy to resolve these issues in a definitive manner; the hierarchy defines supervisory relationships and declares those relationships to be authoritative.[138] These features are not unique to an administrative hierarchy, of course. They also apply to the legislature's or the judiciary's relationship to the administrative apparatus in its entirety.[139] Because the command structure in these cases involves the relationship between large institutions and often occurs only after a considerable period of time has elapsed, a particular administrator's awareness that she will be held accountable is likely to be attenuated.

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136. Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002).

137. *Id.* at 508-26.

138. My inclination is to avoid the term legitimacy in this context. *See* EDWARD RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE (forthcoming 2005). The term is inconsistent with the prevailing definition in political science, which refers to the acceptability of a political regime in its entirety. *See, e.g.*, RODNEY BARKER, POLITICAL LEGITIMACY AND THE STATE 11-24 (1990); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 71-74 (William Rehg trans., The MIT Press 1996) (1992); JÜRGEN HABERMAS, LEGITIMATION CRISIS 36-37 (Thomas McCarthy trans., Beacon Press, 1975) (1973); RONALD ROGOWSKI, RATIONAL LEGITIMACY: A THEORY OF POLITICAL SUPPORT (1974); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 25 (1990); WEBER, *supra* note 4, at 31; Alan Hyde, *The Concept of Legitimization in the Sociology of Law*, 1983 WIS. L. REV. 379. Even worse, it harkens back to premodern images of government, and most specifically to hereditary royal authority.

139. The judiciary's relationship to administrative agencies is the particular concern of Seidenfeld's article. *See* Seidenfeld, *supra* note 136.

The legislature may not turn its attention to the implementation of the law it has enacted; the judiciary may never consider a case that challenges her decision. Within an administrative hierarchy, these relationships are more definitive. Each decisionmaker is usually aware of the particular person or group of persons who will supervise his decision, and supervision is generally carried out more frequently and more immediately.

In fact, administrative hierarchies typically display a feature that can be described as second-order accountability. Those who supervise subordinates and hold these subordinates accountable in various ways, are themselves accountable to those superior to them, and specifically, they are accountable for the way in which they hold their subordinates accountable.[140] That is, one of the crucial tasks that most administrators must perform is the supervision of subordinates, and they are typically judged, or held accountable, for the quality of that supervision. Thus, the superintendent of public Works will be judged by her superior — the mayor, perhaps — based on the way that she holds the chief accountable. She is expected to monitor his performance, make sure he carries out his assigned tasks effectively, and discipline him if he fails to do so. The superintendent, in turn, will judge the chief by the way he holds the manual workers accountable for their performance, and her judgment of the chief's supervision of the manual employees in the department will in turn be a factor in her superior's judgment of her performance. Thus, an administrative hierarchy is frequently a chain of accountability, and the idea of accountability serves as an essential feature in the construction and operation of the hierarchy.

The second element involved in holding someone accountable is the standard that is applied. This standard may be either procedural or substantive, that is, it may specify a decision process or a desired result. In the example given above, a procedural standard would instruct the chief how to carry out the task in question — how often to cut the grass, what kind of weed killer to use, how many people should be assigned to picking up trash, and when the grass has become so worn that it needs to be replaced. A substantive standard would tell the chief what results he is expected to achieve — that the lawns should look neat, clean, and well maintained, or that the grass should never be more than half-an-inch high and that there should be no visible weeds or trash.

We might also describe the second situation by saying that the chief has been granted discretion, but, as I have discussed elsewhere,[141]

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140. *See generally*, HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR (2d ed. 1957).

141. RUBIN, *supra* note 138; Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997). For related views, see M.P. Baumgartner, *The Myth of Discretion*, *in* THE USES OF DISCRETION 129 (Keith Hawkins ed., 1992); Martha S. Feldman,

there are many reasons for avoiding this locution. To say that the chief has been granted discretion sounds like he has been given an explicit authorization to control some subject matter as he sees fit, like a medieval tax farmer or a colonial grantee. This is inconsistent with the structure of modern administrative governance. Specifying the results one wants a subordinate to achieve is not a grant in this sense but an alternative mode of supervision. It is used when the superior does not know what procedures will produce the desired result or believes the subordinate already knows these procedures. Of course, the superior wants the subordinate to use his judgment, in the sense of making good decisions instead of bad ones, but, in an administrative state, it is judgment directed toward a purpose identified by the superior.

In either case, the chief would be responsible for meeting the prescribed standard, and his job performance would be assessed on the basis of his ability to do so. The standard provides the basis on which the chief can, and usually must, justify his actions to the superintendent. Just as the first element of accountability, the hierarchical relationship, creates the structure of administrative governance, the second element, defined standards, establishes its content of this mode of governance. Administrative governance, as Weber pointed out in his seminal discussion of the subject, is instrumental in its basic conception; it is not viewed as divinely inspired, traditionally established, or inherently valuable, but rather as a means by which the people who compose a given society achieve their collective goals.[142] It does not place people in positions of authority because of their birth, their status, or their personal charisma, but because they are qualified to perform specified tasks. The standards that superiors impose on their subordinates are the mechanism by which goals are translated into reality, and the evaluation of subordinates by their superiors is the means by which the administrators' ability to carry out that task is assessed.

The hierarchical, standard-based process of accountability can be contrasted with other modes of government organization. In the premodern era, many public offices were treated as private property. In the classic case, a tax farmer would purchase the right to collect certain types of taxes in a certain geographic area from the royal government. He would then try to collect enough of this tax to earn back his original investment and make a profit. Similarly, the role of licensing some commercial function, such as hackney cabs, would be sold to a private person, who would then derive an income from the

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Social Limits to Discretion: An Organizational Perspective, *in* THE USES OF DISCRETION 163 (Keith Hawkins ed., 1992).

142. 1 WEBER, *supra* note 4, at 212-26.

licensing fees.[143] This approach, which is practical for a state that lacks administrative capacities, does not rely on the mechanism of accountability. The tax farmer is not in a hierarchical relationship within the royal government; he is a private person operating outside that government, and relating to it as a private property owner. No standards are imposed on him; his only obligation is to pay the purchase price, and he is then free to use any legal methods that he chooses and collect as much or as little tax money as he cares to. An indolent tax farmer who failed to collect much money would do the government no harm and would be a blessing for those subject to the tax.

Private property in general, both historically and conceptually, may be thought of as a grant of authority without accountability. In the feudal system of the Middle Ages, the king owned all the land in the realm, but he granted most of it as fiefs to private persons. These grantees, or vassals, then became rulers of the territory they were granted, keeping the peace, dispensing justice, caring for the poor, and managing relations with the church and other vassals. The ways that they carried out these functions were of no direct concern of the king, who generally did not impose standards on the vassal. While the relationship was strongly hierarchical in its overall structure, this hierarchy was based on status, not function; that is, the king's superiority was determined by his identity as king, and the fact that he had originally granted the land, not on his ability to give orders or instructions to the vassal.[144] Today, we retain, somewhat anachronistically, this same idea about property.[145] As Robert Nozick declares, "The central core of the notion of a property right in X,

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143. ERNEST BARKER, THE DEVELOPMENT OF PUBLIC SERVICES IN WESTERN EUROPE 1660-1930 (1966); HOWARD G. BROWN, WAR, REVOLUTION, AND THE BUREAUCRATIC STATE (1995); CLIVE H. CHURCH, REVOLUTION AND RED TAPE: THE FRENCH MINISTERIAL BUREAUCRACY 1770-1850 (1981); HELEN M. JEWELL, ENGLISH LOCAL ADMINISTRATION IN THE MIDDLE AGES (1972); GIANFRANCO POGGI, THE DEVELOPMENT OF THE MODERN STATE (1978); HANS ROSENBERG, BUREAUCRACY, ARISTOCRACY, AND AUTOCRACY: THE PRUSSIAN EXPERIENCE 1660-1815 (1958).

144. The principal duty that a vassal owed his overlord was loyalty, that is, not to take up arms against him. The other duties were regarded as contractual — providing a certain number of knights in time of war, or patrolling a border. *See* MARC BLOCH, FEUDAL SOCIETY 145-75 (L.A. Manyon, trans., 1961); HEINRICH FICHTENAU, LIVING IN THE TENTH CENTURY 138-56 (Patrick J. Geary trans., 1991); F.L. GANSHOF, FEUDALISM 69-93 (Philip Grierson trans., 3d ed. 1996).

145. Many property theorists still subscribe to the classic statement of Blackstone that property is the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile reprint, Univ. of Chicago Press 1979) (1766). *See* A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961); EPSTEIN, *supra* note 133, at 22-23; STEPHEN R. MUNZER, A THEORY OF PROPERTY 17 (1990); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 171 (1974); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 47 (1988).

relative to which other parts of the notion are to be explained, is the right to determine what shall be done with X; the right to choose which of the constrained set of options concerning X shall be realized or attempted."[146] In other words, the property owner is not accountable to any superior authority for her use of her property.

Another mode of government organization that can be contrasted with accountability is election. Elections, as discussed above, are primarily designed to solve the problem of succession and serve as an alternative to the administrative process of appointment. When a public official is elected, she owes her position to the voters and is thus removed from the governmental hierarchy. She cannot be given direct orders by another government official, nor can specific standards be imposed on her performance. Indeed, the rhetoric of election often centers on this sort of independence; some states elect their lieutenant governor or their attorney general, as opposed to appointing them, for the precise purpose of removing that person from the administrative control of the chief executive.

All these categories of government organization, whether administrative or nonadministrative, are being described conceptually, as Weberian ideal types.[147] In practice, of course, public officials in a hierarchy may be able to operate quite independently, while modern property owners are often subject to so many administrative regulations that they are virtual designees of the regulatory agency. The point of this discussion, however, is not to describe any particular governmental agency or function, but to explore the concept of accountability. This will then enable us to speak of insufficient accountability, apparent accountability, excessive accountability, and so forth. There is no harm in identifying a mode of governmental organization, even if it occasionally or often fails to be carried out in practice. What is important to avoid is the use of a term that has no underlying reality in the practice it purports to describe.

B. *Standards of Accountability*

One way to understand the nature of accountability more clearly is to pursue the distinction between procedural and substantive standards. This distinction, like all dichotomies, creates a risk of oversimplification, but it meets the basic criterion for a useful categorization because its implications illuminate the subject matter. It

146. NOZICK, *supra* note 145, at 171. The constraints Nozick is referring to are the general rules of criminal and civil law: "My property rights in my knife allow me to leave it where I will, but not in your chest." *Id.*

147. *See* 1 Weber, *supra* note 4, at 20-21; WEBER, *Objectivity*, *supra* note 106, at 89-106. *See* FRITZ RINGER, MAX WEBER'S METHODOLOGY: THE UNIFICATION OF THE CULTURAL AND SOCIAL SCIENCES 110-21 (1997).

is, however, only one of many possible ways to dichotomize the standards by which a superior can hold a subordinate accountable. Other possibilities are the distinctions between general and specific standards, between standards that exercise control and those that encourage learning, and between standards that state roles in advance and those that involve subsequent monitoring. These will be considered briefly below.

The most important implication of the distinction between procedural and substantive standards of accountability is that the former is internal to the agency, while the latter is external. That is to say, a procedural standard imposes requirements that can be observed and assessed by considering only the operation of the agency itself, while a substantive standard imposes requirements that can only be observed and assessed by looking outside the agency. The superintendent can determine how often the Grounds Department cuts the grass by observing the Grounds Department itself, but she can only determine whether the grass is ever more than half-an-inch high by looking at the actual grass. It follows from this distinction that substantive standards are more complex, but that they are less subject to distortion and manipulation.

Which standard requires more knowledge on the superintendent's part about the matter being regulated or controlled? It is difficult to say without microanalysis.[148] An initial reaction might be that the procedural standard requires more knowledge; instructing the chief to cut the grass to a half inch every ten days may suggest that the superintendent knows that the grass will not grow to more than an inch in height during the intervening period. On the other hand, she may have no idea; the only thing about grass cutting that she may know is that her budget only allows for cutting it every ten days. Conversely, a substantive standard may initially seem to demand a lower level of knowledge; perhaps the superintendent has no idea how fast grass grows, but simply has a mental image of a nice-looking lawn where the grass is no more than an inch high. If she does not know how often grass must be cut in order to maintain that height, however, her standard may have unexpected and unpleasant budgetary implications. Moreover, the fact that a lawn looks nice when the grass is less than one-inch high reflects a certain level of knowledge. In other words, the amount of knowledge that a superior is required to possess depends on the interaction between the accountability standard and the internal and external conditions that it affects. If the superintendent is content to accept any external results, a

148. For a description of microanalysis, see Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

procedural standard demands relatively little knowledge of external circumstances on her part. If she wants to achieve particular results, however, procedural standards demand more knowledge, because she must predict the results of the procedures she requires. A substantive standard demands considerably less knowledge than a procedural one, but only if the superintendent is relatively unconcerned about the costs incurred and about the ability of her subordinates to carry out the task.

This last consideration suggests that there is another type of knowledge that is implicated in the choice between procedural and substantive accountability standards — knowledge about one's subordinates, or the subordinate agency. If the subordinate agency is truculent or poorly managed, it may be better to tell it exactly what to do, via a procedural standard, rather than letting it decide on its own strategy. On the other hand, accountability standards of this sort can lead to purely formal obedience with no positive result, as in the old joke about the workers who are instructed to build a new machine exactly like the old one and proceed to do so, reproducing all the worn out features of the original. Substantive standards may impose a stricter discipline on the subordinate agent because it is being held accountable for particular results. The fact that these results depend on the state of the world, however, rather than simply a performance by the agency, can lead to complaints and excuses whose validity is difficult for the superior to assess. As James Q. Wilson points out, the choice between these standards may also depend on the nature of the agency's task. In some agencies, such as mental hospitals, the procedures are observable but the outcome is not, while in others, such as the Army Corps of Engineers, the outcome is observable but the procedures are not.[149] This will influence, if not determine, the preferable standard of accountability.

The superior's knowledge of the agency interacts with another crucial consideration — the manner in which the superior enforces the standards on her subordinates. Enforcing procedural standards is often simpler, because the standard specifies a required behavior by subordinates, and that behavior can be observed directly, or described in reports. Substantive standards involve greater complexities because they refer to a condition of the outside world, rather than a performance by the subordinates. Substantive standards can be either subjective or objective. The superintendent might tell the chief that she wants the lawns to look good, or pleasant, or spectacular and then decide whether he has achieved this standard by examining them herself or having a different subordinate examine them and report to

149. WILSON, *supra* note 135, at 158-71. The other two types of agencies, according to Wilson, are those where both the procedures and the outcomes are observable, such as the IRS, and those where neither is observable, such as public schools.

her. Alternatively, the superintendent might establish a set of specified criteria that she wants the chief to meet. She might prescribe that the grass must be no more than one-quarter-inch high, that there must be no visible weeds or bare spots, and that there must never be more than one piece of trash per square five yards. Such objective standards have an undeniable appeal and lie at the core of the well-known technique of "management by objectives."[150] They are often more suitable for simpler, less creative governmental functions, however. Suppose the Grounds Department is not only supposed to maintain the lawns but to embellish them with floral arrangements of its own design. An objective description of a flower bed might lead to a hideous mixture of fast-growing plants, while a subjective standard would compel the department to consider well-known, if difficult to articulate, aesthetic effects.

As the enforcement issue suggests, the complexity of the subordinate's task and the types of standards that are used to assess it often depend on whether the task involves the behavior of other human beings, typically private persons. What makes the public buildings example a relatively simple one is that at least two of the tasks, keeping the grass short and removing weeds, refer to conditions of the natural world that respond to fixed, external conditions, like the seasons or the amount of rainfall. Strategic and collaborative behavior with the agency's subject matter are unlikely to be present — you can't collude with grass. The other two tasks, cleaning up trash and replacing grass that has been destroyed by foot traffic, might also be fixed, external conditions for the Grounds Department, depending on its scope of authority. If it can fine people for littering or walking on the grass, or put up "Keep Off the Grass" signs, then human behavior is involved in its performance. But if it does not have such authority, then littering and foot traffic are fixed, external conditions so far as its performance is concerned. It cannot alter them but can only respond by taking corrective action — picking up the trash and replacing the grass that has been destroyed.

Circumstances of this kind apply in a variety of administrative settings when the government is operating its own facilities. In other settings, including almost all regulatory settings, the agency's performance depends on the behavior of human beings outside the agency, and frequently outside the government. This does not change the basic character of accountability, as a supervisory technique, but it does introduce a variety of complex issues. Specifying procedures

150. *See* STEPHEN CARROLL, JR. & HENRY L. TOSI, JR., MANAGEMENT BY OBJECTIVES: APPLICATIONS AND RESEARCH (1973); PETER F. DRUCKER, MANAGING FOR RESULTS: ECONOMIC TASKS AND RISK-TAKING DECISIONS (1964); PETER F. DRUCKER, MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES (1974); GEORGE L. MORRISEY, MANAGEMENT BY OBJECTIVES AND RESULTS IN THE PUBLIC SECTOR (1976).

demands extensive knowledge on the supervisor's part, because the results that the procedures will produce will now depend on an ongoing interaction between the agency and outside parties who are capable of strategic action. Specifying results, on the other hand, may lead to entirely unrealistic standards that the supervisor cannot enforce, thus negating any sense of accountability. In fact, formulating realistic substantive standards under these conditions may be so difficult that the supervisor may be inclined to restrict herself to procedural standards, not because they are more effective but because they allow her to satisfy her own superior, to whom she is accountable through second-order accountability, that she is at least doing something.

Relying on procedural accountability standards because substantive standards are too complex to formulate in regulatory situations may not seem to be a very promising approach, but it is a standard feature of American administrative governance, particularly when institutions outside an administrative agency are trying to hold the agency accountable. In supervising executive administrative agencies, for example, the president relies heavily on the Office of Management and Budget's meta-regulation.[151] This requires agencies to engage in cost-benefit analysis, often rejecting regulations because the agency failed to perform the analysis correctly.[152] Similarly, Congress has instructed courts, through the Administrative Procedure Act, to invalidate regulations because the agency failed to follow the statutorily required procedures.[153] Critics of this approach have pointed out that it often leads to counterproductive results, "ossifying" the administrative process with excessively elaborate procedures that interfere with its effectiveness.[154] Although reliance on procedural

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151. *See supra* Part I.A.

152. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *amended by and combined with* Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *in* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *amended by* Exec. Order No. 13,258, 3 C.F.R. 204 (2003).

153. *See* MARSHALL R. GOODMAN & MARGARET T. WRIGHTSON, MANAGING REGULATORY REFORM: THE REAGAN STRATEGY AND ITS IMPACT (1987); James F. Blumstein, *Regulatory Review by the Executive Office of the president: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851 (2001); Harold H. Bruff, *presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989); Morton Rosenberg, *presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues that May be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199 (1981).

154. R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983); Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443 (1990); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Piece, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300 (1988); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621 (1994).

accountability standards has become virtually habitual at the highest levels of American government, it is far from unavoidable, and it is certainly not the exclusive accountability approach within administrative agencies.

There are several other ways of dichotomizing accountability standards that are also illuminating and that interact with the crucial distinction between procedural and substantive standards. One is the distinction between standards that are specific and those that are generally stated. A specific standard is one that provides a lot of detail about whatever is being ordered, that contains precise, measurable requirements rather than open-ended terms, and that does not authorize the subordinate to make decisions on its own; a generally stated standard is the reverse. In judge-made or statutory law, this distinction is often described as the dichotomy between rules and standards.[155] It is a separate consideration from the procedural or substantive character of accountability standards described above, which means that all the combinations of the two distinctions are possible and, indeed, quite common. In the Grounds Department example, a general procedural standard would instruct the chief to cut the grass, collect the trash, and replant worn areas on a regular basis. A highly specific procedural standard would require the chief to cut the grass every ten days and remove a defined set of weeds every five days, to collect all visible trash every other day, and to resod any area where bare earth was showing within three days. A general substantive standard would be to keep the lawns neat and clean. A highly specific substantive standard might state that the grass must never be more than one inch high, that there must never be more than one visible weed or piece of trash per three square yards, and that there must never be more than three square inches of exposed dirt on any of the designated lawns.

General standards, whether procedural or substantive, may be employed because the superior trusts the subordinate, or because she does not know enough to be more precise, or because she has other means of controlling her subordinates. Any definitive explanation of why these standards, as opposed to more specific ones, are being used requires microanalysis. Even the principle that specific standards indicate more intensive supervision may not always apply. Because of second-order accountability, the supervisor may prefer to issue specific standards even in a situation where they do not effectively

155. *See* FREDERICK SCHAUER, PLAYING BY THE RULES (1991); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

control the subordinate; similarly, when she has complete control of the subordinate, abjuring specific standards may insulate her from such second-order accountability and leave the subordinate within her exclusive control. One thing that can be said is that the dichotomy between general and specific standards interacts with the internal and external aspect of the procedural-substantive distinction. Specifying a procedural standard involves closer regulation of operations within the administrative agency, while specifying substantive standards involves closer regulation of the agency's effect on others. It also interacts with the distinction between subjective and objective substantive standards. Generally speaking, subjective standards ("act in a way that pleases me") will tend to be inherently general, but even this principle may not apply if the subordinate possesses intimate knowledge of the superior's preferences.

Still another crucial distinction between different standards of accountability involves the contrast between command and learning. Command means that the superior will attempt to tell the subordinate what to do and hold the subordinate accountable for doing it. Learning relies on the subordinate to fill in details, change the procedures with changes in circumstances, or even modify the desired result and holds the subordinate accountable for carrying out that process in some particular way. Learning is preferable to command when the superior knows the result it is trying to achieve but does not know the means for achieving it, when circumstances are likely to change in ways that the superior cannot predict, or when the superior does not even know the precise result that she desires.[156] Most of the implementation approaches suggested by New Public Governance rely on learning, although they tend to focus on learning by regulated parties, rather than by subordinates within the administrative apparatus.[157]

The choice of the learning approach is typically associated with general, rather than specific standards of accountability, but it also interacts with the substantive-procedural dichotomy. The first learning situation, where the superior wants the subordinate to take account of changing circumstances, leads to the use of purely substantive standards of accountability, or very general procedural standards. This is relatively well understood and well accepted; administrators are "on the ground" or "in the trenches" or in some other low-lying metaphorical position where they regularly receive information that is

156. *See* CHRIS ARGYRIS, REASONING, LEARNING, AND ACTION: INDIVIDUAL AND ORGANIZATIONAL (1982); CHRIS ARGYRIS & DONALD A. SCHÖN, ORGANIZATIONAL LEARNING: A THEORY OF ACTION PERSPECTIVE (1978); EDGAR S. DUNN, JR., ECONOMIC AND SOCIAL DEVELOPMENT: A PROCESS OF SOCIAL LEARNING (1971); JOHN FRIEDMANN, PLANNING IN THE PUBLIC DOMAIN: FROM KNOWLEDGE TO ACTION 181-224 (1987).

157. *See supra* note 105 (citing sources).

unavailable to their superior, or not known to anyone at the time the superior initiates the program.[158] The second situation, where the superior cannot determine the means of achieving a desired result, is sometimes treated as a failure of technical knowledge or political nerve by the superior,[159] but can also be seen as an honest, empirically oriented approach to the problem of governance. Like the first, it can be achieved by using purely substantive standards, which can be promulgated with a high degree of specificity, or very general procedural ones. The third situation, where the superior simply defines the area of concern and instructs the agency to develop its own goals through a learning process, may seem the most problematic. But as scholars such as Michael Dorf, Susan Sturm, and Cass Sunstein note, a superior can fulfill its function by engaging other institutions in a dialogue about desirable norms.[160] That is, the superior need not regard itself as the sole source of policy initiatives, but may view itself as participating in a mutual learning process with its subordinates. In this situation, the subordinate would need to rely on highly generalized substantive standards or on generalized procedural standards with no substantive standards.

These three reasons to rely on the subordinate's ability to learn can be illustrated by the Grounds Department example. To illustrate the first learning situation, it might be difficult for the superintendent to know how quickly the grass and weeds will grow, because the rate of growth depends on the amount of rainfall and how much trash or foot traffic there will be, since this depends on variations in people's need to visit public buildings. Consequently, a procedural standard of cutting the grass every ten days may lead to either inadequate or excessive grass-cutting; if the superintendent feels that she must use a procedural standard, it might be best to state this standard very generally, such as cutting the grass regularly, or whenever needed. A substantive standard of keeping the grass no more than one inch high seems more promising, although it may have unacceptable budgetary implications at certain times. The second learning situation would apply if no one has any idea how best to get rid of weeds, a procedural standard is impractical, and only a substantive standard will allow the Department to learn an effective method over time. (If the simplicity of the example makes such ignorance seem unlikely, consider the

158. Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 CORNELL L. REV. 452 (2002); *see also* Lisa Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

159. REDISH, *supra* note 7; SCHOENBROD, *supra* note 7; Aranson et al., *supra* note 7.

160. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); Sturm, *supra* note 100; Cass R. Sunstein, *The Supreme Court, 1995 Term, Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

more complex task of adding ornamentation to make the lawns more attractive.) Finally, the third learning situation may occur if the underlying reason why the city wants to have attractive lawns in front of public buildings is to attract more people into the buildings. The superintendent, taking attractiveness as her basic goal, might promulgate either procedural or substantive standards to achieve that goal. If she would allow her subordinates to engage her in a dialogue about this goal, their learning may convince them, and ultimately convince the superintendent, that attractive lawns are not particularly important. It might be more desirable to have lawns that are welcoming, perhaps by having food stands, kiddie rides, and sitting places scattered across them.

One more dichotomy between accountability standards, although far from the last one that might be considered, is the superior's choice whether to issue instructions in advance or to monitor the subordinate's performance and issue judgments on a continuing basis. Ashutosh Bhagwat discusses this as the choice between ex ante and ex post regulation,[161] while McCubbins and Schwartz describe it as the choice between "police-patrol" and "fire-alarm" modes of legislative oversight.[162] Issuing instructions in advance generally possesses the virtue of clarity but suffers from the vice of inflexibility, while continuous monitoring exhibits the opposite features. One can ameliorate the vice of instructions stated in advance by making these instructions open ended but only at a partial sacrifice of clarity. One can ameliorate the vice of continuous monitoring by following a pattern that is transparent to the subordinate, but then one has sacrificed a certain amount of flexibility. Of course, the two approaches can be combined, which either amplifies their individual virtues, amplifies their individual vices, or produces previously unimagined complexities.

The choice between instructions stated in advance and continuous monitoring is independent of the choice between specifying procedures and specifying results, since the supervisor can specify either the procedures or the results in advance, or monitor either on a continuous basis. It is sometimes argued that it is equivalent to the choice between general and specific standards: a specific standard prescribes conduct prior to its occurrence, while a general one allows room for monitoring, or subsequent assessment.[163] This is true to the

161. Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275 (1999). Bhagwat's discussion focuses on the way administrative agencies supervise private parties, but executive, legislative or judicial supervision of agencies follows a similar pattern.

162. McCubbins & Schwartz, *supra* note 25.

163. *See* Kaplow, *supra* note 155, at 557; Sullivan, *supra* note 155, at 58-64; Sunstein, *supra* note 155, at 961.

extent that one is looking at the superior's initial instruction; specificity at the outset precludes the development of standards through case-by-case monitoring of the subordinate's performance. But in an administrative setting, a standard stated in advance can be specific or general, and monitoring can lead to either general or specific assessments of the agency's performance. For example, the superintendent might instruct the chief, in advance, to cut the grass regularly or to cut it every ten days, which are general and specific procedural standards, or she might instruct the chief, also in advance, to make the lawns look nice or keep the grass no more than one inch high, which are general and specific substantive standards. Alternatively, she might simply tell the chief to maintain the lawns, and then examine the laws on a continuing basis. This continuous monitoring can also be either general or specific. The superintendent can tell the chief that he is cutting the grass too often, or that he has cut the grass two days early, or she can tell him that the lawns look scruffy or that the grass is one-half-inch too high.

C. *What Lies Beneath: By Way of a Conclusion*

It might be possible to construct an enormous, multi-dimensional grid to plot the interactions among these various types of accountability standards, although there is no reason to think that these dichotomies are the only useful ones. The point of this cursory discussion, however, is not to solve the problem of administrative supervision, but simply to indicate that holding someone accountable is a complex, technical task. The various factors discussed above indicate how fully the concept of accountability is tied into an administrative hierarchy and requires the sort of continuous, intensive interaction between superior and subordinate that is characteristic of this hierarchy. In order to hold a person accountable for his performance, a person must decide whether to employ procedural or substantive standards, general or specific instructions, control or learning, orders given in advance or continuous monitoring, and a variety of other factors. She must consider how each of these decisions interact with each other and with the characteristics of the subordinate, the nature of the task to be performed, and the actions of those beyond her or her subordinate's control.

When viewed from this perspective, it seems apparent that voters cannot, through the process of election, hold a public official accountable in any real sense, that local populations cannot hold local officials accountable, and that government cannot achieve its aims by making people accountable for themselves. Elections solve the problem of succession more effectively than any other methods and produce a certain generalized responsiveness to citizen desires on the part of elected officials. Local administration is often the most

efficient way to deal with governmental tasks, from a managerial point of view. Devolution of responsibility to private actors is often an efficient managerial strategy as well, and it can produce important benefits in terms of morale and good will.

But none of these techniques are mechanisms of accountability. Consideration of the actual mechanisms, as they are implemented in an administrative hierarchy, emphasize the distance between true accountability and elections, localism, and private responsibility. Elected officials respond to some of the deeply felt, or widely held views of the electorate; local officials exhibit some similarity of outlook with those they govern; and private persons can sometimes be induced to consider the consequences of their actions from a public perspective. But these general and occasional correspondences do not enable one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance. Obligations of this sort can only be imposed in a tightly integrated hierarchy, such as those found within the administrative apparatus. One can always slap the word accountability down on the page if one wants to argue for increased reliance on elected officials, local officials, or private parties, but the underlying concept does not apply.

If this is true, then why have accountability arguments become so popular? The answer lies in our ambivalence toward administrative government. On the one hand, modern Western societies have irrevocably committed themselves to an administrative system and can no longer even conceive of parting with the advantages that this system provides. Accountability is one of these advantages. It would be simply impossible to manage the complex tasks of modern government and implement generally debated and articulated policies without the elaborate administrative mechanisms through which subordinate officials are held accountable for their performance. On the other hand, there is a widespread hostility toward administrative government, a desire for simplicity, community, and freedom of action that the heavy, complex machinery of modern government seems to have obliterated. The discourse of accountability is an effort to argue that we can capture the necessary advantages of the administrative state without subjecting ourselves to its oppressiveness. Let us shift authority from the administrative apparatus back to the president, to Congress, to state officials, to local officials, to private parties, to anyone else. We can still have accountability — in fact we can have more accountability — because elected officials will be accountable to the voters, local officials will be accountable to their communities, and private parties will be accountable to themselves. We will have then achieved the magical result of supervision without supervisors, of hierarchical control without hierarchy, of effective administration without administrative government.

This is, however, an illusion. All types of magic are illusions. We know this now, and we know it through a mode of thought that is intimately connected with the development of the modern administrative state. Part of the connection is pragmatic. Western society has learned, over the course of the last five hundred years or so, that if we want to have a more comfortable, convenient, and prosperous life, we must stop casting spells and start learning science. Once this scientific approach takes hold, it produces a massive, complex, specialized technological culture — a culture that can only be subjected to public control through an administrative apparatus. But the connection between the decline of magic and the administrative state is also conceptual. After centuries of political conflict, society has managed to deny governments their claims that they owe their authority to God and their ability to mystify and overawe the populace. Government, we now know, is a socially created mechanism designed to serve the people's needs; as a result, it is no longer monarchical or theocratic, but administrative in its essential orientation. So we are finished with magic, both in the material and the political arena, and the consequence is administrative government. The idea that we can have accountability without administration is magical thinking, as outmoded as the idea that we can control reality through incantations, or that government is a divine creation. It is enticing, but we have learned that we are better off with science and democracy, even if the price we have to pay for these advantages is administrative governance.